DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW

2013

CarrieLyn D. Guymon
Editor

Office of the Legal Adviser
United States Department of State

INTRODUCTION XXII

NOTE FROM THE EDITOR XXV

CHAPTER 1 1

NATIONALITY, CITIZENSHIP, AND IMMIGRATION 1

A. NATIONALITY AND CITIZENSHIP 1

1. U.S. Response to Questions on Deprivation of Nationality from the UN High Commissioner for Human Rights 1

2. Passports as Proof of Citizenship 6

3. Proof of Citizenship Issued Erroneously 6

B. PASSPORTS 14

1. *United States v. Moreno* 14

2. *Edwards v. Bryson* 15

C. IMMIGRATION AND VISAS 16

1. *De Osorio*: Status of "Aged-Out" Child Aliens Who Are Derivative Beneficiaries of a Visa Petition 16

2. Consular Nonreviewability 19

3. Visa and Immigration Information-Sharing Agreements 22
   a. United Kingdom 22
   b. Canada 22

D. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES 23

1. El Salvador, Honduras, and Nicaragua 23

2. Sudan and South Sudan 24

3. Somalia 24

4. Syria 24

CROSS REFERENCES 25

CHAPTER 2 26

CONSULAR AND JUDICIAL ASSISTANCE AND RELATED ISSUES 26

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE 26

1. Proposed Legislation to Implement *Avena* and the Vienna Convention 26

2. State Actions Relating to *Avena* 27

B. CHILDREN 29

1. Adoption 29
   a. Pre-Adoption Immigration Review ("PAIR") 29
   b. Report on Intercountry Adoption 30
   c. Countries Joining the Hague Convention 30

2. Abduction 30
   a. 2013 Hague Abduction Convention Compliance Report 30
   b. Hague Abduction Convention Litigation 31
   c. Hague Abduction Convention Partners 31

CROSS REFERENCES 31

CHAPTER 3 32

INTERNATIONAL CRIMINAL LAW 32

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE 32

1. Extradition Treaty with Chile 32

2. Mutual Legal Assistance Treaty with Jordan 32

3. Extradition of Bosnian National for War Crimes Charges 32

4. Extradition of Tunisian National Accused in Attempted Suicide Bombing 33

B. INTERNATIONAL CRIMES 34

1. Terrorism 34
   a. Country reports on terrorism 34
   b. UN General Assembly 35

c. U.S. actions against support for terrorists 36
(1) U.S. targeted sanctions implementing UN Security Council resolutions 36
(2) Foreign terrorist organizations 36
(i) New designations 36
(ii) Reviews of FTO designations 37

2. Narcotics 38
a. Majors list process 38
(1) International Narcotics Control Strategy Report 38
(2) Major drug transit or illicit drug producing countries 38
b. Interdiction assistance 38

3. Trafficking in Persons 39
a. Trafficking in Persons report 39
b. Presidential determination 41

4. Money Laundering 42
a. Institutions of primary money laundering concern 42
(1) Rmeiti Exchange (Lebanon) 42
(2) Halawi Exchange (Lebanon) 45
(3) Liberty Reserve (Costa Rica) 48
b. Asset sharing agreement with Andorra 50
c. Asset sharing agreement with Panama 50

5. Organized Crime 51
a. Transnational Organized Crime Rewards Program 51
b. Sanctions Program 52

6. Corruption 52
Conference of States Parties to the UN Convention against Corruption 52

7. Piracy 52
a. Overview 52
b. International support for efforts to bring suspected pirates to justice 54
(1) United Nations 54
(2) Contact Group on Piracy off the Coast of Somalia 55
c. U.S. prosecutions 58
(1) United States v. Ali*: aiding and abetting and conspiracy to commit piracy* 59
(2) United States v. Shibin 67

C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS 71

1. Expansion of the War Crimes Rewards Program 71

2. International Criminal Court 73
a. Overview 73

b. Libya 77
c. Kenya 79
d. Surrender of Bosco Ntaganda 81
e. Darfur 81

3. International Criminal Tribunals for the Former Yugoslavia and Rwanda 84

4. Special Court for Sierra Leone 87

5. Special Tribunal for Lebanon 87

6. Khmer Rouge Tribunal ("ECCC") 88

7. Bangladesh International Crimes Tribunal 88

CROSS REFERENCES 89

CHAPTER 4 90

TREATY AFFAIRS 90

A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS 90

1. U.S.-Chile Extradition Treaty 90

2. Objection to Reservation by Namibia 90

3. Multilateral Nuclear Environment Programme in the Russian Federation ("MNEPR") 91

4. Arms Trade Treaty 91

B. LITIGATION INVOLVING TREATY LAW ISSUES 91

1. Constitutionality of U.S. Statute Implementing the Chemical Weapons Convention 91

2. Constitutionality of MARPOL Amendment Procedure 98

3. *Lakes Pilots Association v. U.S. Coast Guard* 102

CROSS REFERENCES 103

CHAPTER 5 104

FOREIGN RELATIONS 104

A. EXECUTIVE BRANCH DISCRETION OVER FOREIGN RELATIONS 104

Detroit International Bridge: Constitutionality of International Bridge Act 104

B. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT 110

1. Overview 110

2. Extraterritorial Reach of ATS: *Kiobel v. Royal Dutch Petroleum Co.* 111

3. Cases Decided Subsequent to *Kiobel* 117
   a. Balintulo v. Daimler AG *(Apartheid litigation)* 117
   b. Sarei v. Rio Tinto 119

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES 119

1. *Bernstein v. Kerry* 119

2. *Alaska v. Kerry* 122

CROSS REFERENCES 122

CHAPTER 6 123

HUMAN RIGHTS 123

A. GENERAL 123

1. Country Reports on Human Rights Practices 123

2. UN General Assembly Third Committee Resolutions 123

3. ICCPR 124

4. Human Rights Council 124
   a. Overview 124
   b. Actions regarding Syria 127
   c. Actions regarding Sri Lanka 131

B. DISCRIMINATION 132

1. Race 132
   a. Periodic report of the United States to the Committee on the Elimination of Racial Discrimination 132
   b. Human Rights Council 139

c. UN General Assembly 141

2. Gender 142
a. Sexual violence in conflict and emergencies 142
(1) United Nations 142
(2) U.S. "Safe from the Start" Initiative 145
b. Eliminating violence against women 146
c. Commission on the Status of Women 149
d. U.S. actions 150

3. Sexual Orientation 152
a. Human Rights Council 152
b. UN 154

4. Age 157
a. U.S. view on possible draft convention 157
b. UN working group 158
c. Human Rights Council 161
d. UN General Assembly Third Committee 161

5. Persons with Disabilities 162

C. CHILDREN 166

1. Committee on the Rights of the Child 166

2. Rights of the Child 169
a. Human Rights Council 169
b. UN General Assembly 170

3. Children and Armed Conflict 171
a. United Nations 171
b. Child Soldiers Prevention Act 172

D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 173

1. Education 173

2. Food 174

3. Water and Sanitation 176

4. Health 177

E. HUMAN RIGHTS AND THE ENVIRONMENT 180

F. BUSINESS AND HUMAN RIGHTS 181

1. Implementation of Guiding Principles 181

2. Extractive industries 182

G. INDIGENOUS ISSUES 184

H. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 187

Report to the UN Committee Against Torture 187

I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES 190

1. Death Penalty 190

2. Arbitrary Detentions 190

J. FREEDOM OF ASSEMBLY AND ASSOCIATION 191

1. Human Rights Defenders 191

2. Freedom of Assembly and Association Generally 192

K. FREEDOM OF EXPRESSION 195

1. General 195
   a. Protection of Journalists 195
   b. Freedom of expression and women's empowerment 196

2. Internet Freedom and Privacy 197

L. FREEDOM OF RELIGION 200

1. U.S. Domestic Developments 200
   a. Launch of the Office of Faith-Based Community Initiatives 200
   b. U.S. annual report on international religious freedom 201

2. Human Rights Council 201
   a. Resolutions at the 22nd session 201
   b. Istanbul Process 204

M. RULE OF LAW AND DEMOCRACY PROMOTION 206

1. United States Joins Venice Commission 206

2. UN Third Committee Resolution 207

3. Civil Society 208

4. Equal Political Participation 210

N. PUTATIVE RIGHTS 211

1. Right to Development Resolution at the Human Rights Council 211

2. Putative Right to Peace 212
a. Working Group on a Draft UN Declaration on the Right to Peace 212
b. HRC resolution on the UN declaration on the right to peace 218

CROSS REFERENCES 219

CHAPTER 7 220

INTERNATIONAL ORGANIZATIONS 220

A. UNITED NATIONS 220

1. UN Reform 220
Adoption of Fifth Committee resolutions on UN reform 220

2. UN Women 221

B. PALESTINIAN MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS 223

Loss of U.S. Vote at UNESCO 223

C. INTERNATIONAL COURT OF JUSTICE 225

D. INTERNATIONAL LAW COMMISSION 226

1. ILC's Work on Subsequent Agreements and Subsequent Practice in Treaty Interpretation and Immunity of State Officials from Foreign Criminal Jurisdiction 226

2. ILC's Work on Reservations to Treaties 229

3. ILC's Work on Protection of Persons in the Event of Disasters and Other Topics 231

E. OTHER ORGANIZATIONS 235

1. Organization of American States 235

a. Election of U.S. Candidate to the Inter-American Commission on Human Rights 235
b. Resolution on Strengthening the Inter-American Human Rights System 236

2. Organization for Economic Cooperation and Development 236

3. Puerto Rico's Participation in International Organizations 237
a. Association of Caribbean States 237
b. Ibero-American Cultural Congress 237
c. UNESCO 238

4. Gulf Cooperation Council 238

5. International Civil Aviation Organization—Taiwan 238

CROSS REFERENCES 239

CHAPTER 8 240

INTERNATIONAL CLAIMS AND STATE RESPONSIBILITY 240

A. INTERNATIONAL LAW COMMISSION 240

1. Draft Articles on Diplomatic Protection 240

2. State Responsibility 241

3. Other Work of the ILC 241

B. IRAN-U.S. CLAIMS TRIBUNAL 241

C. LIBYA CLAIMS 242

1. Nationality 244

2. Unlawful Detention 247

D. IRAQ CLAIMS 248

E. UN COMPENSATION COMMISSION 249

CROSS REFERENCES 250

CHAPTER 9 251

DIPLOMATIC RELATIONS, SUCCESSION, CONTINUITY OF STATES, AND OTHER STATEHOOD ISSUES 251

A. DIPLOMATIC RELATIONS 251

B. STATUS ISSUES 251

1. U.S. Recognition of Somalia 251

2. Serbia and Kosovo: EU-facilitated Dialogue 256

3. Nagorno-Karabakh 257

4. Georgia 258
   a. Geneva Discussions 258
   b. Georgia and Moldova Agreements with the EU 259

C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION 259

CROSS REFERENCES 269

CHAPTER 10 270

PRIVILEGES AND IMMUNITIES 270

A. FOREIGN SOVEREIGN IMMUNITIES ACT 270

1. Service of Process 270

2. Execution of Judgments and Other Post-Judgment Actions 272
   *a. Attachment of blocked assets under TRIA and the FSIA (*Heiser*)* 272
   b. Discovery to aid in execution under the FSIA 276
      (1) Discovery regarding central bank accounts 276
      (2) Discovery regarding sovereign assets outside the United States 279

B. IMMUNITY OF FOREIGN OFFICIALS 282

1. Overview 282

2. *Samantar v. Yousuf* 282

3. President Zedillo of Mexico 286

4. *Ahmed v. Magan* 286

5. *Rosenberg v. Lashkar-e-Taiba* 286

C. HEAD OF STATE IMMUNITY 290

President Rajapaksa of Sri Lanka 290

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES 291

1. Inviolability of Diplomatic and Consular Premises 291

2. AIT-TECRO Agreement on Privileges, Exemptions, and Immunities 292

3. Immunity of Diplomatic Accounts and Personnel 292

E. INTERNATIONAL ORGANIZATIONS 297

United Nations 297

CROSS REFERENCES 304

CHAPTER 11 305

TRADE, COMMERCIAL RELATIONS, INVESTMENT, AND TRANSPORTATION 305

A. TRANSPORTATION BY AIR 305

1. Bilateral Open Skies and Air Transport Agreements 305

2. Preclearance Agreement with the United Arab Emirates 306

3. Addressing Aviation Impacts on Climate Change 306

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS 307

1. Investment Dispute Settlement under Chapter 11 of the North American Free Trade Agreement Involving the United States 307
   a. Apotex, Inc. v. United States of America 307
   b. Apotex Holdings Inc. and Apotex Inc. v. United States of America 314

2. Non-Disputing Party Submission under Chapter 11 of the North American Free Trade Agreement 316

C. WORLD TRADE ORGANIZATION 319

1. Dispute Settlement 319
   a. Disputes brought by the United States 319
      (1) China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (DS427) 319
      (2) Indonesia – Import Restrictions on Horticultural Products, Animals, and Animal Products (DS455 and DS465) 319
   b. Disputes brought against the United States 320
      (1) Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (WT/DS381) 320
      (2) Zeroing 320
      (3) Certain Country of Origin Labeling (COOL) Requirements (Canada) (DS384) and (Mexico) (DS386) 321
      (4) Measures Affecting the Production and Sale of Clove Cigarettes (DS406) 321

2. WTO Trade Facilitation Agreement 321

D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES 322

1. Free Trade Agreements 322
   a. Trans-Pacific Partnership 322
   b. Trans-Atlantic Trade and Investment Partnership 323
   c. U.S.-Colombia Trade Promotion Agreement 328
      (1) Environmental Cooperation Agreement 328
      (2) Implementing regulations 329

2. Trade Legislation and Trade Preferences 331
   a. Generalized System of Preferences 331
      (1) Bangladesh 331
      (2) Annual review 334
      (3) Lapse of GSP 334
   b. AGOA 334

3. Arbitration and Related Actions Arising from the Softwood Lumber Agreement 335

E. INTELLECTUAL PROPERTY 335

1. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled 335

2. Special 301 Report 336

3. U.S. Joins Patent Law Treaty as a Contracting Party 337

4. U.S. Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons* 337

F. OTHER ISSUES 339

1. World Telecommunication/Information and Communication Technology Policy Forum 339

2. Issuance of Presidential Permit for New International Trade Crossing in Detroit .. 339

3. Committee on Foreign Investment in the United States 340

4. Voluntary Principles on Security and Human Rights 354

5. SEC Rules Implementing Dodd-Frank 355
   a. Challenge to Rule 13p-1 implementing Section 1502 355
   b. Challenge to Rule 13q-1 implementing Section 1504 357

6. Extractive Industries Transparency Initiative ("EITI") 357

7. Tax Treaties 358

CROSS REFERENCES 358

CHAPTER 12 359

TERRITORIAL REGIMES AND RELATED ISSUES 359

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES 359

1. UN Convention on the Law of the Sea 359
   a. Meeting of States Parties to the Law of the Sea Convention 359
   b. International Tribunal for the Law of the Sea 360

2. Other Boundary or Territorial Issues 363
   a. U.S.-Kiribati maritime boundary treaty 363
   b. South China Sea 364

3. Piracy 367

4. Freedoms of Navigation and Overflight 367
   a. Freedom of overflight—Ecuador 367
   b. China's claimed baselines of the territorial sea of the Senkaku Islands 369
   c. Vietnam's national law of the sea 371
   d. China's Announced Air Defense Identification Zone in the East China Sea 372

5. Maritime Security and Law Enforcement 373
   a. Agreement with Palau 373
   b. Amendments to Agreements with Marshall Islands, Kiribati, and Micronesia ... 374

6. Maritime Search and Rescue: Arctic SAR Entry into Force 374

B. OUTER SPACE 375

1. Space Security Conference 375

2. UN Group of Governmental Experts 377

3. UN General Assembly First Committee Discussion on Outer Space 378

4. Space Debris Mitigation Measures 380

CHAPTER 13 383

ENVIRONMENT AND OTHER TRANSNATIONAL SCIENTIFIC ISSUES 383

A. LAND AND AIR POLLUTION AND RELATED ISSUES 383

1. Climate Change 383
   a. General 383
   b. UN Framework Convention on Climate Change 387
   c. Green Climate Fund 388
   d. U.S. Action on Climate Change 389
      (1) U.S. Climate Action Plan 389
      (2) E.O. 13653: Preparing the U.S. for impacts of climate change 389
   e. Launch of Initiative for Sustainable Forest Landscapes 390

2. Minamata Convention on Mercury 391

3. UNEP 392

4. Ozone Depletion 394

5. Sustainable Development 396

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION 398

1. Arctic Council 398
   a. Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic 399
   b. Kiruna Declaration and "Vision for the Arctic" Statement 400

2. Antarctica 406

3. Informal Consultative Process on Oceans and Law of the Sea ("ICP") 408

4. Marine Pollution 410
a. U.S. implementation of amendments to MARPOL Annex V 410
b. Energy Efficiency Design Index Amendments 412
c. Amendments to the 1996 Protocol to the London Convention 413

5 . Fish and Marine Mammals 414
a. Transmittal of the amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries 414
b. Transmittal of Convention on Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean 414
c. Transmittal of Convention on Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean 415
d. CITES new framework on introduction from the sea 416
e. CITES amendments to include marine species 417
f. Sea turtle conservation and shrimp imports 417

C. OTHER CONSERVATION ISSUES 418

1. Wildlife Trafficking 418

2. ILC Work on Transboundary Aquifers 419

CROSS REFERENCES 420

CHAPTER 14 422

EDUCATIONAL AND CULTURAL ISSUES 422

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS 422

1. Belize 422

2. Cambodia 423

B. SYRIA 424

C. PRESERVATION OF AMERICA'S HERITAGE ABROAD 424

CROSS REFERENCES 424

CHAPTER 15 425

PRIVATE INTERNATIONAL LAW 425

A. COMMERCIAL LAW/UNCITRAL 425

1. General 425

2. Rules on Transparency in Treaty-based Investor-State Arbitration 426

B. JUDGMENTS 427

1. Resumption of the Judgments Project 427

2. Hague Convention on Choice of Court Agreements 429

C. FAMILY LAW 432

HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 432

1. *Chafin* 432

2. *Lozano* 435

D. SECURITIES LAW 443

1. Arbitration 443

2. Jurisdiction Over Foreign Entities in U.S. Courts 452

CROSS REFERENCES 460

CHAPTER 16 461

SANCTIONS, EXPORT CONTROLS, AND CERTAIN OTHER RESTRICTIONS 461

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS 461

1. Iran 461
   - *a. Overview* 461
   - *b. Implementation of UN Security Council resolutions* 471
   - *c. U.S. sanctions and other controls* 474
     - *(1) E.O. 13553* 475
     - *(2) E.O. 13599* 475
     - *(3) Iran Sanctions Act, as amended* 476
     - *(4) E.O. 13628* 479

(5) *Iran Freedom and Counter-Proliferation Act* 480
(6) *Section 1245 of the 2012 National Defense Authorization Act* 482
(7) *Modification of sanctions* 483

2. Syria 484
a. *Imposition and removal of sanctions pursuant to Executive Orders* 484
b. *Easing sanctions affecting the opposition in Syria* 484
c. *Sanctions under the Chemical and Biological Weapons Control and Warfare Elimination Act of* 1991 486

3. NONPROLIFERATION 486
a. *Democratic People's Republic of Korea* 486
(1) *UN sanctions* 486
(2) *U.S. sanctions* 494
b. *Iran, North Korea, and Syria Nonproliferation Act* 494
c. *Executive Order 13382* 495
d. *Executive Order 12938* 498
e. *Chemical and biological weapons proliferation sanctions* 498
f. *Missile sanctions* 499

4. Terrorism 499
a. *Security Council actions* 499
b. *U.S. targeted financial sanctions implementing Security Council resolutions* 499
(1) *Overview* 499
(2) *Department of State* 500
(3) *OFAC* 504
(i) *OFAC designations* 504
(ii) *OFAC de-listings* 504

5. Magnitsky Act 505

6. Threats to Democratic Process 506
a. *Burma* 506
(1) *New executive order prohibiting importation of jadeite and rubies from Burma* 506
(2) *E.O. 13619* 507
(3) *E.O. 13448* 507
(4) *Reporting requirements for responsible investment in Burma* 507
b. *Mali* 508
c. *Zimbabwe* 508
d. *Cuba* 508

7. Armed Conflict: Restoration of Peace and Security 509
a. *Democratic Republic of the Congo* 509
b. *Liberia* 509
c. *Central African Republic* 509
d. *Somalia* 509

e. Côte d'Ivoire 510
f. Libya 510
g. Iraq 510
(1) UN Security Council resolution 2107 510
(2) Continuation of national emergency 511

8. Transnational Crime 511

B. EXPORT CONTROLS 511

1. Resolution of Export Control Violations 511
a. Raytheon 511
b. Aeroflex 512
c. Meggitt-USA, Inc. 513
d. Debarment 514

2. Export Control Reform 515

CROSS REFERENCES 516

CHAPTER 17 517

INTERNATIONAL CONFLICT RESOLUTION AND AVOIDANCE 517

A. MIDDLE EAST PEACE PROCESS 517

B. PEACEKEEPING AND CONFLICT RESOLUTION 519

1. Syria 519
a. Security Council 519
b. International cooperation outside of the Security Council 521
c. Syria Justice and Accountability Center 524

2. Democratic Republic of Congo 525

3. Lebanon 527

4. Lord's Resistance Army 529

5. Central African Republic 531

6. Sudan and South Sudan 533

7. Somalia 535

C. CONFLICT AVOIDANCE 535

1. Implementation of the National Action Plan on Women, Peace, and Security 535

2. Post-Conflict Peacebuilding 536

3. Responsibility to Protect 538

CROSS REFERENCES 539

CHAPTER 18 540

USE OF FORCE 540

A. GENERAL 540

1. Use of Force Issues Related to Counterterrorism Efforts 540
   a. President Obama's speech at the National Defense University 540
   b. Attorney General Holder's Letter to Congress 546
   c. Policy and Procedures for Use of Force in Counterterrorism Operations 549

2. Potential Use of Force in Syria 552

3. Bilateral Agreements and Arrangements 554
   a. Implementation of Strategic Framework Agreement with Iraq 554
   b. Protocol to the Guam International Agreement 556

4. International Humanitarian Law 556
   a. Protection of civilians in armed conflict 556
   b. Applicability of international law to conflicts in cyberspace 560
   c. Private military and security companies 563

B. CONVENTIONAL WEAPONS 587

1. General 587

2. Lethal Autonomous Weapons Systems 589

C. DETAINEES 590

1. General 590
   a. Presidential Statements on 2013 and 2014 National Defense Authorization Acts 590
   b. CAT Report 592

2. Transfers 608

3. U.S. court decisions and proceedings 609

a. Detainees at Guantanamo: Habeas Litigation 609
(1) Al Warafi v. Obama 609
(2) Enteral feeding cases 611
(3) Abdullah v. Obama 616
(4) Hatim v. Obama 619
(5) Ali v. Obama 622
b. Former Detainees 623
(1) Al Janko v. Gates 623
(2) Hamad v. Gates 625
(3) Allaithi v. Rumsfeld 626
(4) Former detainees challenging convictions after accepting plea agreements 628
c. Scope of Military Detention Authority: Hedges v. Obama 628

4. Criminal Prosecutions and Other Proceedings 633
a. Al Bahlul v. United States 633
b. New Military Commission Charges 638
c. Periodic Review Process 639

CROSS REFERENCES 639

CHAPTER 19 640

ARMS CONTROL, DISARMAMENT, AND NONPROLIFERATION 640

A. GENERAL 640

B. NUCLEAR NONPROLIFERATION 643

1. Non-Proliferation Treaty ("NPT") 646
a. Fourth P5 Conference 646
b. NPT Preparatory Committee 649

2. Comprehensive Nuclear Test Ban Treaty 657

3. Fissile Material Cut-off Treaty 659

4. Nuclear Security 661

5. Nuclear Safety 664

6. Country-Specific Issues 666
a. Democratic People's Republic of Korea ("DPRK" or "North Korea") 666
b. Iran 672
c. Russia 674
d. Republic of Korea 677

e. Taiwan 680
f. Arrangement with Lithuania on Cooperation in Countering Nuclear Smuggling 681

C. G8 GLOBAL PARTNERSHIP 681

D. IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTION 1540 684

E. PROLIFERATION SECURITY INITIATIVE 685

F. CHEMICAL AND BIOLOGICAL WEAPONS 686

1. Chemical Weapons 686

2. Biological Weapons 702

G. BALLISTIC MISSILE DEFENSE 703

H. NEW START TREATY 707

I. TREATY ON CONVENTIONAL ARMED FORCES IN EUROPE AND TREATY ON OPEN SKIES 707

J. ARMS TRADE TREATY 710

CROSS REFERENCES 715

Introduction

I am delighted to introduce the annual edition of the *Digest of United States Practice in International Law* for 2013. This volume provides a historical record of developments occurring during calendar year 2013, the first year of John F. Kerry's tenure as Secretary of State. 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 quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

Significant developments in the sphere of arms control, disarmament, and nonproliferation led us to create a new chapter (Chapter 19) devoted to that subject in this year's *Digest*, separating the topic from the chapter on the use of force with which it has previously been combined. Among the 2013 developments covered in the new Chapter 19 are: the conclusion of a bilateral protocol with Russia allowing cooperative threat reduction activities in that country to continue; the conclusion of the Arms Trade Treaty; the commitment of Iran and the P5+1 to a Joint Plan of Action to address Iran's nuclear program; and the conclusion of a framework for the elimination of Syria's chemical weapons.

In 2013, the United States remained engaged in the development of international law by negotiating and concluding treaties and agreements. For example, in addition to the aforementioned Arms Trade Treaty, the United States joined other World Intellectual Property Organization members in adopting the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The United States signed several law enforcement-related agreements, including an extradition treaty with Chile, a mutual legal assistance treaty with Jordan, and asset sharing agreements with Andorra and Panama. The American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States signed an agreement on privileges, exemptions, and immunities. The United States signed a maritime boundary treaty with Kiribati and bilateral maritime law enforcement agreements with Palau, Marshall Islands, Kiribati, and Micronesia. In the area of environmental law, the United States participated in laying the groundwork for a new climate agreement at the 19th Conference of the Parties to the UN Framework Convention on Climate Change; became the first State to join the Minamata Convention to reduce mercury pollution; and concluded an agreement with the other Arctic States on cooperation in the event of an oil spill or related emergency. And the United States participated in ongoing negotiations on the Trans-Pacific Partnership trade agreement as well as launching negotiations on a Transatlantic Trade and Investment Partnership agreement.

U.S. government involvement in litigation and arbitration also contributed to the development of international law in 2013. The United States government filed briefs in the U.S. Supreme Court in several cases involving international law, including: *Bond v.*

United States, a case involving a challenge to the constitutionality of the federal criminal law implementing U.S. obligations under the Chemical Weapons Convention; *BG Group v. Argentina*, a case regarding judicial review of an arbitral award issued pursuant to a bilateral investment treaty; and *DaimlerChrysler v. Bauman*, regarding jurisdiction over foreign entities in U.S. courts. The United States also participated in a wide range of litigation matters at other levels, including cases challenging U.S. policy and practice regarding passports and visas, cases brought by law of war detainees and former detainees, and cases concerning foreign official immunity. State and federal courts issued a number of important decisions relating to international law or foreign policy, including: the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, regarding extraterritorial application of the Alien Tort Statute; the U.S. Courts of Appeals for the District of Columbia and Fourth Circuit determining that charges could be brought for aiding and abetting piracy and other acts not committed on the high seas, construing the international law definition of piracy; and several court decisions deferring to U.S. suggestions of immunity and statements of interest in cases involving foreign officials and heads of state. The United States also participated in important arbitral proceedings, including hearings in Case A/15(II:A) before the Iran U.S. Claims Tribunal. In proceedings brought under NAFTA chapter 11, an arbitral tribunal issued an award dismissing all claims brought by Apotex against the United States.

The United States filed periodic reports, responded to questions, and made presentations before treaty bodies regarding several international human rights treaties in 2013. In January, the United States was represented by a large delegation from multiple U.S. departments and agencies, including at the state level, before the Committee on the Rights of the Child regarding implementation of its obligations under two optional protocols to the Convention on the Rights of the Child. In June, the United States submitted its periodic report to the UN Committee on the Elimination of Racial Discrimination. In July, the United States filed its response to the Human Rights Committee's list of issues concerning the International Covenant on Civil and Political Rights. In August, the United States submitted its periodic report to the United Nations Committee Against Torture.

This year's *Digest* also discusses U.S. participation in, and support for, international organizations, institutions, and initiatives. The United States became the 59th member of the Council of Europe's European Commission for Democracy through Law, or Venice Commission, in 2013. The United States participated in the first universal session of the UN Environment Program ("UNEP") Governing Council in Nairobi, Kenya in February 2013, at which the Governing Council reformed the governance of UNEP in several key ways. The United States was involved in the launch of the International Code of Conduct for Private Security Service Providers Association and the "Montreux+5" conference following up on legal issues related to operations of private military and security companies during armed conflict. And, the United States continued to advocate for accountability for international crimes, including by expressing support for the International Criminal Court ("ICC") as its Assembly of State Parties reached consensus on amendments to the ICC procedural rules when confronted with the novel issue of trying a defendant who is also a sitting head-of-state; hailing the ruling by the Special Court for Sierra Leone upholding the conviction of Charles Taylor; and

welcoming the surrender of Bosco Ntaganda to the ICC for crimes in the Democratic Republic of the Congo.

The United States also took important unilateral actions in 2013 with international legal implications. For example, the U.S. government recognized a government of Somalia for the first time since 1991. The Executive branch developed policy guidance establishing a framework governing the use of force in counterterrorism operations outside the United States and areas of active hostilities. And, the United States continued to use various domestic economic sanctions programs to target proliferation, terrorism, human rights abuses, organized crime, and other behaviors that disrupt international security and peace.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2013 volume, attorneys whose voluntary contributions to the *Digest* were particularly significant include Henry Azar, Kevin Baumert, David Buchholz, Violanda Botet, Jamie Briggs, Michael Coffee, David DeBartolo, David Gravallese, Kathleen Hooke, Brian Israel, Kimberly Jackson, Jessica Karbowski, Emily Kimball, Richard Lahne, Jonas Lerman, Ollie Lewis, Michael Mattler, Stephen McCreary, Kathy Milton, Holly Moore, Andrew Neustaetter, Lorie Nierenberg, Phillip Riblett, Courtney Rusin, Tim Schnabel, Jesse Tampio, and Jeremy Weinberg. I express very special thanks to Joan Sherer, the Department's Senior Law Librarian, and to Anthony Stampone and Jerry Drake, from our bureau's records program, 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
Principal Deputy 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 2013 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 2013 volume diverges from the general organization and approach adopted in 2000 in one way. The content of what has previously been Chapter 18 has been divided into two chapters: Chapter 18 on Use of Force and Chapter 19 on Arms Control, Disarmament, and Nonproliferation. 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 middle of May 2014) 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 2014 where they relate to the discussion of developments in 2013.

Updates on most other 2013 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 citation 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://www.un.org/en/documents/ods/*. 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 http://www.state.gov/s/l/treaty and the Library of Congress provides extensive treaty and other legislative resources at *http://beta.congress.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: *http://www.ca1.uscourts.gov/opinions/main.php*U.S. Court of Appeals for the Second Circuit: *http://www.ca2.uscourts.gov/decisions.html*;

U.S. Court of Appeals for the Third Circuit: *http://www.ca3.uscourts.gov/search-opinions*;

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: http://media.ca7.uscourts.gov/opinion.htmlU.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:
http://www.cafc.uscourts.gov/opinions-orders/0/allThe 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. U.S. Response to Questions on Deprivation of Nationality from the UN High Commissioner for Human Rights

In February 2013, the United States provided its written response to questions circulated by the UN High Commissioner for Human Rights in a note dated January 15, 2013 concerning human rights and arbitrary deprivation of nationality. The note from the UN High Commissioner for Human Rights referenced Human Rights Council Resolution 20/5 (2012), which, among other things, requested that the Secretary General collect information to prepare a report on state measures that may lead to the deprivation of nationality. The U.S. response is excerpted below. Both the U.S. response and the note from the UN High Commissioner for Human Rights are available at *www.state.gov/s/l/c8183.htm*.

* * * *

Background

Under the Fourteenth Amendment of the Constitution of the United States, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." The Immigration and Nationality Act (INA) § 101(a)(23) provides that "'naturalization' means the conferring of nationality . . . on a person after birth, by any means whatsoever." The INA also provides for the acquisition of citizenship at birth by a child born abroad to one or two American parent(s) provided that statutory requirements are met. INA §§ 301 and 309. Thus, in general, United States citizenship may be acquired by birth in the United States, birth abroad to

an American parent(s) under specified statutory terms, or after birth by naturalization under procedures provided for in U.S. law.

U.S. laws governing nationality and citizenship, and immigration as a general matter, are not specifically drafted to address statelessness, although in many circumstances these laws can provide important protections against this problem. Because United States law recognizes both the principle of *jus soli* and *jus sanguinis* for the acquisition of citizenship, U.S. law does not generally contribute to the problem of statelessness. In addition, the United States Supreme Court has affirmed that American citizenship cannot be relinquished except upon the voluntary commission of an expatriating act with the *intention to relinquish* citizenship. As the United States Supreme Court held in *Afroyim v. Rusk*:

> "In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."

387 U.S. 253, 268 (1967). Additionally, U.S. citizenship laws do not discriminate on the basis of race, national origin, ethnic origin, religion, or gender grounds. These three principles, taken together, provide important protections against statelessness in the United States. These aspects of U.S. law are more fully discussed in response to specific questions below.

The United States recognizes the right of expatriation and U.S. citizens can lose their citizenship through *voluntary* performance of an expatriating act *with the intention of relinquishing citizenship.* A U.S. citizen may exercise this right even in circumstances which could result in statelessness. In addition, a naturalized U.S. citizen who acquires citizenship after birth is subject to denaturalization if naturalization is improperly obtained (e.g., through fraud). Revocation procedures may take place in such cases even if the individual in question is thereby rendered stateless.

Information on U.S. Legislative Measures

1. On what grounds can nationals lose or be deprived of their nationality?

U.S. law provides for loss of citizenship by voluntary commission of an expatriating act with the intention of relinquishing citizenship or through revocation of naturalization. INA § 349, *Loss of Nationality by Native-Born or Naturalized Citizen*, describes expatriating acts that result in loss of citizenship when performed voluntarily and with the intention of relinquishing United States nationality. Subsection 349(b) provides when loss of nationality is in issue that "the burden shall be upon the person or party claiming that such loss has occurred, to establish such claim by a preponderance of the evidence." For certain acts covered by § 349, such as obtaining citizenship by naturalization in a foreign state, the United States applies an administrative standard that U.S. citizens intend to retain their U.S. citizenship. INA § 340,

Revocation of Naturalization, sets forth the grounds and procedures for loss of citizenship by a naturalized U.S. citizen. Such cases must be brought in the Federal courts of the United States, and may be pursued in circumstances where the order admitting the person to citizenship and the certificate of naturalization were "illegally procured or were procured by concealment of a material fact or by willful misrepresentation."

2. Can an individual only lose or be deprived of nationality if he or she would not be rendered stateless? If so, are there exceptions to this rule? How are any such legislative safeguards against statelessness implemented in practice?

No, the United States recognizes the right of expatriation as an inherent right of all people, and U.S. citizens can lose their nationality through voluntary performance of an expatriating act with the intention of relinquishing citizenship. U.S. citizens may exercise this right even where this would result in statelessness. Nonetheless, the United States has set forth administrative procedures to ensure potentially stateless persons will be informed of the severe hardships that could result. See 7 FAM 1215 and 1261. Separately, a U.S. citizen by naturalization may be denaturalized if such status was improperly obtained. These procedures also could result in statelessness if the person does not possess or acquire another nationality.

3. Does the law ensure that individuals are not deprived of nationality on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, disability, national or social origin, property, birth or other status?

The steps leading to loss of U.S. citizenship under the procedures in §§ 340 and 349, as outlined above, are applied on a non-discriminatory basis, and do not take into account race, sex, religion, political opinion, disability, or other such factors. Loss of U.S. nationality is based on voluntary performance of an expatriating act with intent to relinquish citizenship or revocation of citizenship improperly obtained through naturalization. Further, INA § 311, *Eligibility for Naturalization*, provides that "[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such a person is married."

4. What procedures exist for acquisition of documentation proving nationality by individuals who have automatically acquired nationality at birth or, where relevant, upon State succession? What documentation and other requirements must be satisfied by individuals who apply for proof of nationality? How many applicants for such proof of nationality are rejected because they are unable to meet the requirements?

Persons acquiring citizenship through birth in the United States may apply for a U.S. passport, which serves both as a travel document and as proof of U.S. citizenship. The Passport Application Form DS-11, available at *http://travel.state.gov/passport*, describes the documentation required to be submitted with the application to demonstrate U.S. citizenship. A certified birth certificate showing birth in the United States is the most common primary evidence of citizenship, but many other forms of evidence demonstrating birth in the United States may be submitted. A child who acquires U.S. citizenship through birth abroad to an American parent (or parents) may be issued a "Consular Report of Birth Abroad of a Citizen of the United States" (CRBA) by a consular officer abroad. See 7 FAM 1441. These forms of proof of citizenship are addressed in the State Department Basic Authorities Act § 33 (22 U.S.C. § 2705), which provides:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship . . . :
> (1) A passport, during its period of validity . . . issued by the Secretary of State to a citizen of the United States.
> (2) The report, designated as a "Report of Birth Abroad of a Citizen of the United States," issued by a consular officer to document a citizen born abroad.

INA § 338, *Certificate of Naturalization*, provides for persons who obtain citizenship through naturalization to obtain a certificate of naturalization which states that the applicant has been admitted as a citizen of the United States of America. INA § 341, *Certificates of Citizenship*, provides for issuance of a certificate of citizenship in specific situations.

5. Do all children born on the territory of the State acquire nationality if they would otherwise be stateless? If so, does this occur automatically or upon application? If conditions apply, please list them. How many individuals have benefited from these provisions?

In nearly all cases, children born in the United States acquire U.S. nationality. Under the Fourteenth Amendment to the Constitution of the United States, all persons born within the United States and subject to its jurisdiction are citizens. INA § 301, *Nationals and Citizens of the United States at Birth*, similarly provides that a person "born in the United States, and subject to the jurisdiction thereof" shall be a national and citizen of the United States. Children born in the United States to a sitting foreign head of state or to diplomats accredited to the United States are not subject to U.S. jurisdiction, and thus are an exception to the principle of *jus soli* and do not acquire U.S. citizenship. (The Code of Federal Regulations (CFR), 8 CFR 101.3, addresses the circumstances of children born to foreign diplomats in the United States and provides for lawful permanent resident status.) These principles for acquisition of U.S. citizenship apply in all cases, and without regard to whether the child would otherwise be stateless.

6. Do all children born to nationals who are abroad acquire nationality? If not, do they acquire nationality if they would otherwise be stateless? If conditions apply, please list them. How many individuals have benefited from these provisions?

Children born abroad to U.S. citizens can acquire U.S. citizenship under conditions prescribed by statute. In general, whether a foreign born child acquires U.S. citizenship at birth depends upon a combination of factors, including the citizenship status of the parents (the rules vary depending on whether one or both are U.S. citizens), their marital status (the rules differ for children born to parents who are not married to each other), and the parents' length of residence or physical presence in the United States prior to the birth. See, generally, INA §§ 301 and 309. A foreign born child can also become a naturalized U.S. citizen, acquiring U.S. citizen after birth, upon fulfilling certain conditions specified by statute. Thus, INA § 320, *Children Born Outside the United States and Residing Permanently in the United States; Conditions Under Which Citizenship Automatically Acquired*, provides that a child born outside the United States automatically becomes a U.S. citizen where 1) at least one parent is a citizen, whether by birth or naturalization; 2) the child is under 18 years of age; and 3) the child is legally residing in the United States with the citizen parent. INA § 322, *Children Born and Residing Outside the United States; Conditions for Acquiring Certificate of Citizenship*, sets forth conditions for a foreign born child residing abroad to obtain U.S. citizenship when at least one parent is a U.S. citizen. Again, these rules for acquisition of U.S. citizenship apply in all cases, and without regard to whether the child in question would otherwise be rendered stateless.

7. Does the law provide a right to a fair hearing by a court for an individual who is: (i) denied issuance of documentation proving nationality; and/or (ii) affected by loss or deprivation of nationality?

Principles of due process are enshrined in the Constitution of the United States, and, as with any legal action in the United States, apply to proceedings over loss of nationality or denial of documentation to prove nationality. Numerous provisions of the INA ensure that due process rights are observed. Under INA § 336, *Hearings on Denials of Applications for Naturalization*, if an application for naturalization is administratively denied the applicant may request a hearing before an immigration officer. If the immigration officer also denies the application, INA § 310(c), *Judicial Review*, provides that the applicant may seek review in Federal court and directs the court to conduct a *de novo* review of the application. INA § 340, *Revocation of Naturalization*, requires that the United States institute revocation proceedings in the Federal district court where the naturalized citizen resides, and requires sixty days personal notice of such action to the citizen. Under INA § 349, *Loss of Nationality by Native-Born or Naturalized Citizen*, after identifying the expatriating acts that may lead to loss of citizenship, subsection (b) states "[w]henever the loss of United States nationality is put in issue in any action or proceeding . . . under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." Thus, U.S. law places the burden to show loss of citizenship on the party asserting such loss, i.e., generally on the U.S. Government. Finally, INA § 360, *Proceedings for Declaration of United States Nationality in the Event of Denial of Rights and Privileges as National*, allows any person within the United States who is denied a right or privilege on the ground that he or she is not a national of the United States (e.g., such as denial of a passport) to file an action in Federal district court where the applicant resides for a judgment declaring him or her to be a national of the United States, except where nationality is in issue and may be addressed in removal proceedings.

8. If a person is found to have been arbitrarily deprived of his or her nationality, does the law make provision for an effective remedy, including restoration of the person's nationality?

Yes, INA § 360, *Proceedings for Declaration of United States Nationality in the Event of Denial of Rights and Privileges as National*, permits a person deprived a right or benefit of citizenship to file an action for a declaratory judgment finding him or her to be a national. In such an action, U.S. law authorizes the court to "declare the rights and other legal relations of any interested party seeking such declaration . . . [and] [a]ny such declaration shall have the force and effect of a final judgment or decree." See 28 USC § 2201.

9. What are legislative and administrative measures leading to the deprivation of nationality of individuals or groups of individuals that would be considered arbitrary within your constitutional framework?

Measures leading to loss of nationality that failed to comport with the U.S. Constitution and the provisions of U.S. law, including due process, could be considered arbitrary in the United States and would be addressed through judicial process as described above.

* * * *

2. Passports as Proof of Citizenship

See discussion in Section 1.B., below, of cases involving the use of passports as proof of U.S. citizenship.

3. Proof of Citizenship Issued Erroneously

On January 22, 2013, the United States submitted its brief on appeal in a case brought by an individual born in Yemen challenging the Department's revocation of his Consular Report of Birth Abroad of a Citizen of the United States ("CRBA") and U.S. passport. *Hizam v. Clinton*, No. 12-3810 (2d. Cir.). The plaintiff, Abdo Hizam, brought suit under 8 U.S.C. § 1503 seeking to have his CRBA reissued. Although Mr. Hizam conceded that his U.S. citizen father did not meet the statutory requirements to transmit citizenship to him at birth (not having resided in the United States the requisite number of years prior to his son's birth), he nonetheless argued that he was entitled to keep his CRBA, which serves as proof of U.S. citizenship, on the ground that the State Department lacked any authority to revoke it. Ruling on cross-motions for summary judgment, the district court agreed with Mr. Hizam and ordered the State Department to reissue the CRBA. The United States brief on appeal is excerpted below (with footnotes omitted) and available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Under the United States Constitution, there are "two sources of citizenship, and two only—birth and naturalization." *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898)…A person born outside the United States, such as Hizam, may acquire citizenship at birth only as provided by an act of Congress. *Rogers*, 401 U.S. at 828, 830-31; … In interpreting such a statute, courts must accord "[d]eference to the political branches" and apply " 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.' " *Miller*, 523 U.S. at 434 n.11 (plurality) (quoting *Mathews v. Diaz*, 426 U.S. 67, 82 (1976)). Thus, " '[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with.' " *Rogers*, 401 U.S. at 830 (quoting *United States v. Ginsburg*, 243 U.S. 472, 475 (1917)).

Congress has provided the terms under which a child born abroad to a U.S. citizen parent or parents acquires automatic U.S. citizenship at birth. Citizenship of a person born abroad is determined by the law in effect at the time of birth. *Drozd*, 155 F.3d at 86. In 1980, the year of Hizam's birth, the Immigration and Nationality Act granted citizenship to a child born in wedlock to one U.S. citizen parent if that parent was "physically present in the United States . . .

for a period or periods totaling not less than ten years prior to the birth of the child." 8 U.S.C. § 1401(g) (Supp. III 1980).

Hizam does not dispute that his U.S. citizen father did not meet the physical-presence requirement. (JA 112 (Ali Hizam's physical presence was "less than 10 years . . . since Ali Hizam first arrived in the United States in 1973 and [Hizam] was born in 1980")). Accordingly, Hizam did not acquire U.S. citizenship at birth. Nor does he allege that he is a citizen by virtue of a different statutory provision conferring citizenship at birth, by birth in the United States, or by naturalization. Accordingly, it is beyond doubt that Hizam is not, and never has been, a U.S. citizen.

B. Because He Did Not Acquire U.S. Citizenship at Birth or Through Naturalization, Hizam Is Not Entitled to a CRBA or U.S. Passport

Because Hizam is not a U.S. citizen, he is not entitled to a CRBA or U.S. passport.

1. Legal Authorities Governing CRBAs and U.S. Passports

Congress has charged the Secretary of State with the duty of "determining [the] nationality of a person not in the United States." 8 U.S.C. § 1104(a). Pursuant to that power, the State Department adjudicates the citizenship claims of persons born abroad and, where appropriate, issues CRBAs and U.S. passports. 22 C.F.R. § 50.7(a); see 8 U.S.C. § 1504(b) (CRBA is "issued by a consular officer to document a citizen born abroad"); *Zivotofsky*, 132 S. Ct. at 1436 (Alito, J., concurring in judgment) ("a CRBA is a certification made by a consular official that the bearer acquired United States citizenship at birth").

Like a CRBA, a U.S. passport may only be issued to a citizen or other national of the United States. 22 U.S.C. § 212; 22 C.F.R. § 51.2(a). Both a CRBA and a valid U.S. passport serve as proof of citizenship. 22 U.S.C. § 2705 ("same force and effect as proof of United States citizenship" as naturalization certificate or citizenship certificate).

While the State Department has the authority to make citizenship determinations in connection with adjudicating applications for citizenship documents, it does not have the authority to confer or revoke citizenship status itself. See 8 U.S.C. § 1421(a) ("The sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General."); *Perriello v. Napolitano*, 579 F.3d 135, 139-40 (2d Cir. 2009) (same).

2. The District Court Lacked Authority to Direct the State Department to Return the CRBA

Although Hizam is not entitled to a CRBA or U.S. passport because he is not a U.S. citizen, see infra Point B.3, as a threshold matter the district court lacked authority to direct the State Department to provide those documents. Hizam brought this action under 8 U.S.C. § 1503. That statute provides that a person in the United States who "claims a right or privilege as a national of the United States," but is "denied such right or privilege . . . upon the ground that he is not a national of the United States," may "institute an action under [the Declaratory Judgment Act] against the head of [the] department or independent agency [that denied the claim of nationality] for a judgment declaring him to be a national of the United States." 8 U.S.C. § 1503(a). Neither Hizam nor the district court invoked any source of authority other than § 1503. (JA 1, 3 (relying solely on § 1503)); (JA 158, 163 (same)).

Thus, the district court's authority was limited to declaring that Hizam is a citizen or national of the United States. Yet the district court did not enter such a declaration—presumably because it lacked any ground on which to do so, as Hizam is indisputably not a U.S. citizen or national. See supra Point A. Instead, the district court ordered the State Department to reissue a CRBA to Hizam—a remedy that the court had no authority to grant under § 1503.

Moreover, the district court had no other power to enter the order it did, which effectively required the State Department to violate Congress's statutory citizenship scheme by issuing proof of citizenship to a person who is not a U.S. citizen. "[T]he power to make someone a citizen of the United States has not been conferred upon the federal courts . . . as one of their generally applicable equitable powers," and therefore " '[o]nce it has been determined that a person does not qualify for citizenship, the district court has no discretion to ignore the defect and grant citizenship.' " *INS v. Pangilinan*, 486 U.S. 875, 884 (1988) (quoting *Fedorenko v. United States*, 449 U.S. 490, 517 (1981) (alteration omitted)); accord 8 U.S.C.§ 1421(d) (naturalization may occur "in the manner and under the conditions prescribed in [the INA] and not otherwise" (emphasis added)). Thus, a court may not grant citizenship "by the application of the doctrine of equitable estoppel, nor by invocation of equitable powers, nor by any other means." *Pangilinan*, 486 U.S. at 884-85; accord *Mustanich v. Mukasey*, 518 F.3d 1084, 1088 (9th Cir. 2008) (statutory requirement for naturalization "cannot be ignored," even where agency misconduct alleged, because "[e]stoppel in these circumstances would amount to precisely the type of equity-based departure from the requirements of the immigration statutes that *Pangilinan* prohibits")…

Although the district court did not explicitly order the government to confer citizenship on Hizam, it directed the State Department to issue a CRBA—a document that may be issued only to persons who acquired U.S. citizenship at birth according to the terms of a statute, and which (like a U.S. passport) has "the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." 22 U.S.C. § 2705. Thus, the illogical and impermissible effect of the district court's order is that Hizam will be entitled to prove citizenship that he does not have. Additionally, on the basis of his court-ordered, nonrevocable CRBA, Hizam may enjoy most if not all of the benefits of U.S. citizenship, including obtaining a U.S. passport (which he has already done), filing an immediate-relative petition for his alien wife so that she may obtain an immigrant visa, and applying for CRBAs and U.S. passports for his children. The ultimate effect is the same as if the court had simply declared Hizam to be a U.S. citizen as a matter of equity, something it lacks authority to do. *Pangilinan*, 486 U.S. at 883-85. Because the district court's order was outside its lawful power, it must be reversed.

3. The State Department Acted Lawfully in Canceling Hizam's Erroneously Issued CRBA and U.S. Passport

In any event, the State Department acted lawfully in revoking Hizam's erroneously issued CRBA and U.S. passport.

a. The State Department Is Authorized to Cancel or Revoke Erroneously Issued CRBAs and U.S. Passports

As provided in 8 U.S.C. § 1504, the State Department may "cancel" a CRBA or U.S. passport "if it appears that such document was illegally, fraudulently, or erroneously obtained." 8 U.S.C. § 1504(a). Such a cancellation "shall affect only the document and not the citizenship status of the person in whose name the document was issued." *Id.*

Section 1504, enacted in 1994, codified the State Department's existing administrative authority to correct agency or other errors, specifically with respect to erroneously issued CRBAs and U.S. passports. As the Supreme Court recognized in *Haig v. Agee*, although the statute granting the Secretary of State the power to issue passports "does not in so many words confer upon the Secretary a power to revoke [or deny] a passport," "[n]either, however, does any statute expressly limit those powers." 453 U.S. at 290. The Court concluded that "[i]t is beyond

dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes," and that it was conceded that "if the Secretary may deny a passport application for a certain reason, he may revoke a passport on the same ground." *Id*. at 290-91. That the power to revoke a passport inheres in the power to grant one has been "consistent[ly]" reflected in the State Department's regulations, promulgated pursuant to its "broad rule-making authority." *Id*. at 291 & n.20 (quotation marks omitted); see also Exec. Order 7856, ¶ 124 (Mar. 31, 1938) (granting Secretary of State "discretion . . . to withdraw or cancel a passport already issued"); Exec. Order 11,295 (Aug. 5, 1966) (superseding Exec. Order 7856 and delegating to Secretary of State power to promulgate "rules governing the granting, issuing, and verifying of passports" (emphasis added)).

More generally, agencies have inherent authority to correct their own errors. *NRDC v. Abraham*, 355 F.3d 179, 202-03 (2d Cir. 2004) (noting "power to reconsider decisions reached in individual cases by agencies in the course of exercising quasi-judicial powers"); *Dun & Bradstreet Corp. Foundation v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360-61 (Fed. Cir. 2008); *Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 340 (4th Cir. 2007). That inherent power applies even when the error is "inadvertent," and when several years pass before the error is detected. *American Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958) ("the presence of authority in administrative officers and tribunals to correct such errors has long been recognized—probably so well recognized that little discussion has ensued in the reported cases"). And it applies as well even when a person has relied to his detriment on the agency error, for as the Supreme Court has recognized, because "Congress, not the [agency], prescribes the law," an agency's error cannot subvert federal statutory requirements. *Dixon v. United States*, 381 U.S. 68, 72-73 (1965) (agency "empowered retroactively to correct mistakes of law. . . even where a [person] may have relied to his detriment on the [agency's] mistake") …

The State Department properly exercised these inherent powers in this case. There is no doubt that the State Department could and should have denied the applications for a CRBA and U.S. passport for Hizam when they were submitted, because Hizam's father did not meet the statutory requirement for physical presence in the United States and therefore could not transmit citizenship to Hizam at birth. See 22 C.F.R. §§ 50.7 (CRBA issued only upon "submission of satisfactory proof"), 51.2 (passport may only be issued to U.S. national). Accordingly, as the Supreme Court recognized in *Agee*, the State Department has inherent authority to revoke those documents, thus correcting its initial error.

Additionally, the State Department acted properly under its § 1504(a) authority, which permits it to "cancel" CRBAs and U.S. passports if they were issued "erroneously." While Hizam argued in the district court that § 1504(a) only allows cancellation of citizenship documents if the applicant, rather than the agency, committed an error, that contravenes the plain text of § 1504, which contains no such limitation. See *Friend v. Reno*, 172 F.3d 638, 640, 646-47 (9th Cir. 1999) (citizenship certificate may be revoked if obtained through agency error alone, even when applicant "fully disclosed" truthful but legally incorrect basis of claim to citizenship). Moreover, any rule that citizenship documents issued through agency error cannot be revoked is inconsistent with the fundamental principle that "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship," and if those statutory

conditions are not met the citizenship has been " 'illegally procured,' and naturalization that is unlawfully procured can be set aside." *Fedorenko*, 449 U.S. at 506…

b. The District Court Erred in Rejecting the State Department's Authority to Revoke Erroneously Issued Citizenship Documents

In determining that the State Department has no power to revoke Hizam's CRBA and U.S. passport, the district court relied on two arguments. First, the court held that 22 U.S.C. § 2705, as interpreted by the Ninth Circuit, precludes the State Department from revoking those documents. Second, the court held that because statutes are presumed not to apply retroactively, § 1504 cannot be validly applied to the issuance of CRBAs and U.S. passports prior to its 1994 enactment. Both contentions are incorrect.

i. Section 2705 Does Not Preclude Cancellation of Citizenship Documents

First, § 2705—which provides that valid U.S. passports and CRBAs "have the same force and effect as proof of United States citizenship as certificates of citizenship issued by the Attorney General or by a court having naturalization jurisdiction"—does not address the State Department's authority to cancel documents issued in error to a person who is not a U.S. citizen. As is clear from the text of the statute itself, § 2705 concerns the evidentiary force and effect of CRBAs and U.S. passports, but says nothing about the State Department's ability to cancel or revoke them, or any procedures it must follow in doing so.

In concluding to the contrary, the district court relied on the Ninth Circuit's decision in *Magnuson v. Baker*, which held that by providing that CRBAs and U.S. passports have the "same force and effect" as certificates of citizenship or naturalization, § 2705 thereby also incorporated the procedural and substantive requirements specified in separate statutes for the revocation of the latter certificates. 911 F.2d 330, 333-36 (9th Cir. 1990). But *Magnuson* was wrongly decided, and the district court erred in following it.

To begin with, *Magnuson* is inconsistent with the text of § 2705. As noted above, that text concerns only the evidentiary force and effect of the documents at issue. But the Ninth Circuit unreasonably inferred that by specifying the "force and effect" those documents would have as "proof" of citizenship, Congress also incorporated requirements for revoking those documents, such that revocation could only occur after a hearing and only on the grounds of fraud or illegality. *Id*. at 335. Had Congress intended to adopt those procedural and substantive requirements, it surely would have done so by saying so—as it did for certificates of citizenship and naturalization, see 8 U.S.C. §§ 1451, 1453—rather than requiring courts to discern those protections in language that does not mention them. Indeed, it would make no sense for Congress to specify procedures for the revocation of CRBAs and U.S. passports by reference to two other sets of procedures that differ significantly from each other, leaving courts to guess which of them must be applied. See 8 U.S.C. §§ 1451 (district court proceedings for revoking naturalization order and canceling naturalization certificate), 1453 (administrative proceedings for canceling certificates of citizenship or naturalization). The Ninth Circuit held that if it did not incorporate the procedures required for revoking a citizenship or naturalization certificate into the process for canceling a passport, it would "accord those who use their passport as evidence of their citizenship less protection than those who use other documents as evidence denoting citizenship," contradicting § 2705. 911 F.2d at 335. But that confuses the ability to use a document, which is protected by § 2705, with the right to have it in the first place, a subject on which the statute is silent.

Moreover, both the *Magnuson* court and the district court misunderstood the nature of the documents they considered. As reflected in § 2705, a CRBA documents that a child born abroad

acquired United States citizenship at birth. See 8 U.S.C. § 1504(b); 22 C.F.R. § 50.7(a); 75 Fed. Reg. 36,522, 36,525 (2010). But neither a CRBA nor a U.S. passport can confer U.S. citizenship upon a person who is not a citizen, and neither their issuance nor their cancellation has any effect on a person's underlying U.S. citizenship status. A child born abroad automatically acquires U.S. citizenship at birth if the statutory requirements are met, regardless of whether that person is ever issued a CRBA or U.S. passport. Just as a person who has never applied for or been issued a CRBA or U.S. passport could have nonetheless acquired citizenship at birth, a person, like Hizam, who was erroneously issued a CRBA does not become a U.S. citizen by virtue of that mistake. And if a person acquired U.S. citizenship at birth, that status is unaffected even if that person's U.S. passport or CRBA is revoked: as 8 U.S.C. § 1504 states, "[t]he cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued."

Because CRBAs and passports have different functions from certificates of citizenship and naturalization, both the district court and Magnuson erred in imposing the more rigorous procedures specified for revoking a naturalization certificate on the revocation of a CRBA or U.S. passport. To establish eligibility for a U.S. passport, a naturalized citizen must show that naturalization occurred, typically by producing a naturalization certificate. But a person born abroad who acquired U.S. citizenship at birth may simply prove that the requirements of the applicable citizenship transmission statute were met, regardless of whether he or she has previously been issued a CRBA or U.S. passport. There is, therefore, no need—or logical reason—to subject the cancellation of CRBAs (which only document the acquisition of citizenship) to the same standards as cancellation of naturalization certificates (which are effectively the only means of proving citizenship status). Contrary to the district court's conclusion, the State Department was not "taking away" Hizam's citizenship when it canceled his CRBA; it was only canceling the document it issued and correcting its own prior mistake. Those actions are not equivalent to loss of nationality or denaturalization. See *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 1, 4 (D.D.C. 1998) ("Yet to admit that passports are evidence of citizenship is to say nothing about whether their revocation implicates the fundamental right of citizenship." (citing *Agee*, 453 U.S. at 309-10)).

In any event, even if § 2705 could be read as the Ninth Circuit did in Magnuson, such that the provision precludes the State Department from revoking a CRBA or U.S. passport without meeting the procedural and substantive requirements for canceling naturalization or citizenship certificates, the enactment of § 1504 four years later effectively overruled that decision. By clearly confirming that the State Department has the authority to cancel CRBAs and U.S. passports that have been issued "erroneously," and to do so without a pre-cancellation hearing, Congress laid to rest any argument that either § 2705 or any other statute abrogates that preexisting power.

ii. Section 1504 Is Not Impermissibly Retroactive

Second, although the State Department's inherent authority to correct its error was alone sufficient to revoke Hizam's documents, its action was also justified by § 1504, which is not impermissibly retroactive.

As the Supreme Court held in Landgraf v. USI Film Products, although there is a presumption against retrospective application of statutes, "[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. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 269-70 (citation omitted). Only a statute that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Id*. at 269 (quotation marks omitted). In determining whether a statute should be subject to the presumption against retroactivity, a court should look to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id*. at 270. Central to this analysis is whether a statute "impos[es] new burdens on persons after the fact." *Id*.

However, "[w]hen the intervening statute authorizes. . . prospective relief, application of the new provision is not retroactive." *Id*. at 273. Similarly, an intervening statute that "takes away no substantive right but simply changes the tribunal" is one that "speak[s] to the power of the court rather than to the rights or obligations of the parties" and is therefore not retroactive. *Id*. at 274.

Under these standards, § 1504 is not impermissibly retroactive. To begin with, the statute merely confirms preexisting authority—and, as the Court held in *Landgraf*, when "even before the enactment of [a statute]" the same or similar authority existed, the statute "simply 'did not impose an additional or unforeseeable obligation' " on any person. *Landgraf*, 511 U.S. at 277-78 (quoting *Bradley v. School Board of Richmond*, 416 U.S. 696, 721 (1974)). There is accordingly no bar to applying such a statute to preenactment conduct.

Even if the Court were to conclude that § 1504 did more than confirm the State Department's prior authority, it did not affect substantive rights or impose burdens. As the *Landgraf* Court noted, even when procedural rights and obligations of parties may have changed, it remains permissible to apply new rules to prior facts when those parties' underlying substantive rights and obligations are unaffected. 511 U.S. at 276. Thus, for instance, when "new hearing procedures did not affect either party's obligations under [a] lease agreement," those procedures can be applied to acts taken before the procedures were issued. *Id*.…. Similarly, here, Hizam's underlying right or lack of a right to citizenship was unaffected by passage of § 1504, which "speak[s] to the power of" the State Department rather than the rights of individuals. 511 U.S. at 274. Hizam either acquired US. citizenship at birth or he did not, an issue unaffected by the State Department's power to later correct errors in issuing documents.

* * * *

…The government recognizes the inequity of this situation, and although the State Department lacks any legal authority to confer citizenship or other immigration status on Hizam, it has brought the matter to the attention of U.S. Citizenship and Immigration Services, and will continue to support other lawful means to provide relief to Hizam, including a private bill in Congress should one be introduced.

Nevertheless, the unfairness occasioned in one particular case is no reason to undermine or disregard well-established legal rules grounded in important constitutional and policy concerns. …

* * * *

On May 13, 2013, the United States filed a reply brief in the case, also available at *www.state.gov/s/l/c8183.htm*. The reply brief reiterates the points made in the U.S. opening brief, but also responds to Hizam's argument that the U.S. interpretation of the statute permitting revocation of his erroneously issued documentary proof of citizenship conflicts with international law. The U.S. reply brief is excerpted below.[*]

* * * *

Finally, Hizam argues that the Court should apply the *Charming Betsy* canon of statutory construction, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). According to Hizam, "[r]eading 8 U.S.C. § 1504 as authorizing retroactive revocation of CRBAs for agency error risks the possibility of statelessness for the class of individuals in the same position as Mr. Hizam." (Hizam Br. 26). Therefore, Hizam argues, "the scope of § 1504 must be determined in light of the international norm against policies that lead to statelessness." (Hizam Br. 26). But Hizam does not allege that he himself would be rendered stateless by application of § 1504, or that he lacks citizenship in Yemen or elsewhere. He accordingly has no standing to raise this argument. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992) (to support standing, "injury must affect the plaintiff in a personal and individual way"). Even if Hizam holds no citizenship in any other country, his statelessness results from his undisputed lack of U.S. citizenship, not from the cancellation of his CRBA under § 1504. And the arguments Hizam asserts are speculative and unsupported: he contends that unspecified "individuals in the same position" risk "the possibility of statelessness" because unnamed "[c]ertain countries will not provide citizenship to the children of U.S. citizens," and "[s]till other [unidentified] countries consider individuals who acquire foreign citizenship to have abandoned any prior citizenship." (Hizam Br. 26-27).

Moreover, Hizam has misapplied the *Charming Betsy* canon. The rule of interpretation applies to an "ambiguous statute," but not "where the statute at issue admits no relevant ambiguity." *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). Here, § 1504 is clear: it explicitly permits the Secretary of State to cancel CRBAs and U.S. passports that were "illegally, fraudulently, or erroneously obtained," 8 U.S.C. § 1504, making the determination of whether to cancel those documents rest solely on those factors. And if the Court were required to construe the statute "not to conflict with international law," *Oliva*, 433 F.3d at 235, Hizam has identified no controlling principle of international law, instead offering only the U.S. government objective of reducing statelessness, and citing an international convention to which neither the United States nor Yemen is a party.[11]

[*] Editor's note: On March 12, 2014, the U.S. Court of Appeals for the Second Circuit issued its decision in the case, reversing the district court and remanding with instructions to dismiss the case. *Hizam v Kerry*, No. 12-3810 (2d. Cir. 2014). *Digest 2014* will discuss the appeals court's decision.

[11] A list of parties to the Convention Relating to the Status of Stateless Persons is available at http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en. Hizam offers no argument that the Convention is otherwise accepted as internationallaw. Nor does he cite any provision of the Convention—which generally

* * * *

B. PASSPORTS

1. *United States v. Moreno*

In *United States v. Moreno*, No. 12-1460, 727 f.3d 255 (3d Cir. Jul. 3, 2013), a defendant in a criminal case appealed her conviction for falsely and willfully representing herself as a United States citizen in violation of 18 U.S.C. § 911. The defendant argued that "her validly issued passport constitutes conclusive proof of U.S. citizenship under 22 U.S.C. § 2705," and therefore, "the government failed to prove lack of citizenship." *Id.* at *1. On July 3, 2013, the U.S Court of Appeals for the Third Circuit issued its opinion, rejecting the defendant's argument, and holding that "[b]y its text, § 2705 provides that a passport will serve as conclusive proof of citizenship only if it was 'issued by the Secretary of State *to a citizen of the United States*.'" *Id.* at *3 (quoting 22 U.S.C. § 2705) (emphasis added by court). Excerpts from the court's opinion appear below (with footnotes omitted).

* * * *

By its text, § 2705 provides that a passport will serve as conclusive proof of citizenship only if it was "issued by the Secretary of State *to a citizen of the United States.*" 22 U.S.C. § 2705 (emphasis added). Under the plain meaning of the statute, a passport is proof of citizenship only if its holder was actually a citizen of the United States when the passport was issued. Under the language of the statute, the logical premise needed to establish conclusive proof of citizenship consists of two independent conditions: (1) having a valid passport and (2) being a U.S. citizen. The second condition is not necessarily satisfied when the first condition is satisfied. For example, the Secretary of State issues passports not only to U.S. citizens but also to U.S. nationals. *See* 22 C.F.R. § 50.4 (noting that United States nationals may apply for a United States passport); *see also* 8 U.S.C. § 1101(22) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.").

Here, Moreno satisfies the first condition but not the second: she has a valid U.S. passport but is not a U.S. citizen—and was not one at the time the passport was issued. …

This is an issue of first impression in the Third Circuit. Moreno argues that other courts …have interpreted § 2705 as establishing that a valid passport is conclusive proof of U.S. citizenship. *See, e.g., Vana v. Att'y Gen.*, 341 F. App'x 836, 839 (3d Cir. 2009) (per curiam)

---

addresses the treatment of stateless persons—that supports his view that it embodies a broad "international norm against policies that lead to statelessness." (Hizam Br. 26).

("[A] United States passport is considered to be conclusive proof of United States citizenship… ."); *Magnuson v. Baker*, 911 F.2d 330, 333 (9th Cir. 1990) ("[T]hrough section 2705, Congress authorized passport holders to use the passport as conclusive proof of citizenship.") (dictum)…

However, we are not bound by these cases and believe that this interpretation is atextual because it effectively reads the phrase "to a citizen of the United States" out of the statute. Thus, it does not give effect to the statute as written. … Because the text of § 2705 is unambiguous, we hold that a passport is conclusive proof of citizenship only if its holder was actually a citizen of the United States when it was issued.

* * * *

2. *Edwards v. Bryson*

The Third Circuit reaffirmed its holding in *Moreno* in another case decided on August 26, 2013, *Edwards v. Bryson*, No. 12-3670, 2013 WL 4504783 (3d Cir. Aug. 26, 2013). In *Edwards*, the plaintiff brought a declaratory judgment action under § 1503 following denial of a certificate of citizenship. The district court held that the plaintiff satisfied his prima facie burden by producing an expired U.S. passport, and the Government had failed to satisfy its burden of presenting clear and convincing evidence to disprove the Secretary of State's prior determination. On appeal, the Third Circuit reversed, in light of the holding in *Moreno* (discussed *supra*), and remanded the case with directions to enter judgment in favor of the Government. Excerpts from the court's opinion appear below.

_____

* * * *

Edwards's declaratory judgment action entitled him to a *de novo* proceeding before an Article III court to determine whether he is a United States citizen. *Delmore v. Brownell*, 236 F.2d 598, 599 & n.1 (3d Cir. 1956). In the § 1503(a) proceeding before the District Court, Edwards bore "the burden of proving his citizenship by a preponderance of the evidence." *Id.* at 600. The District Court held that Edwards's expired passport was sufficient to satisfy this burden. *Edwards v. Bryson*, 884 F. Supp. 2d 202, 205-06 (E.D. Pa. 2012). The District Court's decision relied principally on 22 U.S.C. § 2705. Section 2705 provides that a "passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States" will serve as conclusive proof of United States citizenship. 22 U.S.C. § 2705. In light of § 2705 and because Edwards had been issued a passport, the District Court held that, although there was a dispute as to whether "an expired passport can serve as conclusive proof of citizenship, there is no doubt that it is sufficient to establish by a preponderance of the evidence that Edwards is a U.S. citizen." *Edwards*, 884 F. Supp. 2d at 206.

While Edwards's appeal was pending, we interpreted 22 U.S.C. § 2705 as providing that a passport will serve as conclusive proof of United States citizenship only if "its holder was actually a citizen of the United States when the passport was issued." *United States v. Moreno*, --

- F.3d ---, No. 12-1460, 2013 WL 3481488, at *3 (3d Cir. July 3, 2013). Here, however, the District Court held that, under § 2705, Edwards's expired passport was conclusive proof of his citizenship, even though there was no evidence that he was actually a citizen when his passport was issued to him. *Edwards*, 884 F. Supp. 2d at 206. This ruling is inconsistent with our decision in *Moreno*.

It is acknowledged by the parties that Edwards was not already a citizen of the U.S. when his passport was issued in 1991. Edwards's argument has been that he is a U.S. citizen based on the passport issued to him. He has made no showing that, at the time he obtained the passport, he was a U.S. citizen. Under M*oreno*, therefore, his passport is not conclusive proof of his U.S. citizenship and he has failed to meet his burden under 8 U.S.C. § 1503(a). *See Delmore*, 236 F.2d 598, 600.

* * * *

C. IMMIGRATION AND VISAS

1. *De Osorio*: Status of "Aged-Out" Child Aliens Who Are Derivative Beneficiaries of a Visa Petition

On January 25, 2013, the United States filed a petition for writ of certiorari in the United States Supreme Court in a case decided by the U.S. Court of Appeals for the Ninth Circuit, *Mayorkas v. De Osorio*, No. 12-930. In *De Osorio*, a majority of the en banc court of appeals held that the Board of Immigration Appeals ("BIA" or "Board") had misinterpreted a provision of the Immigration and Nationality Act ("INA") which the court deemed unambiguous, 8 U.S.C. § 1153(h)(3). Section 1153(h)(3) addresses how to treat an alien who reaches age 21 ("ages out"), and therefore loses "child" status under the INA. The BIA determined that, if a new petition and petitioner were required, the alien's priority date for a visa would be determined by the date of a subsequently-filed visa petition, and not the date of the original petition as to which the alien was a derivative beneficiary.

Under the INA, U.S. citizens and lawful permanent resident aliens may petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident. The INA limits the total number issued annually for each of the family-preference categories, including F3, the category for married sons and daughters of U.S. citizens, and F4, the category for brothers and sisters of U.S. citizens. The citizen or lawful permanent resident files a petition for a family member, who is known as the principal beneficiary. Approval of the petition places the principal beneficiary in line to wait for one of the limited number of visas allotted each year, based on the priority date, which is typically the date the petition was filed.

A principal beneficiary can also add certain "derivative" beneficiaries, the principal beneficiary's spouse and unmarried children under age 21. By the time the principal beneficiary reaches the front of the line for a visa, however, the "child" derivative beneficiary may have "aged out," or reached his or her twenty-first birthday. In that

event, the aged-out alien cannot claim derivative-beneficiary status. The Child Status Protection Act ("CSPA"), enacted in 2002, addresses the treatment of children under the immigration laws, permitting certain beneficiaries who have reached or passed the age of 21 to nevertheless retain "child" status for purposes of the priority date for visa availability, essentially if the aging out was caused by administrative delay. Section 1153(h)(3), the subject of *De Osorio*, pertains to aged-out aliens who do not qualify as a "child" even after application of the CSPA's age-reduction formula. It provides that "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

The *De Osorio* case arose out of suits filed by groups of plaintiffs in federal district court claiming that their aged-out derivative beneficiaries had incorrectly been denied relief under Section 1153(h)(3) when the priority dates of the principal beneficiaries' petitions were not used in determining the aged-out aliens' eligibility for visas. The district court granted summary judgment for the U.S. government, finding that the BIA's interpretation of Section 1153(h)(3) was reasonable and entitled to deference. A panel of the Ninth Circuit Court of Appeals affirmed. The panel explained that Section 1153(h) could be read to apply to all derivative beneficiaries, but also could be read to exclude some beneficiaries from its reach: those who aged out of derivative-beneficiary status with respect to petitions that cannot "automatically be converted" to a family-preference category that covers a person age 21 or older because in order to obtain such a preference it would be necessary for a different petitioner to file a new petition. The panel concluded that deference to the BIA's interpretation was appropriate. The court of appeals granted rehearing en banc, vacated the panel opinion, and reversed and remanded in a 6-5 decision.

On June 24, 2013, the Supreme Court granted certiorari. The United States filed its brief on September 3, 2013, arguing that the en banc court erred in concluding that Section 1153(h)(3) was unambiguous in covering aged-out former derivative beneficiaries of F3 and F4 petitions and that the BIA's interpretation of the provision should be accorded deference. Excerpts below are from the Summary of Argument section of the brief. The brief in its entirety, as well as the petition for writ of certiorari, are available at *www.state.gov/s/l/c8183.htm.* The Supreme Court heard oral arguments in the case on December 10, 2013.

---

* * * *

The Ninth Circuit erred in ruling that Section 1153(h)(3) unambiguously extends a special priority status to aged-out former derivative beneficiaries of F3 and F4 immigrant-visa petitions and definitively forecloses the Board's narrower interpretation. Rather, as the Board recognized, Section 1153(h)(3) is sensibly read to grant a special priority only to aliens whose petitions can "automatically be converted" from one "appropriate" family-preference "category" to a different

one without the need for a new petitioner and a new petition, 8 U.S.C. 1153(h)(3)—a group that does not include respondents' children (and others like them). The Board's reasonable construction of the provision merits *Chevron* deference, which is "especially appropriate in the immigration context." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

First, the Ninth Circuit's conclusion that Section 1153(h)(3) has an unambiguously broad scope cannot be reconciled with the provision's statement that "the alien's petition shall automatically be converted to the appropriate category." 8 U.S.C. 1153(h)(3). That statement contains a number of discrete requirements: that the petition as to which the alien was a beneficiary prior to aging out is the only petition eligible for conversion; that the transformation of the petition is of a limited nature, consisting only of movement from one valid and appropriate category to another; and that the conversion must take place automatically, without gaps in time or external events like the intervention of a new petitioner.

All of those requirements are readily satisfied with respect to certain aliens covered by the statutory subsections to which Section 1153(h)(3) refers. But the requirements cannot be met with respect to the kind of petitions at issue in this case—F3 and F4 petitions as to which an aged-out alien was formerly entitled to derivative status as a child. No "appropriate category" exists under which the original F3 or F4 petitioner could petition for an aged-out former derivative beneficiary—that is, the petitioner's grandchild, niece, or nephew. And while the aged-out person's own parent might at some point qualify as a lawful permanent resident who could file an F2B petition for his or her adult son or daughter, the shift from an F3 or F4 petition to a new F2B petition that might possibly be filed at some later point by a different person, depending on how various contingencies are resolved, cannot reasonably be characterized as an "automatic[] *** conver[sion]" of "the alien's petition."

That interpretation of the conversion language of Section 1153(h)(3) is bolstered by the limited way in which Congress used the term "converted" (or its variants) elsewhere in the CSPA itself, as well as by the way that the term "conversion" is used in regulations in place when the CSPA was enacted. In particular, the provision at issue in this case was sandwiched at enactment between other CSPA provisions that use "converted" to describe recategorization of an existing petition based on changed circumstances, not the filing of a new petition or the replacement of the original petitioner with a different one.

Second, no other aspect of the text of Section 1153(h)(3) supports the Ninth Circuit's ruling. While the first half of that provision refers to Section 1153(h)(1), that reference does not indicate that all petitions covered by Section 1153(h)(1) are necessarily subject to automatic conversion under Section 1153(h)(3). Indeed, it is precisely the tension between the two halves of Section 1153(h)(3)'s single sentence that makes the provision ambiguous, and the Ninth Circuit erred by focusing on the first half and effectively ignoring the succeeding text. In addition, Section 1153(h)(3) cannot reasonably be read to make automatic conversion and priority-date retention separate and independent benefits. The provision applies only if automatic conversion is available, while also clarifying that a converted petition should be given its original priority date rather than a new priority date corresponding to the date of the conversion.

Third, the broad interpretation of Section 1153(h)(3) adopted by the Ninth Circuit is inconsistent with the overall statutory scheme because it would substantially disrupt the immigrant-visa system. That interpretation would "not permit more aliens to enter the country or keep more families together," Pet. App. 35a (dissenting opinion), but would negatively affect many aliens who have been waiting for a visa for a long time by pushing aliens such as respondents' sons and daughters—likely tens of thousands of people—to the front of the line.

Because changing priority dates is a "zero-sum game," ibid., such reshuffling would substantially increase the wait times of others currently in line, with many resulting unfairnesses. The Board's narrower interpretation of Section 1153(h)(3), in contrast, does not create such difficulties. If Congress had intended the kind of far-reaching change that the Ninth Circuit's reading dictates, it would undoubtedly have said so far more clearly.

Finally, the legislative history of the CSPA does not support the view that Section 1153(h)(3) unambiguously applies in this case. The legislative history is of limited usefulness here; Congress did not specifically discuss Section 1153(h)(3), and the relevant history primarily consists of floor debate, which is weak evidence of congressional intent. Nevertheless, nothing in that debate suggests that Congress intended to create the striking disruption that the Ninth Circuit's reading of Section 1153(h)(3) would require. Rather, the debate suggests that Section 1153(h)(3), which was not directed at the administrative-delay problem on which Congress was focused, was intended to work only a limited change—one that modestly expanded the scope of an existing regulatory provision.

For all of these reasons, the Board's narrower interpretation of Section 1153(h)(3) is a reasonable one. And while the Ninth Circuit did not reach the question of whether the Board's interpretation of Section 1153(h)(3) is entitled to Chevron deference, such deference is appropriate. The Board applied its expertise to the whole statutory and regulatory scheme at issue, and chose a reading of Section 1153(h)(3) that works seamlessly with related provisions while also giving full force to the automatic-conversion language that Congress enacted. In addition, the Board made a sensible policy choice not to interpret Section 1153(h)(3) to grant special priority status to independent adults at the expense of the aliens already patiently waiting in the visa line that those adults would join.

* * * *

2. Consular Nonreviewability

On September 9, 2013, the United States filed a petition for rehearing en banc in the U.S. Court of Appeals for the Ninth Circuit in *Din v. Kerry*, No. 10-16772. Plaintiff, Fauzia Din, a U.S. citizen, brought suit in federal court after the denial of a visa application filed by her husband, an Afghan citizen. The district court dismissed plaintiff's complaint. A panel of the U.S. Court of Appeals for the Ninth Circuit reversed, applying the limited judicial review of visa decisions permitted under *Mandel v. Kliendienst*, 408 U.S. 753 (1972), as extended in the Ninth Circuit by *Bustamonte v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008) (extending standing to invoke *Mandel* to U.S. citizen spouses of visa applicants). The Ninth Circuit in *Din* held that the government's identification of a statutory ground for a visa refusal based on terrorism-related activity did not constitute a "facially legitimate" reason necessary to satisfy *Mandel* and remanded to the district court for further proceedings. Excerpts (with footnotes and citations to the record omitted) follow from the U.S. brief in support of rehearing en banc. The brief in its entirety is available at *www.state.gov/s/l/c8183.htm*. On December 24, 2013, the petition for rehearing was denied.

_____

* * * *

2. Plaintiff Fauzia Din is a United States citizen who, in 2006, married Kanishka Berashk, an Afghan citizen who resides in Afghanistan. Berashk has worked for the Afghan Ministry of Social Welfare since 1992, including during the period when the Taliban controlled the country. Shortly after Din and Berashk were married, Din filed an immigrant visa petition for Berashk. The United States Citizenship and Immigration Services notified Din that it approved the petition. But after Berashk's interview at the United States Embassy in Islamabad, a consular officer denied Berashk's visa application, citing 8 U.S.C. § 1182(a)(3)(B), a provision making an alien inadmissible on terrorism-related grounds.

Din brought suit, seeking review of the visa denial and alleging that the government's action impaired her constitutionally protected interest in her marriage to Berashk. The district court granted the government's motion to dismiss, holding that the government's identification of 8 U.S.C. § 1182(a)(3)(B) was a "facially legitimate" reason for the denial and that Din had not established that the reason was not "bona fide."

The panel majority reversed. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013). The Court determined that it had authority to review the consular officer's visa denial because, in a prior decision, the Court "recognized that a citizen has a protected liberty interest in marriage that entitles the citizen to review of a spouse's visa." *Id*. at 860; *see Bustamante*, 531 F.3d at 1062. The Court held that the government's identification of a "properly construed" statutory ground for exclusion combined with a consular officer's assurance that he or she had reason to believe that the ground applies to the visa applicant would be a facially legitimate reason for the denial. *Din*, 718 F.3d at 861. But the Court held that the government failed to satisfy that standard in this case because it cited only the general terrorism exclusion provision and failed to make any specific allegation that Berashk had engaged in behavior coming within a specific provision. *Id*. at 863.1.

* * * *

ARGUMENT

1. *En banc* review is merited because the panel majority's threshold decision to except this case from the doctrine of consular nonreviewability conflicts with precedent from within and without the Ninth Circuit and improperly encroaches on Congress's plenary authority over the admission of aliens.

* * * *

…[O]other courts of appeal have held that a United States citizen has no constitutional right to have an alien spouse reside with him or her in the United States. *See, e.g., Bangura v. Hansen*, 434 F.3d 487, 495-96 (6th Cir. 2006); *Garcia v. Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982); *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975); *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970); *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958); *see also Flores*, 507 U.S. at 303 ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it.").

…[T]he visa denial in this case in no way interfered with Din's decision to marry Berashk; that marriage occurred before Berashk had even applied for the visa. Nor does the visa

decision nullify the marriage or deprive Din and Berashk the legal benefits of marriage, or prevent them from living together anywhere other than in the United States. *Cf. Swartz*, 254 F.2d at 339 ("Certainly deportation would put burdens upon the marriage. It would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created."). Thus, the panel majority erred in concluding that the visa denial implicated Din's liberty interest in the freedom of choice in marriage. More fundamentally, Din's general liberty interest in marriage cannot properly be the basis for judicial review of Berashk's visa denial when the more specific interest—a United States citizen's interest in having an alien spouse join her in the United States—is not. *See Glucksberg*, 521 U.S. at 721-22.

The panel majority's threshold decision to engage in judicial review of a consular officer's visa determination is thus premised on an incorrect determination that the decision implicated Din's constitutionally protected-interest, whether that interest is in the freedom of choice in marriage or in the presence of an alien spouse in the United States. In overriding the doctrine of consular nonreviewability, the panel majority improperly encroached on Congress's plenary authority to determine the conditions for the admission of aliens into the United States. That error constitutes a significant violation of the separation of powers and is serious enough to merit *en banc* reconsideration.

2. The panel majority's application of limited judicial review was equally flawed. The panel majority held that, to provide a "facially legitimate" reason for a visa denial, the government must identify a statutory "ground narrow enough to allow [the court] to determine that it has been 'properly construed.' " *Din*, 718 F.3d at 862. The government also must allege facts sufficient for the court to determine whether they "constitute a ground for exclusion under the statute." *Id*. at 863. In so holding, the panel majority overstepped the role assigned to the courts in immigration and national security matters. *See Mezei*, 345 U.S. at 212 ("[B]ecause the action of the executive officer under such authority is final and conclusive, the [Executive Branch] cannot be compelled to disclose the evidence underlying [its] determinations in an exclusion case.").

The Supreme Court has recognized that the Constitution assigns to the political branches the authority for protecting the national security, thus requiring judicial deference to Congress and the Executive's national security judgments. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting the "heightened deference to the judgments of the political branches with respect to matters of national security"); *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."). The Supreme Court also has recognized a direct connection between Congress's plenary authority over the admission of aliens and its authority over national security. *See Galvan v. Press*, 374 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.").

Typically, when a consular officer denies a visa application because the officer has determined that the alien is inadmissible on a statutory ground, Congress requires the officer to provide the alien with written notice that "states the determination" and that "lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. § 1182(b)(1). Congress has, however, made the notice requirement inapplicable to visa denials made on terrorism-related grounds. 8 U.S.C. § 1182(b)(3). Although neither the statute nor the legislative

history explain why Congress enacted that notice exception, that exception unambiguously furthers the ability of the Executive Branch to protect the national security and to conduct terrorism-related investigations by avoiding the disclosure of potentially sensitive information when denying a visa to an alien who a consular officer has determined is inadmissible, based on terrorism-related grounds.

In addition, information supporting a visa denial pursuant to 8 U.S.C. § 1182(a)(3)(B) often is classified, would jeopardize public safety if revealed, is permitted for only limited use by another agency, or is related to an ongoing investigation. Providing such information to an individual visa applicant, even if possible to do so in an unclassified form, may reveal details about national security investigations and operations. For that reason, if courts were to require the Department of State to identify factual allegations supporting a consular officer's visa denial on national security grounds, other agencies would be less willing to share intelligence or other sensitive information with consular officers, making it more difficult for such officers to exclude aliens who could be threats to the national security. It is for such reasons that Congress has given consular officers discretion whether to even notify an alien the statutory ground for a decision that is based on terrorism-related grounds. 8 U.S.C. §1182(b)(3).2.

* * * *

3. Visa and Immigration Information-Sharing Agreements

a. United Kingdom

On April 18, 2013, representatives of the governments of the United States and the United Kingdom signed an agreement "For the Sharing of Visa, Immigration, and Nationality Information." The full text of the agreement is available at *www.state.gov/s/l/c8183.htm*. The stated purpose of the agreement is "to assist in the effective administration and enforcement of the respective immigration and nationality laws of the Parties regarding Nationals of a Third Country" by sharing information about those third country nationals through a settled process for exchanging information. The agreement includes provisions relating to the use, disclosure, and protection of the information exchanged. The U.S.-U.K. agreement entered into force on November 8, 2013 after an exchange of diplomatic notes in accordance with the terms of the agreement.

b. Canada

The U.S.-Canada Visa and Immigration Information-Sharing Agreement, discussed in *Digest 2012* at 7-8, entered into force on November 21, 2013 after an exchange of diplomatic notes in accordance with the terms of the agreement.

D. ASYLUM, REFUGEE, AND MIGRANT PROTECTION 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 (or stateless persons who last habitually resided in 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; *Digest 2011* at 6-9; and *Digest 2012* at 8-14. In 2013, the United States extended TPS designations for El Salvador, Honduras, and Nicaragua, and both redesignated and extended the designations for Sudan and South Sudan, as discussed below.

1. El Salvador, Honduras, and Nicaragua

On May 30, 2013, the Department of Homeland Security ("DHS") announced the extension of the designation of El Salvador for TPS for 18 months from September 10, 2013 through March 9, 2015. 78 Fed. Reg. 32,418 (May 30, 2013). 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 earthquakes in 2001, and El Salvador remains unable, temporarily, to adequately handle the return of its nationals.

On April 3, 2013, DHS announced the extension of the designation of Honduras for TPS for 18 months from July 6, 2013 through January 5, 2015. 78 Fed. Reg. 20,123 (Apr. 3, 2013). The extension was based on the determination that, there continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, and Honduras remains unable, temporarily, to handle adequately the return of its nationals.

Also on April 3, 2013, DHS announced the extension of the designation of Nicaragua for TPS for 18 months from July 6, 2013 through January 5, 2015. 78 Fed. Reg. 20,128 (Apr. 3, 2013). The extension was based on the determination that, there continues to be a substantial, but temporary, disruption of living conditions in Nicaragua resulting

from Hurricane Mitch, and Nicaragua remains unable, temporarily, to handle adequately the return of its nationals.

2. Sudan and South Sudan

On January 9, 2013, DHS announced that it was both extending the existing designation of South Sudan for TPS for 18 months and redesignating South Sudan for TPS for 18 months, effective May 3, 2013 through November 2, 2014. 78 Fed. Reg. 1866 (Jan. 9, 2013). DHS also announced on the same day that it was likewise both extending the designation of, and redesignating, Sudan for TPS for the same period. 78 Fed. Reg. 1872. The redesignation of each country allows additional individuals residing continuously in the United States since January 9, 2013 to obtain TPS benefits, if eligible. The extension and redesignation of each country were based on a determination that conditions in each country have continued to deteriorate and there continues to be a substantial, but temporary, disruption of living conditions in each country based upon ongoing armed conflict and extraordinary and temporary conditions that prevent nationals of each from returning in safety.

3. Somalia

On November 1, 2013, DHS announced that it was extending the existing designation of Somalia for TPS for 18 months through September 17, 2015. 78 Fed. Reg. 65,690 (Nov. 1, 2013). The extension was based on the determination that conditions in Somalia that prompted the TPS designation continue to be met, namely there continues to be a substantial, but temporary, disruption of living conditions in Somalia based upon ongoing armed conflict and extraordinary and temporary conditions in that country that prevent Somalis who have TPS from safely returning.

4. Syria

On June 17, 2013, DHS announced that it was both extending the existing designation of Syria for TPS for 18 months and redesignating Syria for TPS for 18 months, effective October 1, 2013 through March 31, 2015. 78 Fed. Reg. 36,223 (June 17, 2013). The extension was based on the determination that an extension and redesignation are warranted because the extraordinary and temporary conditions in Syria that prompted the 2012 TPS designation have not only persisted, but have deteriorated, and because there is now an on-going armed conflict in Syria that would pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country. The redesignation of Syria allows additional individuals who have been continuously residing in the United States since June 17, 2013 to obtain TPS, if otherwise eligible.

Cross References

Nationality in Libya claims cases, **Chapter 8.C.1.**
Diplomatic relations, **Chapter 9.A.**
*Suit seeking to record Israel as place of birth on passport (*Zivotofsky*)*, **Chapter 9.C.**
Somalia, **Chapter 9.B.1**, **Chapter 16.A.7.D.**, and **Chapter 17.B.7**
Sudan and South Sudan, **Chapter 17.B.6.**

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Proposed Legislation to Implement *Avena* and the Vienna Convention

In 2013, Congress continued to consider legislation that would facilitate compliance with 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*"), as well as the United States' consular notification and access obligations under the Vienna Convention on Consular Relations ("VCCR") and comparable bilateral international agreements. Much of the text of a bill that was first introduced in 2011 by U.S. Senator Patrick Leahy entitled the "Consular Notification Compliance Act," or CNCA, and later included in part in the State, Foreign Operations, and Related Agencies Appropriations Act, Fiscal Year 2013 (S. 3241), was incorporated into the Senate State, Foreign Operations, and Related Agencies Appropriations Act, Fiscal Year 2014 (S. 1372), as reported by the Senate Appropriations Committee on July 25, 2013.

The Senate Appropriations Committee's Report on the bill noted that the purpose of the section on consular notification compliance was "to provide a limited but important remedy for certain previous violations" of Article 36 of the VCCR and comparable provisions of bilateral international agreements. The Committee Report, Report 113-81, to accompany S. 1372, at 75 (July 25, 2013), is available at *www.gpo.gov/fdsys/pkg/CRPT-113srpt81/pdf/CRPT-113srpt81.pdf*. Specifically, this section provides that foreign nationals who had been convicted of capital crimes as of the date of the legislation's enactment, and in whose cases domestic authorities had not complied with U.S. consular notification and access obligations, may seek federal court review to determine whether their convictions or sentences were prejudiced by the violation. In addition, this section would create a remedy for foreign national defendants facing capital charges who raise a timely consular notification claim. This

section provides that these individuals could have the appropriate consulate notified immediately and obtain a postponement of proceedings, if the court determined this to be necessary to provide an adequate opportunity for consular access and assistance.

The consular notification compliance section contained in the Senate's State, Foreign Operations, and Related Agencies Appropriations Act, Fiscal Year 2014 (S. 1372) was also included in Section 7062 of the President's Fiscal Year 2014 budget request for the Department of State and Other International Programs, which is available at *www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/sta.pdf*.

For further background on efforts to facilitate compliance with the VCCR, as well as the ruling of the ICJ in *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; *Digest 2012* at 15-16. 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/content/travel/english/consularnotification.html*.

2. State Actions Relating to *Avena*

In August 2013, the U.S. Department of State learned that the Harris County District Attorney's Office planned to ask a Texas court to set an execution date for Edgar Arias Tamayo, a Mexican national named in the ICJ's *Avena* decision, who was convicted and sentenced to death for the murder of a Houston police officer in 1994. The Department of State has communicated with state authorities in the past to request that they provide Mexican nationals named in *Avena* with the judicial "review and reconsideration" mandated by the ICJ decision and/or delay the executions of such individuals until they are provided with such review and reconsideration. As part of the Department of State's continuing dialogue with the Texas state authorities, on September 16, 2013, Secretary of State John Kerry wrote letters to Texas Governor Rick Perry, Texas Attorney General Greg Abbott, and Harris County First Assistant District Attorney Belinda Hill to request that Texas delay seeking an execution date for Mr. Tamayo. The content of Secretary Kerry's letters is reproduced below.

---

* * * *

I write to you regarding an urgent and important matter that implicates the welfare of U.S. citizens and members of the United States Armed Forces traveling abroad, as well as our relations with key U.S. allies. I respectfully request your assistance in taking all available steps to protect these vital U.S. interests.

The U.S. Department of State has recently learned that a Texas court has scheduled a hearing on September 17 in which the Harris County District Attorney's Office intends to ask the court to set an execution date for Edgar Arias Tamayo. Mr. Tamayo was convicted of a capital

crime and sentenced to death in Harris County. I want to be clear: I have no reason to doubt the facts of Mr. Tamayo's conviction, and as a former prosecutor, I have no sympathy for anyone who would murder a police officer. This is a process issue I am raising because it could impact the way American citizens are treated in other countries. As you know, Mr. Tamayo is one of 51 Mexican nationals named in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31) (*Avena*). As you know, in *Avena*, the International Court of Justice directed the United States to provide judicial "review and reconsideration" to determine whether the convictions and sentences of several dozen Mexican nationals were prejudiced by violations of the Vienna Convention on Consular Relations (VCCR). This decision is binding on the United States under international law. As one of the Mexican nationals named in the *Avena* decision, Mr. Tamayo's case directly impacts U.S. foreign relations as well as our country's ability to provide consular assistance to U.S. citizens overseas. Without commenting on the guilt of the defendant or on the sentence in this case, I write to inform you of the important interests at stake in this case. Specifically, I request that competent Texas authorities delay seeking an execution date for Mr. Tamayo.

The Federal Executive Branch has worked diligently to ensure compliance with the U.S. international legal obligations under *Avena*. Compliance sends a strong message that the United States takes seriously its obligations under the VCCR to provide consular notification and access to foreign citizens arrested in the United States. In addition, compliance also ensures the U.S. government will be able to rely on these same provisions to provide critical consular assistance to U.S. citizens detained abroad, including the men and women of our Armed Forces and their families, many of whom are residents of the state of Texas. Our consular visits help ensure U.S. citizens detained overseas have access to food and appropriate medical care, if needed, as well as access to legal representation. As former Secretary of Defense Panetta wrote in 2011, it is important that the United States do all it can to ensure that U.S. service members, civilian personnel, and dependents are afforded consular protection while stationed abroad.

The previous Administration attempted to direct compliance with the *Avena* judgment by means of a memorandum issued by President Bush. However, although the U.S. Supreme Court unanimously recognized that "the *Avena* decision . . . constitutes an international law obligation, on the part of the United States," *Medellin v. Texas*, 552 U.S. 491, 504 (2008), the Court concluded that the President of the United States cannot unilaterally compel Texas to comply with that obligation. The Court further explained that Congress could ensure compliance with the *Avena* decision by enacting legislation to implement the ICJ decision. A statutory provision that would provide for judicial "review and reconsideration" for those Mexican nationals named in the decision—as well as similarly situated foreign nationals—is currently included in the Department of State, Foreign Operations, and Related Programs Appropriations Act, Fiscal Year 2014 (S. 1372), which has been approved by the Senate Appropriations Committee.

The setting of an execution date for Mr. Tamayo would be extremely detrimental to the interests of the United States. This issue is particularly important to our bilateral relationship with Mexico. The Mexican ambassador to the United States sent me the enclosed letter on August 28 to warn that the execution of Mr. Tamayo, in these circumstances, would be damaging to our bilateral cooperation and to express support for the proposed legislation described above. Compliance with our international legal obligations under *Avena*, is also an important issue for other U.S. allies, many of whom have written to Congress and the Department of State on this issue. For example, in August 2010, British Foreign Secretary William Hague wrote a letter to

former Secretary of State Hillary Clinton to raise his concerns about the case of Linda Carty, a similarly-situated dual British and St. Kitts national, currently on death row in Harris County.

If an execution date is set for Mr. Tamayo, Ms. Carty, or any other similarly situated foreign national, it would unquestionably damage these vital U.S. interests. Moreover, seeking an execution date would be particularly egregious, in light of the fact that no court has yet addressed Mr. Tamayo's claim of prejudice on the merits, which the state of Texas pledged it would do in a July 18, 2008, letter to my predecessor, Condoleezza Rice, and former Attorney General Michael Mukasey. It is my sincere hope that Texas authorities will make every effort to avoid jeopardizing the U.S. relationship with our allies and our ability to provide consular assistance to U.S. citizens abroad, particularly while Congress gives full consideration to the pending legislation.

* * * *

B. CHILDREN

1. Adoption

a. Pre-Adoption Immigration Review ("PAIR")

In January 2013, the Taiwan Child Welfare Bureau issued an administrative order that requires all adoption cases filed on behalf of U.S. prospective adoptive parents with the Taiwan courts to undergo the U.S. PAIR process. The order instructs Taiwan adoption service providers ("ASPs") to include a letter issued by the American Institute in Taiwan ("AIT") located in Taipei, confirming completion of the PAIR process with each court filing initiated after April 1, 2013. U.S. Citizenship and Immigration Services ("USCIS") issued a policy memorandum on February 14, 2013, allowing prospective adoptive parents to file a Form I-600, Petition to Classify Orphan as an Immediate Relative, before Taiwan courts finalize an adoption in Taiwan. The policy memorandum, which is available in full at *www.uscis.gov/USCIS/Laws/Memoranda/2013/January/Taiwan%20PAIR%20PM%20.pdf*, explains some benefits of implementing the PAIR process:

> Currently, adoptive parents generally file a Form I-600 after traveling to and completing the adoption of a child (beneficiary) in Taiwan. As a result, any serious problems with a case may only become apparent after the adoptive parents have a permanent legal relationship with the child. Irregularities uncovered after the adoption or grant of legal custody is finalized can delay or prevent the immigration of a child to the United States, which can leave adoptive parents and children in untenable situations. Implementation of the PAIR process to meet the new requirements of Taiwan will significantly reduce or eliminate such problems, since a preliminary determination on U.S. immigration eligibility will precede the issuance of adoption decrees or legal custody orders.

Effective September 1, 2013, the Government of Ethiopia began requiring all adoption cases filed on behalf of U.S. prospective adoptive parents with the Ethiopian courts to undergo the U.S. PAIR process. State Department notices regarding adoptions from Ethiopia are available at *http://adoption.state.gov/country_information/country_specific_info.php?country-select=Ethiopia*.

b. Report on Intercountry Adoption

In March 2014, the State Department released its Annual Adoption Report to Congress. The report is available at *http://adoption.state.gov/content/pdf/fy2013_annual_report.pdf*. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2013, average times to complete adoptions, and median fees charged by adoption service providers.

c. Countries Joining the Hague Convention

On December 5, 2013, Croatia deposited its instrument of accession to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention"). Serbia deposited its instrument of accession on December 18, 2013. Haiti deposited its instrument of ratification of the Hague Adoption Convention on December 16, 2013. On May 24, 2013, the Republic of Korea signed the Hague Adoption Convention. Swaziland deposited its instrument of accession on March 5, 2013 and the Convention entered into force for Swaziland on July 1, 2013. For Croatia, Serbia, and Haiti, which deposited instruments in December 2013, the Convention enters into force April 1, 2014. A status table for the Hague Adoption Convention is available at *www.hcch.net/index_en.php?act=conventions.status&cid=69*.

2. Abduction

a. 2013 Hague Abduction Convention Compliance Report

In April 2013, 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 evaluates compliance by treaty partner countries with the Convention. The Convention 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 2013 report, covering the period January 1, 2012 through December 31, 2012, identified Costa Rica and Guatemala as "Not Compliant with the Convention" and named the Bahamas, Brazil, and Panama as states demonstrating "Patterns of Noncompliance." The report is available at *http://travel.state.gov/content/dam/childabduction/complianceReports/2013ComplianceReport.pdf*.

b. Hague Abduction Convention Litigation

See Chapter 15.C. for a discussion of developments in 2013 Hague Abduction Convention cases in the U.S. Supreme Court in which the United States participated.

c. Hague Abduction Convention Partners

On November 1, 2013, the 1980 Hague Convention on the Civil Aspects of International Child Abduction entered into force between the United States and the Republic of Korea. A State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/11/216180.htm*, stated:

> The United States now has 72 partners under the Convention.
>
> The Convention is the primary civil law mechanism for parents seeking the return of children who have been abducted from or wrongfully retained outside their country of habitual residence by another parent or family member. Parents seeking access to children residing in treaty partner countries may also invoke the Convention. The Convention is critically important because it establishes an internationally recognized legal framework to resolve parental abduction cases. The Convention does not address who should have custody of the child; rather it addresses where issues of child custody should be heard.

Cross References

Diplomatic relations, **Chapter 9.A.**
Hague Abduction Convention cases, **Chapter 15.C.**

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Extradition Treaty with Chile

On June 5, 2013, the governments of the United States of America and the Republic of Chile signed an extradition treaty. The treaty is subject to ratification by each party and will enter into force upon the exchange of instruments of ratification. Upon its entry into force, it will replace an extradition treaty the two countries signed in 1900.

2. Mutual Legal Assistance Treaty with Jordan

On October 1, 2013, the governments of the United States of America and the Hashemite Kingdom of Jordan signed a Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT"). The U.S.-Jordan MLAT is subject to ratification by each party and will enter into force upon the exchange of instruments of ratification.

3. Extradition of Bosnian National for War Crimes Charges

On June 3, 2013, the U.S. Department of Justice announced that the United States had extradited Sulejman Mujagic, "a citizen of Bosnia and Herzegovina and a resident of Utica, N.Y., to stand trial in Bosnia for charges relating to the torture and murder of one prisoner of war and the torture of another during the armed conflict in Bosnia." Department of Justice press release, June 3, 2013, available at *www.justice.gov/opa/pr/2013/June/13-crm-633.html*. After a federal court found Mujagic to be subject to extradition, it certified its findings to the Secretary of State. On May 17, 2013, the U.S. Department of State issued a warrant authorizing the extradition of Mujagic, who was subsequently extradited, as explained below in excerpts from the Department of Justice press release.

_____

* * * *

Mujagic is being extradited to Bosnia to be tried for war crimes committed on or about March 6, 1995, during the armed conflict that followed the breakup of the former Yugoslavia. Bosnia has alleged that Mujagic, then a platoon commander in the Army of the Autonomous Province of Western Bosnia, summarily tortured and executed a disarmed Bosnian Army soldier and tortured a second soldier after the two prisoners had been captured by Mujagic and his men.

In response to the Bosnian government's request for extradition pursuant to the extradition treaty currently in force between the United States and Bosnia, the U.S. Department of Justice filed a complaint in U.S. federal district court on Nov. 27, 2012, and HSI [Homeland Security Investigations] special agents arrested Mujagic the next day in Utica for purposes of extradition.

On April 2, 2013, the federal district court in the Northern District of New York ruled that Mujagic was subject to extradition to Bosnia to stand trial for the murder and torture of the two unarmed victims. On May 31, 2013, Mujagic was delivered to Bosnian authorities and removed from the United States. The Office of the Cantonal Prosecutor of the Una-Sana Canton in Bihac is handling Mujagic's prosecution in Bosnia.

Mujagic entered the United States in July 1997 and obtained status as a lawful permanent resident in March 2001. Mujagic does not retain U.S. citizenship.

* * * *

4. Extradition of Tunisian National Accused in Attempted Suicide Bombing

In October 2013, the United States government announced that Nizar Trabelsi, a Tunisian national, had been extradited to the United States from Belgium to face charges in the District of Columbia. The October 3, 2013 FBI press release regarding the extradition is available at *www.fbi.gov/washingtondc/press-releases/2013/alleged-al-qaeda-member-extradited-to-u.s.-to-face-charges-in-terrorism-conspiracy*. Trabelsi was indicted in 2006, with a superseding indictment filed in 2007. The indictment, which was unsealed after Trabelsi's extradition, alleges that Trabelsi met with Osama bin Laden and other high-level al-Qaeda members to volunteer and prepare for a suicide bomb attack on a U.S. military facility. Charges against Trabelsi include: conspiracy to kill U.S nationals outside of the United States; conspiracy and attempt to use weapons of mass destruction; conspiracy to provide material support and resources to a foreign terrorist organization; and providing material support and resources to a foreign terrorist organization.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On May 30, 2013, the Department of State released the 2012 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*. A State Department fact sheet about the 2012 Country Reports, available at *www.state.gov/r/pa/prs/ps/2013/05/210103.htm*, lists the following counterterrorism developments in 2012.

* * * *

A marked resurgence of Iran's state sponsorship of terrorism, through its Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF), its Ministry of Intelligence and Security, and Tehran's ally Hizballah was noted. Iran's state sponsorship of terrorism and Hizballah's terrorist activity have reached a tempo unseen since the 1990s, with attacks plotted in Southeast Asia, Europe, and Africa. Both Iran and Hizballah also continued to provide a broad range of support to the Asad regime, as it continues its brutal crackdown against the Syrian people.

The al-Qa'ida (AQ) core in Pakistan continued to weaken. As a result of leadership losses, the AQ core's ability to direct activities and attacks has diminished, as its leaders focus increasingly on survival.

Tumultuous events in the Middle East and North Africa have complicated the counterterrorism picture. The AQ core is on a path to defeat, and its two most dangerous affiliates have suffered significant setbacks: Yemen, with the help of armed residents, regained government control over territory in the south that AQAP has seized and occupied since 2011; also, Somali National Forces and the African Union Mission in Somalia expelled al-Shabaab from major cities in southern Somalia. Despite these gains, however, recent events in the region have complicated the counterterrorism picture. The dispersal of weapons stocks in the wake of the revolution in Libya, the Tuareg rebellion, and the coup d'état in Mali presented terrorists with new opportunities. The actions of France and African countries, however, in conjunction with both short-term U.S. support to the African-led International Support Mission in Mali and the long-term efforts of the United States via the Trans-Sahara Counterterrorism Partnership, have done much to roll back and contain the threat.

Leadership losses have driven AQ affiliates to become more independent. AQ affiliates are increasingly setting their own goals and specifying their own targets. As receiving and sending funds have become more difficult, several affiliates have increased their financial independence by engaging in kidnapping for ransom operations and other criminal activities.

We are facing a more decentralized and geographically dispersed terrorist threat. Defeating a terrorist network requires us to work with our international partners to disrupt

criminal and terrorist financial networks, strengthen rule of law institutions while respecting human rights, address recruitment, and eliminate the safe havens that protect and facilitate this activity. In the long term, we must build the capabilities of our partners and counter the ideology that continues to incite terrorist violence around the world.

Although terrorist attacks occurred in 85 different countries in 2012, they were heavily concentrated geographically. As in recent years, over half of all attacks (55%), fatalities (62%), and injuries (65%) occurred in just three countries: Pakistan, Iraq, and Afghanistan.

* * * *

b. UN General Assembly

On October 7, 2013, Steven Hill, U.S. Deputy Legal Adviser for the U.S. Mission to the UN, delivered remarks on measures to eliminate international terrorism at the UN General Assembly Sixth Committee (Legal). His remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/215249.htm.*

* * * *

The United States reiterates both its firm condemnation of terrorism in all its forms and manifestations as well as our commitment to the common fight to end terrorism. All acts of terrorism—by whomever committed—are criminal, inhumane and unjustifiable, regardless of motivation. An unwavering and united effort by the international community is required if we are to succeed in preventing these heinous acts. In this respect, we recognize the United Nations' central role in coordinating the efforts by member states in countering terrorism and bolstering the ability of states to prevent terrorist acts. We express our firm support for these UN efforts, as well as those of the Global Counterterrorism Forum and other multilateral bodies aimed at developing practical tools to further the implementation of the UN CT framework.

We look forward to the next review of the UN Global Counterterrorism Strategy, particularly as an opportunity to examine and evaluate efforts underway to increase Member States' implementation of this important strategy. We strongly welcome the efforts of the United Nations to facilitate the promotion and protection of human rights and the rule of law while countering terrorism, to recognize the role that victims of terrorism can play in countering violent extremism, to improve border management, and to target financial measures to counter terrorism. We are pleased to note our voluntary contributions to the Counterterrorism Implementation Task Force to develop assistance and training in this regard.

Focusing here on the legal developments, we 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 2013, the Department of State announced the Secretary of State's designation of seven additional organizations and their associated aliases as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act: Ansar al-

Dine (78 Fed. Reg. 17,744 (Mar. 22, 2013)); Boko Haram and Ansaru (78 Fed. Reg. 68,500 (Nov. 14, 2013); see also *www.state.gov/r/pa/prs/ps/2013/11/217509.htm*); the al-Mulathamun Battalion, with its aliases, "Those Who Sign in Blood" battalion and "al-Murabitoun" (78 Fed. Reg. 76,887 (Dec. 19, 2013); see also *www.state.gov/r/pa/prs/ps/2013/218880.htm*); Ansar al-Shari'a in Tunisia (79 Fed. Reg. 2240 (Jan. 13, 2014)); Ansar al-Shari'a in Darnah (79 Fed. Reg. 2241 (Jan. 13, 2014)); Ansar al-Shari'a in Benghazi (79 Fed. Reg. 2241 (Jan. 13, 2014)). See Chapter 16.A.4.b. for a 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

During 2013, 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: Hizballah (78 Fed. Reg. 17,745 (Mar. 22, 2013)); Real Irish Republican Army (78 Fed. Reg. 26,101 (May 3, 2013)); Abu Sayyaf Group (78 Fed. Reg. 24,463 (Apr. 25, 2013)); Kurdistan Worker's Party (78 Fed. Reg. 69,927 (Nov. 21, 2013); Revolutionary People's Liberation Party/Front (78 Fed. Reg. 46,671 (Aug. 1, 2013)).

On May 13, 2013, the Secretary determined that the circumstances that were the basis for the designation of the Moroccan Islamic Combatant Group as an FTO have changed in such a manner as to warrant revocation of the designation. 78 Fed. Reg. 32,000 (May 28, 2013).

2. Narcotics

a. Majors list process

(1) International Narcotics Control Strategy Report

On March 4, 2013, the Department of State submitted the 2013 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 2012. 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/2013/*.

(2) Major drug transit or illicit drug producing countries

On September 13, 2013, President Obama issued Presidential Determination 2013-14, "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2014." Daily Comp. Pres. Docs., 2013 DCPD No. 00626, pp. 1–4. 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 2013. 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 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 2014 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 2013 President Obama again certified, with respect to Colombia (Daily Comp. Pres. Docs., 2013 DCPD No. 00564, p. 1, Aug. 9, 2013) and Brazil (Daily Comp. Pres. Docs., 2013 DCPD No. No 00696, p. 1, Oct. 10, 2013), 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. Trafficking in Persons report

On June 19, 2013, the Department of State released the 2013 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 2012 through March 2013 and evaluates the anti-trafficking efforts of countries around the world. 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 21 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/2013/index.htm*. Chapter 6.C.3.b. discusses the determinations relating to child soldiers.

In a briefing upon the release of the 2013 report, available at *www.state.gov/j/tip/rls/rm/2013/210906.htm*, Luis CdeBaca, Ambassador-at-Large for the State Department's Office To Monitor and Combat Trafficking in Persons, explained some of the findings in the 2013 report. That briefing is excerpted below. Secretary Kerry also delivered remarks upon release of the report (not excerpted herein), which are available at *www.state.gov/secretary/remarks/2013/06/210911.htm*.

---

* * * *

… in 188 countries in the world that we were able to look at this year—we see 30 countries which have achieved what we call Tier 1 on the report, and that's a country that, while certainly not having solved the trafficking problem—no country has—those are countries that are meeting those minimum standards.

What are the minimum standards? It's pretty easy. Is this illegal? Is holding someone in a condition of compelled service a crime? Is the punishment for that commensurate with other serious offenses like rape, kidnapping and extortion? Are there protections for the victims? Are there alternatives to deportation if the victim is a foreign victim? [Are] there prevention efforts going on on the part of the government?

And again, as we said, these are minimum standards. And so even the United States, who is one of those … Tier 1 countries—even the United States has a long way to go. And I think that what we've dedicated ourselves to doing is to looking at the needs of each tier. The Tier 1 countries, while doing an adequate job, need to sharpen victim identification, need to make sure that victims are able to walk on their path to the new life that they deserve. The Tier 2 countries, countries that are doing a lot but haven't quite gotten there yet, this year [there are] 92 of them. Those countries often are [prosecuting] cases, maybe have some shelters and some victim protection in place, but don't necessarily have long-term programs for victim rehabilitation, don't necessarily have robust and proactive law enforcement that's going out and really putting a dent in this.

Now, the Tier Two Watch List was originally created …in order to basically warn countries that they were on a downward trajectory. The "watch" in watch list literally is, "Watch out, you might be on your way to Tier 3." This year, there are 44 countries on the Tier 2 Watch List. And then there's Tier 3, which is the countries that are found by law not to be taking the affirmative steps necessary to fight human trafficking. And this year, there are 21 countries in that status.

This is the first year in which a law from 2008 has come into effect. [Congress] was concerned that countries were sitting on [the] Tier 2 Watch List and that maybe some countries were getting comfortable being on [the] Tier 2 Watch List, doing a minimum amount, not really doing all that much, not on the upward trajectory of a Tier 2 or a Tier 1 country. And so in 2008, in legislation, the Trafficking Victims Protection Act Reauthorization of 2008, which was sponsored by Chris Smith and others on the House side and sponsored by then-Senator Biden on the Senate side, moved to limit the number of years … a country could be on [the] Tier 2 Watch List. There is a waiver provision if a country has a written plan and resources dedicated towards meeting the concerns that are raised by the minimum standards in the [TIP] [R]eport, that we would be able to maintain them on that Watch List. But those waivers were only available for two years.

So this year, the 2013 report represents the first year in which the waiver possibility for a plan of action and resources is no longer available. And there were six countries that were facing that situation in this year's report. Those six countries are Azerbaijan, Iraq, the Congo, Russia, China, and Uzbekistan.

In looking at those countries, applying the … law, it was apparent …that three of those countries, Azerbaijan, the Congo, and Iraq—that we'd seen quite a bit of progress. For the first time now in Iraq, a new law [has] been passed, an anti-trafficking unit [has been] established in the Ministry of Interior, even going back and going into the women's prisons and screening people who had been convicted of other offenses, identifying 16 victims through that method and being able to get them out of prison, where they'd been unjustly punished.

In Azerbaijan, [this year there were] the first-ever forced labor prosecutions; an understanding and an increased commitment on the part of the government to address this [issue]. In the Congo, a country where, as most people who have been to Brazzaville will testify to, the reach of law enforcement, the reach of rule of law does not go that far outside of capital, and yet we were able to see for the first time active law enforcement responses in that country, with traffickers actually being brought to justice.

And so [in] those three countries, we saw a rise in the tier ranking on the merits to Tier 2, off of the Watch List. In the other countries that were subject to this provision for the first time, the automatic downgrade provision, of China, Russia, and Uzbekistan, we didn't see that same

kind of forward progress. We continue to have concerns about victim care and the need for more aggressive victim identification and assistance. For instance, in … China, the national plan of action that recently came out gives us, I think, a good path forward. It came out, however, in April, which is after the reporting year ended, and was not able to be credited in this year's report. And plans of action and promises of future action on the part of a government are something that is typically credited as part of a Tier 2 Watch List designation, which, as I mentioned earlier, was no longer available to China for this year.

We look forward to working with the Chinese and others on this national plan of action. We come across Chinese victims here in the United States, and our embassies actually come across Chinese victims in countries around the world. And we have gone out of our way to help them, to make sure that they are safe, make sure that they have a voice in the process. And we'll continue to work with the Chinese Government on seeing the results that will hopefully come out of that national plan of action.

And finally, [there is] Uzbekistan. As many of you may be familiar with, there's been an ongoing issue in Uzbekistan with the government's direct involvement in this problem: the mobilization of children and adults into forced labor in the cotton harvest each fall. This is something that we've raised with Uzbekistan in a number of fora. It's something that Assistant Secretary Bob Blake has been working very hard on. …

* * * *

b. 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 17, 2013, President Obama issued a memorandum for the Secretary of State, "Presidential Determination With Respect to Foreign Governments' Efforts Regarding Trafficking in Persons." The memorandum for the Secretary of State is available at *www.state.gov/j/tip/rls/other/2013/217567.htm*, with the memorandum of justification with regard to the determination for each country. The President's memorandum conveys determinations concerning the 21 countries that the 2013 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a. *supra* for discussion of the 2013 report.

The Trafficking Victims Protection Act further requires that the President's notification be accompanied by a certification by the Secretary of State regarding certain types of foreign assistance ("covered assistance") that "no [such covered] assistance is intended to be received or used by any agency or official who has participated in, facilitated, or condoned a severe form of trafficking in persons." Secretary Kerry signed the required certification as to all 21 countries place on the Tier 3 in the 2013 Report on September 3, 2013. Prior to obligating or expending covered

assistance, relevant bureaus in the State Department are required to take appropriate steps to ensure that all assistance is provided in accordance with the Secretary's certification.

4. Money Laundering

a. Institutions of primary money laundering concern

(1) Rmeiti Exchange (Lebanon)

On April 25, 2013, 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 Kassem Rmeiti & Co. For Exchange ("Rmeiti Exchange") is a financial institution operating outside the United States that is of primary money laundering concern. 78 Fed. Reg. 24,593 (Apr. 25, 2013). Based on this finding, FinCEN also issued a notice of proposed rulemaking under § 311. 78 Fed. Reg. 24,576 (Apr. 25, 2013). 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 Rmeiti Exchange. 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 Rmeiti Exchange. On April 23, 2013, FinCEN imposed the first special measure by temporary order to immediately address the threat to the U.S. financial system. FinCEN had previously determined that another bank in Lebanon, Lebanese Canadian Bank ("LCB"), was of primary money laundering concern. *Digest 2011* at 61-65. Excerpts below from the notice of finding explain the determination with regard to Rmeiti Exchange (with footnotes omitted).

_____

* * * *

III. The Extent to Which Rmeiti Exchange Has Been Used To Facilitate or Promote Money Laundering in or Through Lebanon

In finding that Rmeiti Exchange is a financial institution of primary money laundering concern, FinCEN reviewed the extent to which Rmeiti Exchange facilitates or promotes money laundering and determined that Rmeiti Exchange, its ownership, management, and associates are involved in illicit activity that includes the same trade-based money laundering activities conducted by U.S.-designated narcotics kingpin Ali Mohamed Kharroubi and Elissa Exchange, facilitate money laundering by other Lebanese exchanges on behalf of drug traffickers, and provide financial services to Hizballah.

A. Rmeiti Exchange Engages in Trade-Based Money Laundering for U.S.-Designated Narcotics Kingpin Ali Mohamed Kharroubi and Elissa Exchange

According to information available to the U.S. Government, Rmeiti Exchange engages in auto sale-related financial transactions working with [Specially Designated Narcotics

Trafficker or] SDNT Ali Mohamed Kharroubi to send funds to U.S. auto dealers as part of a trade-based money laundering scheme. Before and after the January 2011 Treasury designation of Ali Mohamed Kharroubi and Elissa Exchange and FinCEN's Section 311 Action against LCB which exposed the use of LCB accounts by Kharroubi and his company, Elissa Exchange, to launder drug proceeds for the Joumaa drug trafficking organization through the purchase and export of used cars from the United States, Rmeiti Exchange and its management processed structured, regular, round-number, large-denomination international wire transfers for the purchase of vehicles in the United States. The funds often originated from unknown individuals in high-risk money laundering regions and were sent to auto auction companies and used car dealers, some of which have no physical presence or verifiable address.

1. Rmeiti Exchange Engages in Trade-Based Money Laundering Activity With Narcotics Traffickers

Rmeiti Exchange and its management facilitate extensive transactions for known money launderers and drug traffickers. Prior to Treasury's Kingpin designation and FinCEN's LCB 311 Action, Kassem Rmeiti, through Rmeiti Exchange, routinely processed structured international wire transfers from its accounts at LCB and other banks to many of the same U.S.-based car dealerships that received funds from Elissa Exchange and were subsequently named in the [U.S. District Court for the Southern District of New York, or] SDNY Complaint as participants in the Joumaa network's money laundering scheme. In fact, between 2008 and March 2011, Rmeiti Exchange and its owner, provided at least $25 million in large, round dollar, and repetitive payments to U.S.-based car dealers and exporters, including more than $22 million from accounts it held at LCB. Many of the used car dealers that received payments from Rmeiti Exchange were later named in the SDNY Complaint for receiving funds from the Joumaa network.

2. Rmeiti Exchange Engages in Trade-Based Money Laundering Activity With Individuals the U.S. Government Has Designated as Narcotics Traffickers

After SDNT Ali Mohamed Kharroubi's network was exposed in the Treasury and Department of Justice actions, the network adapted its business practices and utilized other exchange houses which they could control or otherwise use to continue sending funds to used car dealerships in the United States, in particular Rmeiti Exchange. After the LCB 311 Action in February 2011, Rmeiti Exchange companies continued to make structured international wire payments to U.S. car dealers and companies for car purchases in a manner representative of trade-based money laundering, and a Rmeiti Exchange company was specifically used to facilitate such payments on behalf of Treasury-designated narcotics trafficker Ali Kharroubi. According to U.S. Government information, in February 2011 Ali Mohamed Kharroubi directed Kassem Rmeiti to create the Trading African Group (TAG) in Benin so that Kharroubi could continue making international wire transfers for U.S. car purchases that avoided U.S. Government scrutiny. Further, by the fall of 2011, former Elissa Exchange employees were working for TAG, and Kassem Rmeiti was paying Kharroubi about 30-40% of TAG's profits.

TAG provided more than $1.7 million to U.S. car dealers and exporters between March and October 2011. These payments consisted of structured, regular, large-denomination international wire payments in a manner representative of trade-based money laundering, and included at least one U.S. car dealer named in the SDNY Complaint as receiving car purchase payments from Elissa Exchange as part of the money laundering scheme alleged in the Complaint. The U.S. car dealers also received multiple wire transfers from individuals and businesses in regions considered high-risk for trade-based money laundering, which funded

purchases of cars that were then shipped to Lebanon and likely Benin. The sources of some funds were unknown, and the recipients had addresses that could not be verified or appeared to be a residence.

3. Following U.S. Government Actions in 2011, Rmeiti Exchange Adapted Its Trade-Based Money Laundering Activity To Conduct Transactions Through Rmeiti's Other Businesses, Especially World Car Service LTD

Kassem Rmeiti also serves as a board member or executive and represents himself as the owner of World Car Service LTD, a.k.a., World Car Service AG, (WCS AG)--an international transport and shipping business located in Switzerland, which is believed to be an affiliate of World Car Service International Transport and Shipping Company (a.k.a., WCS SA) located in Benin. Between March 2011 and August 2012, WCS SA in Benin processed numerous international wire transfers totaling over $100,000 and referencing auto purchases or vehicles to U.S.-based individuals and businesses and one other individual involved in auto exports or sales. From 2011 to 2012, WCS SA in Benin provided over $2.2 million in large, round-dollar wire transfers to numerous U.S. car dealers and car exporters, one of which was named in the 2011 SDNY Complaint, and many of which had previously received over $2 million in dozens of large, round-dollar wire transfers from Rmeiti Exchange or TAG between early 2007 and mid-2011. This pattern of activity indicates that in 2011 Rmeiti shifted some transactions away from his exchange companies and TAG and began increasingly utilizing his WCS accounts for trade-based money laundering transactions with the same entities through 2012.

Additionally, Kassem Rmeiti has engaged in commingling of over $2.5 million among his several businesses, including WCS SA, WCS AG, STE Rmaiti SARL, and Kassem Rmeiti and Co. For Exchange between 2009 and 2012, which is consistent with money laundering indicators and techniques.

B. Rmeiti Exchange Facilitates or Promotes Money Laundering Activity With or on Behalf of Other Money Launderers and Drug Trafficking Organizations

In addition to involvement in the trade-based money laundering activities described above, Rmeiti Exchange and its management have conducted financial activities for other money laundering and drug trafficking organizations operating in both Europe and Africa. Between March 2011 and October 2012, Rmeiti Exchange, its management, and employees facilitated the movement of at least $1.7 million for known or suspected Beninoise and Lebanese money launderers and drug traffickers. This included Rmeiti Exchange and Kassem Rmeiti taking on large cash deposits, collection of bulk cash currency, issuance of cashier's checks, and facilitation of cross-border wire transfers on behalf of known and suspected money launderers, drug traffickers, and Hizballah affiliates.

1. Rmeiti Exchange Facilitates Payments for a Money Launderer Known To Be Affiliated With a Colombian Drug Trafficking Organization

Since at least 2010, Rmeiti Exchange has transferred funds on behalf of known or suspected money launderers and shared its office space and security resources as part of a large-scale money laundering scheme that involves the purchase and sale of used cars in the United States for export to West Africa. For example, following the seizure of over 8.7 million euro by European authorities related to a Colombian drug trafficking ring that imported cocaine into Europe and laundered the illicit proceeds through Lebanon and South America, a known money launderer of this organization with ties to Hizballah moved his operations to Kassem Rmeiti Exchange in the Dahieh area of Beirut. This money launderer continued to wire large dollar amounts to U.S.-based car dealers via a Rmeiti Exchange account prior to the LCB 311 Action.

Rmeiti Exchange facilitated money laundering for other entities engaged in trade-based money laundering. Rmeiti processed over $3 million in dozens of large, round-dollar international wire transfers to two entities, whose businesses engaged in transactions typical of used-car trade-based money laundering. The two entities received over $2 million in wire transfers for car purchases from entities in high-risk trade-based money laundering regions, including through another exchange house.

2. Rmeiti Exchange Actively Seeks Money Laundering Opportunities With Other Lebanese Exchange Houses and Precious Metal Dealers

Rmeiti Exchange owner Kassem Rmeiti has also worked with other Lebanese exchange houses, including Halawi Exchange, determined to be a financial institution operating outside of the United States that is of primary money laundering concern on April 22, 2013, to facilitate money laundering activities. For example, Rmeiti Exchange, Halawi Exchange, and other exchange houses sent over $9 million in dozens of round-number, large-denomination international wire transfers from unknown sources to the same U.S. car shipping business from 2007 through 2010. Rmeiti Exchange and Halawi Exchange have facilitated financial activity on behalf of a money launderer involved in collecting illicit drug proceeds. Kassem Rmeiti has worked with a separate Lebanese exchange house to coordinate currency transfers and courier shipments on behalf of various money launderers between mid-2011 and mid-2012. Benin-based suspected money launderer Kassem Rmeiti, the owner of Rmeiti Exchange, continues to actively seek money laundering opportunities in trade transactions. For example, Rmeiti sought the assistance of a Lebanon-based money launderer in April 2012, to begin selling African gold in Lebanon or Dubai. Rmeiti Exchange and its owners' and employees' willingness to work for a variety of criminal networks involved in drug trafficking and money laundering suggests that a venture into the import or export of gold, which is a high-risk industry for money laundering, will likely provide another source to commingle illicit funds for Ali Mohamed Kharroubi and others.

C. Rmeiti Exchange Facilitates or Promotes Money Laundering for Specially Designated Global Terrorist Hizballah

Rmeiti Exchange has also conducted money laundering activities for and provided financial services to Hizballah. Rmeiti Exchange used accounts it held at LCB to deposit bulk cash shipments generated by Hizballah through illicit activity in Africa and as of December 2011, Hizballah had replaced U.S.-designated Elissa Exchange owner Ali Kharroubi with Haitham Rmeiti--the manager/owner of STE Rmeiti--as a key facilitator for wiring money and transferring Hizballah funds. Rmeiti Exchange, through its owner, Kassem Rmeiti, owns Societe Rmaiti SARL (a.k.a. STE Rmeiti). These steps taken by Hizballah demonstrate its efforts to adapt after U.S. Government disruptive action, and illustrates the need for continued action against its financial facilitators.

* * * *

(2) Halawi Exchange (Lebanon)

Also on April 25, 2013, FinCEN issued notice of its finding under § 311 of the USA PATRIOT Act, Pub. L. 107-56, that Halawi Exchange Co. ("Halawi Exchange") is a financial institution operating outside the United States that is of primary money laundering concern. 78 Fed. Reg. 24,596 (Apr. 25, 2013). Based on this finding, FinCEN also issued a

notice of proposed rulemaking under § 311. 78 Fed. Reg. 24,584 (Apr. 25, 2013). 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 Halawi Exchange. 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 Halawi Exchange. On April 23, 2013, FinCEN imposed the first special measure by temporary order to immediately address the threat to the U.S. financial system. This determination was made in conjunction with the finding regarding Rmeiti Exchange, discussed above. Excerpts below from the notice of finding explain the determination with regard to Halawi Exchange (with footnotes omitted).

* * * *

III. The Extent to Which Halawi Exchange and Its Subsidiaries Have Been Used To Facilitate or Promote Money Laundering in or Through Lebanon

According to information available to the U.S. Government, Halawi Exchange, its subsidiaries, and their respective management, ownership, and key employees are engaged in illicit financial activity. A pattern of regular, round-number, large-denomination international wire transfers consistent with money laundering are processed through Halawi Exchange. Many of these transactions appear to be structured because they are separated into multiple smaller transactions for no apparent reason. Halawi Exchange facilitates transactions as part of a large-scale trade-based money laundering scheme that involves the purchase of used cars in the United States for export to West Africa. Additionally, Halawi Exchange, and its management, ownership, and key employees are complicit in providing money laundering services for an international narcotics trafficking and money laundering network that is affiliated with Hizballah.

A. Past and Current Association With Used Car Trade-Based Money Laundering Scheme

Halawi Exchange facilitates transactions for a network of individuals and companies which launder money through the purchase and sale of used cars in the United States for export to West Africa. In support of this network, management, ownership, and key employees of Halawi Exchange coordinate transactions--processed within and outside of Halawi Exchange--on behalf of Benin-based money launderers and their associates. A significant portion of the funds are intended for U.S.-based car dealerships for the purchase of cars which are then shipped to Benin.

As of late 2012, Halawi Exchange was primarily used by Benin-based Lebanese car lot owners to wire transfer money to their U.S. suppliers. The proceeds of car sales were hand-transported in the form of bulk cash U.S. dollars from Cotonou, Benin to Beirut, Lebanon via air travel and deposited directly into one of the Halawi Exchange offices, which allowed bulk cash deposits to be made without requiring documentation of where the money originated. Halawi Exchange, through its network of established international exchange houses, initiated wire transfers to the United States without using the Lebanese banking system in order to avoid scrutiny associated with Treasury's designations of Hassan Ayash Exchange, Elissa Exchange, and its LCB 311 Action. The money was wire transferred indirectly to the United States through countries that included China, Singapore, and the UAE, which were perceived to receive less

scrutiny by the U.S. Government.

Participants in this network have coordinated the movement of millions of dollars per month, a significant portion of which has moved through Halawi Exchange. For example, in early 2012, Halawi Exchange, its management, its ownership, or key employees were involved in arranging multiple wire transfers totaling over $4 million on behalf of this network. Additionally, as of mid-2012, central figures in this scheme planned to move $224 million worth of vehicle shipping contracts through this network via a Halawi-owned Benin-based car lot, which receives vehicle shipments from the United States. Mahmoud Halawi was heavily involved in the establishment of this car lot, which is run by Ahmed Tofeily, a Benin-based money launderer, and continues to be involved in its operations. This car lot was established six months after the SDNY Complaint. Additionally, Tofeily--a Halawi agent/employee--owns and operates a car lot in Benin named Auto Deal (AKA Ste Auto Deal, Societe Auto Deal) which purchases cars in Canada and exports them through the United States. Tofeily worked closely with Halawi Exchange and wired all of his money through it. This car lot--identified as maintaining no brick and mortar structures--has wired hundreds of thousands of dollars throughout 2012 from Benin to U.S.-based car dealerships.

From 2008 to 2011, Halawi Exchange, its management, and employees sent numerous international wire transfers to U.S.-based used car companies consistent with the practice of laundering money through the purchase of cars in the United States for export to West Africa. Ali Halawi--a partner at Halawi Exchange--is listed by name on many of these transfers. A large number of these transfers were sent through accounts at LCB, which has been identified by Treasury as a financial institution of primary money laundering concern under Section 311 for its role in facilitating the money laundering activities of Ayman Joumaa's international narcotics trafficking and money laundering network. Some of the U.S.-based car dealerships that received funds transfers from Halawi Exchange were later identified in the SDNY Complaint as participants in the Joumaa network's money laundering activities.

Joumaa's network moved illegal drugs from South America to Europe and the Middle East via West Africa and laundered hundreds of millions of dollars monthly through accounts held at LCB, as well as through trade-based money laundering involving consumer goods throughout the world, including through used car dealerships in the United States. This criminal scheme involved bulk cash smuggling operations and use of several Lebanese exchange houses that utilized accounts at LCB branches, as discussed in the LCB 311 Action.

Halawi Exchange has also worked with other Lebanese exchange houses, including Rmeiti Exchange, to facilitate money laundering activities. For example, Halawi Exchange, Rmeiti Exchange, and other exchange houses sent over $9 million in dozens of round-number, large-denomination international wire transfers from unknown sources to the same U.S. car shipping business from 2007 through 2010.

B. Past and Current Connection to Designated Narcotics Kingpins and Their Associates

SDNTs Ibrahim Chebli and Abbas Hussein Harb regularly coordinated and executed financial transactions--including bulk cash transfers--that were processed through the Halawi Exchange. Harb and Chebli were designated by Treasury in June 2012 pursuant to the Kingpin Act for collaboration with Joumaa in the movement of millions of dollars of narcotics-related proceeds. Harb's Columbia- and Venezuela-based organization has laundered money for the Joumaa network through the Lebanese financial sector. Additionally, Chebli used his position as the manager of the Abbassieh branch of Fenicia Bank in Lebanon to facilitate the movement of money for Joumaa and Harb.

C. Past and Current Connection to Another International Narcotics Trafficking and Money Laundering Network With Ties to Hizballah

Management and key employees at Lebanon-based Halawi Exchange and members of the Halawi family coordinate, execute, receive, or are otherwise involved in millions of dollars-worth of transactions for members of another international narcotics trafficking and money laundering network. For example, high-level management at Lebanon-based Halawi Exchange and members of the Halawi family were involved in the movement of over $4 million in late 2012 for this international narcotics trafficking and money laundering network. Additionally, Fouad Halawi, acting in his capacity as a senior official at Halawi Holding, was responsible for the receipt and transfer of funds for this narcotics trafficking and money laundering network and provided accounting services for its senior leadership. To avoid detection, the involved parties scheduled structured payments by splitting larger sums into smaller, more frequent transactions which they often moved through numerous high-risk jurisdictions.

This additional international narcotics trafficking and money laundering network has been involved in extensive international narcotics trafficking operations. For example, it is known to have trafficked heroin from Lebanon to the United States and hundred-kilogram quantities of cocaine from South America to Nigeria for distribution in Europe and Lebanon. It is also known to have trafficked cocaine out of Lebanon in multi-ton quantities. The head of this network has operated an extensive money laundering organization, including a series of offshore corporate shell companies and underlying bank accounts, established by intermediaries, to receive and send money transfers throughout the world. It has arranged the laundering of profits from large-scale narcotics trafficking operations. Transfers coordinated by this network have impacted the United States, Canada, Europe, the Middle East, Asia, Australia, and South America. This international narcotics trafficking and money laundering network is affiliated with Hizballah.

Additionally, Halawi Exchange is known to have laundered profits from drug trafficking and cocaine-related money laundering for a Hizballah leader and narcotics trafficker. Halawi Exchange has also been routinely used by other Hizballah associates as a means to transfer illicit funds.

* * * *

(3) Liberty Reserve (Costa Rica)

On June 6, 2013, FinCEN issued notice of its finding under § 311 of the USA PATRIOT Act, Pub. L. 107-56, that Liberty Reserve S.A. ("Liberty Reserve") is a financial institution operating outside the United States that is of primary money laundering concern. 78 Fed. Reg. 34,169 (June 6, 2012). Based on this finding, FinCEN also issued a notice of proposed rulemaking under § 311. 78 Fed. Reg. 34,008 (June 6, 2013). The rule proposed would impose the special measure authorized by section 5318A(b)(5) (the fifth special measure). The fifth special measure prohibits or conditions the opening or maintaining of correspondent or payable-through accounts for Liberty Reserve. Excerpts below from the notice of finding explain the determination with regard to Liberty Reserve (with footnotes omitted).

_____

* * * *

II. The Extent to Which Liberty Reserve Has Been Used To Facilitate or Promote Money Laundering in or Through Costa Rica and Internationally

Liberty Reserve is a Web-based money transfer system, or "virtual currency." It is a financial institution currently registered in Costa Rica and has been operating since 2001. Liberty Reserve's system is structured so as to facilitate money laundering and other criminal activity, while making any legitimate use economically unreasonable. The Department of Justice is taking criminal action against Liberty Reserve and related individuals.

Liberty Reserve uses a system of internal accounts and a network of virtual currency exchangers to move funds. Operating under the domain name *www.libertyreserve.com*, it maintains accounts for registered users. Users fund their accounts by ordering a bank wire or money services business (MSB) transfer to the bank of a Liberty Reserve exchanger. Users can also fund Liberty Reserve accounts by depositing cash, postal money orders, or checks directly into the exchanger's bank account. The exchanger then credits a corresponding value to the user's Liberty Reserve account, denominated in "Liberty Reserve Dollars" or "Liberty Reserve Euros." Liberty Reserve claims to maintain Dollar for Dollar and Euro for Euro reserves to back their virtual currencies,

To withdraw funds, the user instructs Liberty Reserve to send funds from the user's Liberty Reserve account to a Liberty Reserve exchanger, which then sends a bank wire, MSB transfer, or other transfer method to the user's or recipient's bank account in U.S. dollars or other major currencies. The exchangers are independent MSBs operating around the world. They charge a commission on each transfer to and from the Liberty Reserve system.

Once funded, the Liberty Reserve virtual currency can be transferred among accounts within the Liberty Reserve system. The transfers are anonymous, and the recipient only sees the account number from which the funds were transferred. For an additional fee, even that information can be eliminated for greater anonymity.

A. History and Ownership

According to reporting of a Planetgold.com interview in 2003 with Arthur Budovsky, who founded the company, Liberty Reserve was then based in Nevis and began as a private exchange system for import/export businesses. In 2002, Budovsky and another individual, Vladimir Kats, set up several other companies, including GoldAge Inc., according to the New York County District Attorney's Office. GoldAge served as a prominent exchanger for E-Gold, a gold-based virtual currency system. E-Gold was charged with money laundering and operating an illegal MSB, and pled guilty in 2008. Similar to how Liberty Reserve operates, customers opened online GoldAge accounts with only limited identification documentation and then could choose their method of payment, including wire transfers, cash deposits, postal money orders, or checks, to GoldAge to buy digital gold-based currency. GoldAge customers could withdraw their funds by wire transfers to anywhere in the world or by having checks sent to an individual.

In March 2004, Liberty Reserve's Web site indicated that it was operating out of Brooklyn, New York. In May 2006, Liberty Reserve was re-registered in Costa Rica. In July 2006, Budovsky and Kats were indicted by the state of New York for operating an illegal money transmitting business, GoldAge, out of their Brooklyn apartments. By that date, the defendants had transmitted at least $30 million through GoldAge to digital currency accounts globally since 2002. Budovsky pled guilty and was sentenced to five years of probation.

* * * *

D. Liberty Reserve Is Regularly Used To Store, Transfer, and Launder Illicit Proceeds

Liberty Reserve is used extensively by criminals to store, transfer, and launder illicit proceeds, including through U.S. financial institutions. Information available to the U.S. government shows frequent wire transfer activity to or from Liberty Reserve that indicates money laundering, in that: (1) The legitimate business purpose, source of funds, and validity of the wire transactions could not be determined or verified; (2) little or no identifying information appeared in wire transaction records regarding the ultimate originators or beneficiaries such as addresses, telephone numbers, or identification numbers, with only Liberty Reserve in the "reference" field, suggesting an attempt to conceal the identities of the involved parties; (3) transactions involved unidentified entities located and/or banking in jurisdictions considered vulnerable or high-risk for money laundering activities; and (4) transactions involved large, round-dollar, repetitive international wire transfers sent to the same Liberty Reserve exchanger.

* * * *

b. Asset sharing agreement with Andorra

On February 14, 2013, the governments of the United States of America and the Principality of Andorra signed an agreement "Regarding the Sharing of Confiscated Proceeds and Instrumentalities of Crimes." Article 3 of the Agreement identifies the circumstances in which assets may be shared: when (1) assets are confiscated through cooperation by the other Party; (2) assets are held due to an order issued by the other Party; (3) victims of the conduct underlying confiscation are identifiable and assets are placed in the custody of the other Party. Article 4 relates to requests for sharing of assets. Articles 5 and 6 relate to the method of sharing and the terms of payment.

c. Asset sharing agreement with Panama

On October 22, 2013, the United States and the Republic of Panama signed an agreement regarding the sharing of assets that were forfeited in cases prosecuted in federal court in New York against Speed Joyeros and Argento Vivo for violations of anti-money laundering provisions in U.S. law. The prosecution resulted in the forfeiture of over $52 million. Under the agreement, over $36 million will be transferred to Panama, due to the valuable cooperation the Republic of Panama provided in the prosecution. The agreement entered into force upon signature and was concluded in accordance with the asset forfeiture cooperation provision (Article 14, paragraph 2) in the Treaty between the United States and the Republic of Panama on Mutual Assistance in Criminal Matters, signed April 11, 1991, and entered into force September 6, 1995.

5. Organized Crime

a. Transnational Organized Crime Rewards Program

As discussed in section 3.C.1.a., *infra*, President Obama signed the Department of State Rewards Program Update and Technical Corrections Act of 2012, S. 2318, on January 15, 2013. The president's signing statement explained, "This legislation will enhance the ability of the U.S. Government to offer monetary rewards for information that leads to the arrest or conviction of foreign nationals accused by international criminal tribunals of atrocity-related crimes and of individuals involved in transnational organized crime." Daily Comp. Pres. Docs., 2013 DCPD No. 00016, p. 1. In addition to expanding the scope of the rewards program for information about those indicted by international tribunals, the legislation creates a new Transnational Organized Crime Rewards Program. As described in a State Department media note released on January 16, 2013, and available at *www.state.gov/r/pa/prs/ps/2013/01/202902.htm*:

> The new program will build on the success of the existing Narcotics Rewards Program by authorizing rewards for information leading to the arrest or conviction of significant members of transnational criminal organizations involved in activities beyond narcotics trafficking that threaten national security, such as human trafficking, and trafficking in arms or other illicit goods.

On November 13, 2013, the Secretary of State announced the first reward offer under the new program for information leading to the dismantling of a transnational criminal organization. A November 13 press statement, available at *www.state.gov/secretary/remarks/2013/11/217558.htm*, explains the reward offer:

> The involvement of sophisticated transnational criminal organizations in wildlife trafficking perpetuates corruption, threatens the rule of law and border security in fragile regions, and destabilizes communities that depend on wildlife for biodiversity and eco-tourism. Profits from wildlife trafficking, estimated at $8–10 billion per year, fund other illicit activities such as narcotics, arms, and human trafficking.
>
> That is why the Department of State is offering a reward of up to $1 million for information leading to the dismantling of the Xaysavang Network.
>
> Based in Laos—with affiliates in South Africa, Mozambique, Thailand, Malaysia, Vietnam, and China—the Xaysavang Network facilitates the killing of endangered elephants, rhinos, and other species for products such as ivory.
>
> Several major seizures of illegal wildlife products have been linked to the Xaysavang Network.

b. Sanctions Program

See Chapter 16 for a discussion of sanctions related to transnational organized crime.

6. Corruption

Conference of States Parties to the UN Convention against Corruption

As explained in a November 25, 2013 State Department media note available at *www.state.gov/r/pa/prs/ps/2013/11/218038.htm*, the U.S. Department of State led the U.S. delegation to the November 25–29 Conference of States Parties ("COSP") to the UN Convention against Corruption ("UNCAC") in Panama City, Panama. The United States is one of 168 States Parties to the UNCAC.

7. Piracy

a. Overview

On April 20, 2013, Andrew J. Shapiro, Assistant Secretary of State for Political-Military Affairs, testified before the U.S. House Committee on Transportation and Infrastructure's Subcommittee on Coast Guard and Marine Transportation. Mr. Shapiro's statement is excerpted below and available at *www.state.gov/t/pm/rls/rm/2013/207361.htm*.

_____

* * * *

I would like to briefly outline our approach to tackling piracy off the coast of Somalia.

The Obama administration developed and pursued an integrated multi-dimensional approach to combat piracy. The overriding objective of which, was to make sure that piracy didn't pay. Piracy above all is a business. It is based on the potential to make money by preying on the vast supply of ships that pass through the waters off Somalia. What we have done is made it so the pirate's business model was no longer profitable. Pirates today can no longer find helpless victims like they could in the past and pirates operating at sea now often operate at a loss.

This has truly been an international and an inter-agency effort. I will let my colleagues speak in more detail about the remarkable international naval effort off the coast of Somalia, which has been a critical component of our efforts to combating piracy. The naval effort has helped create a protected transit corridor and has helped ships in need and deterred pirate attacks. However, there is often just too much water to patrol. While naval patrols are an absolutely essential component of any effective counter-piracy strategy, we recognized that we needed to broaden our efforts.

First, the United States has helped lead the international response and galvanize international action. …

All countries connected to the global economy have an interest in addressing piracy. … We therefore sought to make this a collective effort and build new kinds of partnerships and coalitions.

In January 2009, the United States helped establish the Contact Group on Piracy off the Coast of Somalia, which now includes over 80 nations and international, and industry organizations bound together on an ad hoc and purely voluntary basis. The Contact Group meets frequently to coordinate national and international counter-piracy actions. The Contact Group has become an essential forum. It helps galvanize action and coordinate the counter-piracy efforts of states, as well as regional and international organizations. Through the Contact Group, the international community has been able to coordinate multi-national naval patrols, work through the legal difficulties involved in addressing piracy, and cooperate to impede the financial flows of pirate networks. While we don't always agree on everything at the Contact Group, we agree on a lot, and this coordinated international engagement has spawned considerable international action and leveraged resources and capabilities.

Second, the United States has sought to empower the private sector to take steps to protect themselves from attack. This has been perhaps the most significant factor in the decline of successful pirate attacks and here too our diplomatic efforts have played a critical role.

We have pushed the maritime industry to adopt so-called Best Management Practices—which include practical measures, such as: proceeding at full-speed through high risk areas and erecting physical barriers, such as razor wire. The U.S. government has required U.S.-flagged vessels sailing in designated high-risk waters to fully implement these measures. These measures have helped harden merchant ships against pirate attack.

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 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. Early on in the crisis we permitted armed personnel aboard U.S.-flagged merchant vessels in situations where the risk of piracy made it appropriate to do so. We also made a concerted diplomatic effort to encourage port states to permit the transit of armed security teams. This included working with countries to address the varying national legal regimes, which can complicate the movement of these teams and their weapons from ship-to-ship or ship-to-shore. American Ambassadors, Embassy officials, and members of our counter-piracy office at the State Department pressed countries on this issue. I myself, in meetings with senior officials from key maritime states have made the case that permitting armed personnel aboard ships is an effective way to reduce successful incidents of piracy. U.S. diplomatic efforts have therefore been critical to enabling the expanded use of armed personnel.

Third, we have sought to deter piracy through effective apprehension, prosecution and incarceration of pirates and their networks. 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. The United States has encouraged countries to prosecute pirates and we have supported efforts to increase prison capacity in Somalia. We have also sought to develop a framework for prisoner transfers so convicted pirates serve their sentence back in their home country of Somalia.

But as piracy evolved into an organized transnational criminal enterprise, it became increasingly clear that prosecuting low-level pirates at sea was not on its own going to significantly change the dynamic. We also needed to target pirate kingpins and pirate networks. As any investigator who works organized crime will tell you—we need to follow the money.

This focus is paying off. Today, we are collaborating with law enforcement and the intelligence community, as well as our international partners like Interpol, to detect, track, disrupt, and interdict illicit financial transactions connected to piracy and the criminal networks that finance piracy. We have also helped support the creation of the Regional Anti-Piracy Prosecution and Coordination Center in the Seychelles. This Center hosts multinational law enforcement and intelligence personnel who work together to produce evidentiary packages that can be handed off to any prosecuting authority in a position to bring charges against mid-level and top-tier pirates.

This is having an impact. A number of Somali pirate leaders have publicly announced their "retirement" or otherwise declared their intention to get out of the business. Needless to say we and our international partners remain committed to apprehending and convicting these pirate leaders. But it does show they are feeling the impact of our efforts.

Lastly, the most durable long-term solution to piracy is the re-establishment of stability in Somalia. The successful Somali political transition in 2012 that put in place a new provisional constitution, new parliament, and a new president is clearly a step in the right direction, but much remains to be done. Supporting the emergence of effective and responsible governance in Somalia will require continued, accountable assistance to the Somali government to build its capacity to deal with the social, legal, economic, and operational challenges it faces. Once Somalia is capable of policing its own territory and its own waters, piracy will fade away. To that end, the United States continues to support the newly established government in Mogadishu.

The comprehensive, multilateral approach that we have pursued has helped turn the tide on piracy and has provided an example of how the U.S. government and the international community can respond to transnational threats and challenges in the future. …

* * * *

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

(1) United Nations

On November 18, 2013, the UN Security Council adopted resolution 2125, its annual resolution on piracy off the coast of Somalia. U.N. Doc. S/RES/2125 (2013). The resolution notes the significant decrease in reported incidents of piracy, renews authorizations in previous resolutions on piracy, and repeats the calls to criminalize, prosecute, support Somalia in its counter-piracy efforts, and in other ways combat piracy.

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

In 2013, the United States served as chair of 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. The fourteenth plenary session of the CPCS was held on May 1, 2013. Communiques released at the conclusion of each session are available at *www.thecgpcs.org/plenary.do?action=plenaryMain#*. The U.S. Department of State issued quarterly updates on the CGPCS as fact sheets from the Bureau of Political-Military Affairs. The first quarterly update for 2013, available at *www.state.gov/t/pm/rls/fs/2013/207651.htm*, includes the following:

> On January 25, the EU Naval Force vessel FS SURCOUF transferred 12 suspected pirates to authorities in Mauritius for prosecution. The French naval frigate captured the suspected pirates after an attack on a merchant vessel off Somalia's coast earlier that month.
>
> On February 25, the EU Naval Force frigate HNLMS DE RUYTER transferred nine suspected pirates to authorities in the Republic of Seychelles. The suspects were captured aboard two skiffs after an alarm report from a merchant vessel on February 19.
>
> Piracy Trials
>
> On February 27, a federal jury in Norfolk, Virginia convicted five Somali men of piracy for the 2010 attack on the USS ASHLAND. A piracy conviction in the United States carries a mandatory life sentence.
>
> Trials have been proceeding in the region for 16 suspected pirates detained in April 2012 by the Danish naval vessel ABSALON, operating as part of NATO's Operation OCEAN SHIELD. A court in Seychelles sentenced three of the pirates to prison terms of 24 years and a fourth to 16 years. Denmark collaborated with Pakistan to secure Pakistani fishermen held hostage by the pirates to serve as witnesses in court. The next step will be to transfer the convicted pirates to serve their sentences in their home country, Somalia.

The second quarterly report, available at *www.state.gov/t/pm/rls/fs/2013/212140.htm*, likewise contains updates on prosecutions and apprehensions:

> • On July 8, a federal jury in Norfolk, Virginia convicted three Somali pirates of the 2011 murder of four Americans aboard the yacht QUEST off the coast of East Africa; sentencing proceedings will begin later in July. Eleven of the pirates who attacked the QUEST pleaded guilty in federal court in 2011 and were given life

sentences. The onshore negotiator working for the pirates also received multiple life sentences.

• On June 10, a Kenyan court sentenced nine Somali citizens each to five years in prison after finding them guilty of violently hijacking the MV MAGELLAN STAR in the Gulf of Aden in September 2010. The court issued the relatively short prison terms in recognition of time served.

• On July 2, seven suspected pirates apprehended by U.S. forces in February 2009 were convicted in Kenya for the attempted hijacking of the MV POLARIS and sentenced to four years imprisonment.

• The UN Office on Drugs and Crime (UNODC) provided a Universal Forensic Extraction Device (UFED) to Tanzanian authorities in support of that country's two ongoing piracy trials. The UFED enables the Tanzanian police's Cyber Crime Unit to develop its capability to extract information from the phones of suspected pirates and those suspected of other transnational organized crimes.

Apprehensions at Sea

• On June 5, EU Naval Force warship HSwMS CARLSKRONA and NATO counter-piracy Dutch warship HNLMS VAN SPEJIK rescued fourteen Indian sailors after Somali pirates abandoned their captured dhow in the Gulf of Aden

Prisoner Transfers

• In Seychelles, the UNODC supported talks for the next round of prisoner transfers to Somaliland and Puntland. A total of 23 convicted Somali piracy prisoners consented to be transferred immediately, while two elected to wait for their appeals to be heard. UNODC also supported arrangements for the return of one Somali juvenile to his family after completing his sentence for piracy and subject to his informed consent, as well as funding of defense lawyers for the last group of nine suspected pirates detained by EUNAVFOR.

The third quarterly update, available at *www.state.gov/t/pm/rls/fs/2013/215719.htm*, includes the following information about piracy prosecutions:

• On October 12, Belgian police arrested Mohamed Abdi Hassan at Brussels airport. Hassan, whose nickname, Afweyne, means "Big Mouth," and whom the United Nations has called "one of the most notorious and influential leaders" of a major Somali pirate organization. Hassan is believed responsible for the hijacking of dozens of commercial vessels from 2008 to 2013. In a sting operation, Hassan was lured from Somalia to Belgium with promises of work on a documentary about high-seas crime. Belgian authorities also arrested an accomplice, Mohammad Aden Tiiceey.

• Also on October 7, Spain began the trial of six Somalis accused of attacking the EU NAVFOR ship SPS PATINO in early January, 2012. Spain said the six apparently mistook the warship for a trawler and broke off an attack when the ship returned fire. The six claimed they were innocent fishermen.

• On October 7, Mauritius delayed the trial of 12 suspected Somali pirates due to the illness of one of the accused. The United Nations Office on Drugs and Crime (UNODC) had two interpreters there to translate in the courtroom. A third UNODC interpreter who was present for the translation of the defendants' statements in the investigation will be called as a prosecution witness.
• On October 5, the counter-piracy Force Commanders from Combined Maritime Forces (CMF), the EU Naval Force and NATO met at sea off the Somali Coast on board the EU Naval Force flagship, HNLMS JOHAN DE WITT. The meeting was to review the current and future situation concerning piracy in the Indian Ocean and to share information. Commodore Peter Lenselink from the Royal Netherlands Navy welcomed on board Commodore Jeremy Blunden from the Royal Navy (CMF) and Commodore Henning Amundsen from the Royal Norwegian Navy (NATO Operation Ocean Shield).
• On October 2, the Seychellois Supreme Court passed sentence on the 11 Somali pirates convicted on three counts of piracy against the M/V SUPER LADY. The adults were given a 16-year sentence for each charge (to run concurrently). The youngest of the group was given an 18 month sentence which, taking account of the time he has served meant he was released immediately. He was returned to his family in Somalia within one week. The 11 were captured by the Dutch Navy ship HNLMS VAN AMSTEL, operating under Operation ATALANTA.
• On September 19, a Tanzanian court found procedural problems in the trial of seven accused Somali pirates. The High Court in Dar es Salaam ordered a lower court to conduct proper committal proceedings in the trial against the seven, who are charged with attacking the oil exploration vessel M/V SAM S ALL-GOOD within Tanzania's waters. The Tanzanian navy captured the Somali suspects in October 2011.
• On September 10, Spain's National Court sentenced six Somali pirates to jail for attempting to kidnap the crew of a fishing boat. They will likely serve 40 years each. The pirates targeted the F/V IZURDIA in October 2012 while it was sailing in the Indian Ocean. A French Ship, the FS LA FAYETTE, working under EUNAVFOR's Operation ATALANTA, and the Dutch ship HNLMS ROTTERDAM, working under NATO's Operation OCEAN SHIELD, caught the pirates October 24, 2012.
• On September 5, a U.S. Appellate Court ordered pirate interpreter Ali Mohammed Ali returned to custody. The ruling came just 24 hours after a U.S. District Court Judge in Virginia freed Ali pending trial because he was held in pre-trial detention for 28 months.
• Also on September 2, the trial of nine defendants accused of involvement in the unsuccessful pirate attack on M/V ALBA STAR in February 2013 commenced in the Seychellois Supreme Court. Dutch naval officers from HNLMS DE RUYTER (operating under EUNAVFOR's Operation ATALANTA) as well as officers from the Spanish maritime aerial reconnaissance patrol gave evidence.

• On September 2, a Malaysian court sentenced seven Somali pirates to eight to 10 years imprisonment for shooting at Malaysian troops on board a tanker in Gulf of Aden. The pirates boarded the Malaysian-operated chemical tanker M/T BUNGA LAUREL in January of 2011. A Royal Malaysian Navy ship, the MT BUNGA MAS LIMA, captured the pirates a few hours later.
• A U.S. jury on August 2 recommended that three Somali pirates be sentenced to life in prison in the slayings of four Americans aboard the yacht QUEST off the coast of Africa. Formal sentencing is set for October and November. Eleven of the pirates who attacked the QUEST pleaded guilty in federal court in 2011 and were given life sentences. The onshore negotiator working for the pirates also received multiple life sentences.
• On July 23, the Seychellois Supreme Court convicted six Somali pirates accused of acts of piracy against the M/V BURHAN NOOR. Five of the six received sentences of 24 years. The other convicted pirate, aged 15, was sentenced to 12 years. The six were captured August 13, 2012, by the Dutch Navy ship HNLMS ROTTERDAM, working under NATO's Operation OCEAN SHIELD.
• On July 30, the Magistrates Court in Mombasa, Kenya delivered sentence in the M/V COURIER case. Nine pirates, apprehended by the German frigate RHEINLAND-PFALZ, working under EUNAVFOR's Operation ATALANTA, and the American destroy USS MONTEREY of CTF 151, on March 3, 2009, received sentences of five years which will start from the date of judgment.

The 15th Plenary of the Contact Group on Piracy off the Coast of Somalia was held in Djibouti, November 10-14, 2013. The State Department media note on the plenary is available at *www.state.gov/r/pa/prs/ps/2013/11/217619.htm*. Among other things, the media note mentions that there have been no successful pirate attacks on commercial vessels off the Horn of Africa in more than 18 months. The United States passed the chairmanship to the European Union for 2014.

c. U.S. prosecutions

Domestically, the United States continues to pursue the prosecution of captured individuals suspected in several pirate attacks. As of the end of 2013, 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 27 defendants receiving convictions.

On August 2, 2013, three Somali pirates were sentenced to life in prison in the U.S. District Court for the Eastern District of Virginia for the 2011 murder of four U.S. citizens abducted on the yacht QUEST off the coast of East Africa. The State Department issued a press statement on August 7, 2013, welcoming the sentencing, available at *www.state.gov/r/pa/prs/ps/2013/08/212809.htm*. Eleven of the other pirates who attacked the QUEST previously pleaded guilty in federal court in 2011 and were also

sentenced to life in prison. The onshore negotiator working for the pirates was also convicted and received multiple life sentences as well.

(1) United States v. Ali*: aiding and abetting and conspiracy to commit piracy*

On June 11, 2013, the U.S. Court of Appeals for the District of Columbia reversed, in part, a district court's dismissal of charges of aiding and abetting piracy, conspiracy to commit piracy, and hostage taking. *United States v. Ali*, 718 F.3d. 929 (D.C. Cir. 2013). The district court found it critical that defendant's alleged actions as a hostage negotiator occurred on land and in territorial waters—not upon the high seas. The court of appeals held that prosecution for aiding and abetting piracy based on acts not committed on the high seas was consistent with U.S. and international law, but that prosecution for conspiracy to commit piracy was not consistent with international law. The court of appeals also held that prosecution of defendant for hostage taking was neither in violation of international law nor due process under the U.S. Constitution. Excerpts from the opinion of the court of appeals follow (with footnotes omitted).*

* * * *

In most cases, the criminal law of the United States does not reach crimes committed by foreign nationals in foreign locations against foreign interests. Two judicial presumptions promote this outcome. The first is the presumption against the extraterritorial effect of statutes: "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Austl. Bank Ltd.*, ——U.S. ——, 130 S.Ct. 2869, 2878, 177 L.Ed.2d 535 (2010). The second is the judicial presumption that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804)—the so-called *Charming Betsy* canon. Because international law itself limits a state's authority to apply its laws beyond its borders, *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402–03, *Charming Betsy* operates alongside the presumption against extraterritorial effect to check the exercise of U.S. criminal jurisdiction. Neither presumption imposes a substantive limit on Congress's legislative authority, but they do constrain judicial inquiry into a statute's scope.

Piracy, however, is no ordinary offense. The federal piracy statute clearly applies extraterritorially to "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations," even though that person is only "afterwards brought into or found in the United States." 18 U.S.C. § 1651. Likewise, through the principle of universal jurisdiction, international law permits states to "define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404; *see United States v. Yunis*, 924 F.2d 1086, 1091 (D.C.Cir.1991). And

* Editor's note: After the court of appeals issued its decision, the case went to trial before a jury which resulted in acquittal of Mr. Ali on the piracy charges in late November 2013. The jury could not reach agreement on the charges of hostage taking, resulting in the district court declaring a mistrial on those charges in early December 2013. The U.S. government elected not to pursue the available retrial solely on the hostage taking charges.

of all such universal crimes, piracy is the oldest and most widely acknowledged. *See, e.g.*, Kenneth C. Randall, *Universal Jurisdiction Under International Law,* 66 TEX. L.REV. 785, 791 (1988). "Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority," the pirate is "*hostis humani generis*," *United States v. Brig Malek Adhel,* 43 U.S. (2 How.) 210, 232, 11 L.Ed. 239 (1844)—in other words, "an enemy of the human race," *United States v. Smith,* 18 (5 Wheat.) U.S. 153, 161, 5 L.Ed. 57 (1820). Thus, "all nations [may punish] all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity." *Id.* at 162.

Universal jurisdiction is not some idiosyncratic domestic invention but a creature of international law. Unlike the average criminal, a pirate may easily find himself before an American court despite committing his offense on the other side of the globe. Ali's situation is a bit more complicated, though. His indictment contains no straightforward charge of piracy. Rather, the government accuses him of two inchoate offenses relating to piracy: conspiracy to commit piracy and aiding and abetting piracy.

On their face, both ancillary statutes apply generally and without exception: § 2 to "*[w]hoever* ... aids, abets, counsels, commands, induces or procures" the commission of "an offense against the United States," 18 U.S.C. § 2(a) (emphasis added), and § 371 to persons who "do any act to effect the object of the conspiracy" to "commit *any* offense against the United States," 18 U.S.C. § 371 (emphasis added). But so powerful is the presumption against extraterritorial effect that even such generic language is insufficient rebuttal. *See Small v. United States,* 544 U.S. 385, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005). That leaves both statutes ambiguous as to their application abroad, requiring us to resort to interpretive canons to guide our analysis.

Given this ambiguity in the extraterritorial scope of the two ancillary statutes, we consider whether applying them to Ali's actions is consistent with international law. Conducting this *Charming Betsy* analysis requires parsing through international treaties, employing interpretive canons, and delving into drafting history. Likewise, because the two ancillary statutes are "not so broad as to expand the extraterritorial reach of the underlying statute," *United States v. Yakou,* 428 F.3d 241, 252 (D.C.Cir.2005), we also conduct a separate analysis to determine the precise contours of § 1651's extraterritorial scope. Ultimately, Ali's assault on his conspiracy charge prevails for the same reason the attack on the aiding and abetting charge fails.

A. Aiding and Abetting Piracy

We begin with Ali's charge of aiding and abetting piracy. Aiding and abetting is a theory of criminal liability, not a separate offense, *United States v. Ginyard,* 511 F.3d 203, 211 (D.C.Cir.2008)—one that allows a defendant who "aids, abets, counsels, commands, induces or procures" commission of a crime to be punished as a principal, 18 U.S.C. § 2(a). "All that is necessary is to show some affirmative participation which at least encourages the principal offender to commit the offense, with all its elements, as proscribed by the statute." *United States v. Raper,* 676 F.2d 841, 850 (D.C.Cir.1982). From Ali's perspective, it is not enough that acts of piracy were committed on the high seas and that he aided and abetted them. Rather, he believes any acts of aiding and abetting he committed must themselves have occurred in extraterritorial waters and not merely supported the capture of the *CEC Future* on the high seas.

Ali's argument involves two distinct (though closely related) inquiries. First, does the *Charming Betsy* canon pose any obstacle to prosecuting Ali for aiding and abetting piracy? For we assume, absent contrary indication, Congress intends its enactments to comport with

international law. Second, is the presumption against extraterritoriality applicable to acts of aiding and abetting piracy not committed on the high seas?

1. Piracy and the *Charming Betsy* Canon

Section 1651 criminalizes "the crime of piracy as defined by the law of nations." Correspondence between the domestic and international definitions is essential to exercising universal jurisdiction. Otherwise, invocation of the magic word "piracy" would confer universal jurisdiction on a nation and vest its actions with the authority of international law. *See* Randall, *supra,* at 795. As a domestic matter, doing so may be perfectly legal. But because *Charming Betsy* counsels against interpreting federal statutes to contravene international law, we must satisfy ourselves that prosecuting Ali for aiding and abetting piracy would be consistent with the law of nations.

Though § 1651's invocation of universal jurisdiction may comport with international law, that does not tell us whether § 2's broad aider and abettor liability covers conduct neither within U.S. territory nor on the high seas. Resolving that difficult question requires examining precisely what conduct constitutes piracy under the law of nations. Luckily, defining piracy is a fairly straightforward exercise. Despite not being a signatory, the United States has recognized, via United Nations Security Council resolution, that the U.N. Convention on the Law of the Sea ("UNCLOS") "sets out the legal framework applicable to combating piracy and armed robbery at sea." S.C. Res.2020, U.N. Doc. S/Res/2020, at 2 (Nov. 22, 2011); *see United States v. Dire,* 680 F.3d 446, 469 (4th Cir.2012). According to UNCLOS:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship ... and directed:
>
> (i) on the high seas, against another ship ... or against persons or property on board such ship ...;
>
> (ii) against a ship, ... persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship ... with knowledge of facts making it a pirate ship ...;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

UNCLOS, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397, 436. By including "intentionally facilitating" a piratical act within its definition of piracy, article 101(c) puts to rest any worry that American notions of aider and abettor liability might fail to respect the international understanding of piracy. One question remains: does international law require facilitative acts take place on the high seas?

Explicit geographical limits—"on the high seas" and "outside the jurisdiction of any state"—govern piratical acts under article 101(a)(i) and (ii). Such language is absent, however, in article 101(c), strongly suggesting a facilitative act need not occur on the high seas so long as its predicate offense has. *Cf. Dean v. United States,* 556 U.S. 568, 573, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)). So far, so good; *Charming Betsy* poses no problems.

Ali endeavors nonetheless to impute a "high seas" requirement to article 101(c) by pointing to UNCLOS article 86, which states, "The provisions of this Part apply to all parts of

the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." 1833 U.N.T.S. at 432. Though, at first glance, the language at issue appears generally applicable, there are several problems with Ali's theory that article 86 imposes a strict high seas requirement on all provisions in Part VII. For one thing, Ali's reading would result in numerous redundancies throughout UNCLOS where, as in article 101(a)(i), the term "high seas" is already used, and interpretations resulting in textual surplusage are typically disfavored. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995). Similarly, many of the provisions to which article 86 applies explicitly concern conduct outside the high seas. *See, e.g.*, UNCLOS, art. 92(1), 1833 U.N.T.S. at 433 ("A ship may not change its flag during a voyage or while in a port of call...."); *id.* art. 100, 1833 U.N.T.S. at 436 ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."). Ali's expansive interpretation of article 86 is simply not plausible.

What does article 86 mean, then, if it imposes no high seas requirement on the other articles in Part VII of UNCLOS? After all, "the canon against surplusage merely favors that interpretation which *avoids* surplusage," not the construction substituting one instance of superfluous language for another. *Freeman v. Quicken Loans, Inc.*, —— U.S. ——, 132 S.Ct. 2034, 2043, 182 L.Ed.2d 955 (2012). We believe it is best understood as definitional, explicating the term "high seas" for that portion of the treaty most directly discussing such issues. Under this interpretation, article 86 mirrors other prefatory provisions in UNCLOS. Part II, for example, concerns "Territorial Sea and Contiguous Zone" and so opens with article 2's explanation of the legal status of a State's territorial sea. 1833 U.N.T.S. at 400. And Part III, covering "Straits Used for International Navigation," begins with article 34's clarification of the legal status of straits used for international navigation. 1833 U.N.T.S. at 410. Drawing guidance from these provisions, article 86 makes the most sense as an introduction to Part VII, which is titled "High Seas," and not as a limit on jurisdictional scope. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks omitted)).

Thwarted by article 101's text, Ali contends that even if facilitative acts count as piracy, a nation's universal jurisdiction over piracy offenses is limited to high seas conduct. In support of this claim, Ali invokes UNCLOS article 105, which reads,

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed....

1833 U.N.T.S. at 437. Ali understands article 105's preface to govern the actual enforcement of antipiracy law—and, by extension, to restrict universal jurisdiction to the high seas—even if the definition of piracy is more expansive. In fact, Ali gets it backward. Rather than curtailing the categories of persons who may be prosecuted as pirates, the provision's reference to the high seas highlights the broad authority of nations to apprehend pirates even in international waters. His reading also proves too much, leaving nations incapable of prosecuting even those undisputed pirates they discover within their own borders—a far cry from "universal" jurisdiction. Article 105 is therefore no indication international law limits the liability of aiders and abettors to their conduct on the high seas.

Ali's next effort to exclude his conduct from the international definition of piracy eschews UNCLOS's text in favor of its drafting history—or, rather, its drafting history's drafting history. He points to UNCLOS's origins in article 15 of the 1958 Geneva Convention on the High Seas, which closely parallels the later treaty's article 101. *See* Geneva Convention on the High Seas, art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82. Article 15 was based in large part on a model convention compiled at Harvard Law School by various legal scholars, *see* 2 ILC YEARBOOK 282 (1956), who postulated that "[t]he act of instigation or facilitation is not subjected to the common jurisdiction unless it takes place outside territorial jurisdiction." Joseph W. Bingham et al., *Codification of International Law: Part IV: Piracy,* 26 AM. J. INT'L L. SUPP. 739, 822 (1932). Ali hopes this latter statement is dispositive.

Effectively, Ali would have us ignore UNCLOS's plain meaning in favor of eighty-year-old scholarship that may have influenced a treaty that includes language similar to UNCLOS article 101. This is a bridge too far. Legislative history is an imperfect enough guide when dealing with acts of Congress. *See Conroy v. Aniskoff,* 507 U.S. 511, 519, 113 S.Ct. 1562, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring in the judgment) ("If one were to search for an interpretive technique that, *on the whole,* was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."). Ali's inferential chain compounds the flaws—and that even assumes a single intent can be divined as easily from the myriad foreign governments that ratified the agreement as from a group of individual legislators. Even were it a more feasible exercise, weighing the relevance of scholarly work that indirectly inspired UNCLOS is not an avenue open to us. Basic principles of treaty interpretation—both domestic and international—direct courts to construe treaties based on their text before resorting to extraneous materials. *See United States v. Alvarez–Machain,* 504 U.S. 655, 663, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."); Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 8 I.L.M. 679, 692, 1155 U.N.T.S. 331, 340. Because international law permits prosecuting acts of aiding and abetting piracy committed while not on the high seas, the *Charming Betsy* canon is no constraint on the scope of Count Two.

2. Piracy and the Presumption Against Extraterritorial Effect

Ali next attempts to achieve through the presumption against extraterritoriality what he cannot with *Charming Betsy.* Generally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute. *Yakou,* 428 F.3d at 252. And when the underlying criminal statute's extraterritorial reach is unquestionable, the presumption is rebutted with equal force for aiding and abetting. *See United States v. Hill,* 279 F.3d 731, 739 (9th Cir.2002) ("[A]iding and abetting[ ] and conspiracy ... have been deemed to confer extraterritorial jurisdiction to the same extent as the offenses that underlie them."); *see also Yunis,* 924 F.2d at 1091 (analyzing underlying offenses under extraterritoriality canon but conducting no separate analysis with respect to conspiracy conviction). Ali admits the piracy statute must have some extraterritorial reach—after all, its very terms cover conduct outside U.S. territory—but denies that the extraterritorial scope extends to any conduct that was not itself perpetrated on the high seas.

We note, as an initial matter, that proving a defendant guilty of aiding and abetting does not ordinarily require the government to establish "participation in each substantive and jurisdictional element of the underlying offense." *United States v. Garrett,* 720 F.2d 705, 713 n. 4 (D.C.Cir.1983). A defendant could, for example, aid and abet "travel[ing] in foreign commerce [ ] for the purpose of engaging in any illicit sexual conduct with another person," 18 U.S.C.

§ 2423(b), without himself crossing any international border. *Cf. Raper*, 676 F.2d at 850.

Ali's argument appears to be more nuanced. Ali claims the government seeks to use aider and abettor liability to expand the extraterritorial scope of the piracy statute beyond conduct on the high seas. Because § 1651 expressly targets crimes committed on the high seas, he believes Congress intended its extraterritorial effect—and, by extension, that of the aiding and abetting statute—to extend to international waters and no further. And, he claims, our opinion in *United States v. Yakou* supports this proposition by deciding that a foreign national who had renounced his legal permanent resident status could not be prosecuted for aiding and abetting under a statute applicable to " '[a]ny U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States.' " 428 F.3d at 243 n. 1 (quoting 22 C.F.R. § 129.3(a)). But this language makes clear the intention to limit U.S. criminal jurisdiction to certain categories of persons—a restriction employing broad aider and abettor liability would have frustrated. *See* 438 F.3d at 252. In other words, *Yakou* spoke to the sort of defendant Congress had in mind, while § 1651's reference to the high seas, in contrast, describes a category of conduct.

Thus, instead of thwarting some clearly expressed Congressional purpose, extending aider and abettor liability to those who facilitate such conduct furthers the goal of deterring piracy on the high seas—even when the facilitator stays close to shore. In fact, *Yakou* distinguished the offense at issue there from those crimes—like piracy—in which "the evil sought to be averted inherently relates to, and indeed requires, persons in certain categories." *Id.* In keeping with that principle, § 1651's high seas language refers to the very feature of piracy that makes it such a threat: that it exists outside the reach of any territorial authority, rendering it both notoriously difficult to police and inimical to international commerce. *See* Eugene Kontorovich, *Implementing* Sosa v. Alvarez–Machain: *What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L.REV. 111, 152–53 (2004). As UNCLOS § 101(c) recognizes, it is self-defeating to prosecute those pirates desperate enough to do the dirty work but immunize the planners, organizers, and negotiators who remain ashore.

Nor does the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, –— U.S. ——, 133 S.Ct. 1659, 185 L.Ed. 2d 671 (2013), change the equation. Reiterating that "[w]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms," the Court rejected the notion that "because Congress surely intended the [Alien Tort Statute] to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad." *Id.* at 1667 (quoting *Morrison*, 130 S.Ct. at 2883). Ali contends that § 1651's high seas requirement is similarly limiting, and that the presumption against extraterritoriality remains intact as to acts done elsewhere.

Even assuming Ali's analogy to *Kiobel* is valid, he overlooks a crucial fact: § 1651's high seas element is not the only evidence of the statute's extraterritorial reach, for the statute references not only "the high seas" but also "the crime of piracy as defined by the law of nations." As explained already, the law of nations specifically contemplates, within its definition of piracy, facilitative acts undertaken from within a nation's territory. *See supra* Subsection II.A.1. By defining piracy in terms of the law of nations, § 1651 incorporated this extraterritorial application of the international law of piracy and indicates Congress's intent to subject extraterritorial acts like Ali's to prosecution.

Why then does § 1651 mention the high seas at all if "the law of nations," which has its own high seas requirements, is filling in the statute's content? Simply put, doing so fits the international definition of piracy—a concept that encompasses both crimes on the high seas and the acts that facilitate them—into the structure of U.S. criminal law. To be convicted as a principal under § 1651 alone, one must commit piratical acts on the high seas, just as UNCLOS article 101(a) demands. But applying aider and abettor liability to the sorts of facilitative acts proscribed by UNCLOS article 101(c) requires using § 1651 and § 2 in tandem. That is not to say § 1651's high seas requirement plays no role in prosecuting Ali for aiding and abetting piracy, for the government must prove *someone* committed piratical acts while on the high seas. *See Raper,* 676 F.2d at 849. That is an element the government must prove at trial, but not one it must show Ali perpetrated personally.

Of course, § 1651's high seas language could also be read as Congress's decision to narrow the scope of the international definition of piracy to encompass only those actions committed on the high seas. But Ali's preferred interpretation has some problems. Most damningly, to understand § 1651 as a circumscription of the law of nations would *itself* run afoul of *Charming Betsy,* requiring a construction in conflict with international law. Ultimately, we think it most prudent to read the statute the way it tells us to. It is titled "[p]iracy under law of nations," after all.

Like the *Charming Betsy* canon, the presumption against extraterritorial effect does not constrain trying Ali for aiding and abetting piracy. While the offense he aided and abetted must have involved acts of piracy committed on the high seas, his own criminal liability is not contingent on his having facilitated these acts while in international waters himself.

B. Conspiracy To Commit Piracy

Though the aiding and abetting statute reaches Ali's conduct, his conspiracy charge is another matter. In many respects conspiracy and aiding and abetting are alike, which would suggest the government's ability to charge Ali with one implies the ability to charge him with both. While conspiracy is a "separate and distinct" offense in the United States, *Pinkerton v. United States,* 328 U.S. 640, 643, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), it is also a theory of liability like aiding and abetting; "[a]s long as a substantive offense was done in furtherance of the conspiracy, and was reasonably foreseeable as a necessary or natural consequence of the unlawful agreement, then a conspirator will be held vicariously liable for the offense committed by his or her co-conspirators." *United States v. Moore,* 651 F.3d 30, 80 (D.C.Cir.2011) (per curiam) (internal quotation marks omitted).

Yet a crucial difference separates the two theories of liability. Because § 371, like § 2, fails to offer concrete evidence of its application abroad, we turn, pursuant to the *Charming Betsy* canon, to international law to help us resolve this ambiguity of meaning. Whereas UNCLOS, by including facilitative acts within article 101's definition of piracy, endorses aider and abettor liability for pirates, the convention is silent on conspiratorial liability. International law provides for limited instances in which nations may prosecute the crimes of foreign nationals committed abroad, and, in invoking universal jurisdiction here, the government predicates its prosecution of Ali on one of those theories. And although neither side disputes the applicability of universal jurisdiction to piracy as defined by the law of nations, UNCLOS's plain language does not include *conspiracy* to commit piracy. *See, e.g.,* Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?,* 39 DENV. J. INT'L L. & POL'YY 177, 181 (2011) ("It should be noted that the [UNCLOS] definition does not refer to either an attempt to commit an act of piracy or to conspiracy relating to such an act, but it does

include voluntary participation or facilitation."). The government offers us no reason to believe otherwise, and at any rate, we are mindful that "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." *Hamdan v. United States,* 696 F.3d 1238, 1250 n. 10 (D.C.Cir.2012) (emphasis added). International law does not permit the government's abortive use of universal jurisdiction to charge Ali with conspiracy. Thus, the *Charming Betsy* doctrine, which was no impediment to Ali's aider and abettor liability, cautions against his prosecution for conspiracy.

The government hopes nonetheless to salvage its argument through appeal to § 371's text. Though courts construe statutes, when possible, to accord with international law, Congress has full license to enact laws that supersede it. *See Yunis,* 924 F.2d at 1091. The government suggests Congress intended to do precisely that in § 371, which provides that "[i]f two or more persons conspire ... to commit any offense against the United States ... and one or more of such persons do any act to effect the object of the conspiracy," each is subject to criminal liability. Homing in on the phrase "any offense against the United States," the government contends Congress intended the statute to apply to all federal criminal statutes, even when the result conflicts with international law. Yet, as we explained above, if we are to interpret § 371 as supplanting international law, we need stronger evidence than this. Indeed, the Supreme Court recently rejected the notion that similar language of general application successfully rebuts the presumption against extraterritorial effect. *See Kiobel,* 133 S.Ct. at 1665 ("Nor does the fact that the text reaches '*any* civil action' suggest application to torts committed abroad; it is well established that generic terms like ' any' or ' every' do not rebut the presumption against extraterritoriality.").

Under international law, prosecuting Ali for conspiracy to commit piracy would require the United States to have universal jurisdiction over his offense. And such jurisdiction would only exist if the underlying charge actually falls within UNCLOS's definition of piracy. Because conspiracy, unlike aiding and abetting, is not part of that definition, and because § 371 falls short of expressly rejecting international law, *Charming Betsy* precludes Ali's prosecution for conspiracy to commit piracy. The district court properly dismissed Count One.

III. THE HOSTAGE TAKING CHARGES

The linguistic impediments that trouble Counts One and Two do not beset the charges for hostage taking under 18 U.S.C. § 1203. The statute's extraterritorial scope is as clear as can be, prescribing punishments against "whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act." 18 U.S.C. § 1203(a). We also need not worry about *Charming Betsy's* implications, as § 1203 unambiguously criminalizes Ali's conduct. Section 1203 likely reflects international law anyway, as it fulfills U.S. treaty obligations under the widely supported International Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1456, 1316 U.N.T.S. 205. *See United States v. Lin,* 101 F.3d 760, 766 (D.C.Cir.1996). Nor, as in the case of the federal piracy statute, is there any uncertainty as to the availability of conspiratorial liability, since the statute applies equally to any person who "attempts or conspires to" commit hostage taking. 18 U.S.C. § 1203(a).

Faced with this reality, Ali has adopted a different strategy when it comes to Counts Three and Four, swapping his statutory arguments for constitutional ones. He relies on the principle embraced by many courts that the Fifth Amendment's guarantee of due process may

impose limits on a criminal law's extraterritorial application even when interpretive canons do not. Though this Circuit has yet to speak definitively, *see United States v. Delgado–Garcia*, 374 F.3d 1337, 1341–43 (D.C.Cir.2004) (explaining that, even if prosecuting the appellants for their extraterritorial conduct would deprive them of due process, the argument had been waived through their unconditional guilty pleas), several other circuits have reasoned that before a federal criminal statute is given extraterritorial effect, due process requires "a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir.1990) (internal citation omitted); *see United States v. Brehm*, 691 F.3d 547, 552 (4th Cir.2012); *United States v. Ibarguen–Mosquera*, 634 F.3d 1370, 1378–79 (11th Cir.2011); *United States v. Yousef*, 327 F.3d 56, 111–12 (2d Cir.2003) (per curiam); *United States v. Cardales*, 168 F.3d 548, 552–53 (1st Cir.1999). Others have approached the due process issue in more cautious terms. *See United States v. Suerte*, 291 F.3d 366, 375 (5th Cir.2002) (assuming, without deciding, the Due Process Clause constrains extraterritorial reach in order to conclude no violation occurred); *United States v. Martinez–Hidalgo*, 993 F.2d 1052, 1056 (3d Cir.1993) (accord). Likewise, the principle is not without its scholarly critics. *See, e.g.*, Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F.. 323, 338 ("[I]t may be logically awkward for a defendant to rely on what could be characterized as an extraterritorial application of the U.S. Constitution in an effort to block the extraterritorial application of U.S. law."). We need not decide, however, whether the Constitution limits the extraterritorial exercise of federal criminal jurisdiction. Either way, Ali's prosecution under § 1203 safely satisfies the requirements erected by the Fifth Amendment.

* * * *

(2) United States v. Shibin

About one month after the D.C. Circuit opinion in *Ali*, discussed *supra*, the U.S. Court of Appeals for the Fourth Circuit issued its opinion in *United States v. Shibin*. 722 F.3d 233 (4th Cir. 2013). The Fourth Circuit agreed with the D.C. Circuit that the definition of the offense of piracy in international law includes acts not committed on the high seas, such as facilitating, or aiding and abetting, piracy. Defendant Shibin acted as a negotiator on behalf of Somali pirates in two seizures of ships on the high seas, but was never himself on the high seas when taking these actions. He was nonetheless convicted on piracy charges in the district court. His conviction was upheld on appeal. The opinion of the U.S. Court of Appeals in *Shibin* is excerpted below (with footnotes omitted).

* * * *

Shibin contends first that he did not "commit the crime of piracy," as charged in Counts 1 and 7, because, "according to statutory text, legislative history, and international law, [he] could only be convicted of aiding and abetting piracy if the government proved that he was on the high seas, and while on the high seas, facilitated piratical acts."

The government observes that there is no dispute that the piracies in this case occurred on the high seas beyond the territorial waters of Somalia, which are generally defined as the waters

within 12 nautical miles of the coast. It contends that Shibin is liable as a principal in those piracies, even though he did not personally venture into international waters, because he "intentionally facilitated" and thereby aided and abetted the piracies. The government argues that liability for aiding and abetting piracy is not limited to conduct on the high seas, explaining:

> That no such limitation is imposed is sensible. Once members of a joint criminal enterprise trigger the universal jurisdiction that applies to piracy on the high seas, both international and domestic law prudently include in the scope of the crime all those persons that worked together to commit it, including those leaders like Shibin who facilitate the crime and without which the crime itself would not be possible.

In Counts 1 and 7, Shibin was charged with committing and aiding and abetting the crime of piracy, in violation of 18 U.S.C. §§ 1651 and 2. Section 1651 provides:

> Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

18 U.S.C. § 1651. And § 2 provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. § 2(a).

The district court's jurisdiction over these crimes arises from "universal jurisdiction." Universal jurisdiction is an international law doctrine that recognizes a "narrow and unique exception" to the general requirement that nations have a jurisdictional nexus before punishing extraterritorial conduct committed by non-nationals. *United States v. Hasan,* 747 F.Supp.2d 599, 608 (E.D.Va.2010), *aff'd sub nom. United States v. Dire,* 680 F.3d 446 (4th Cir.2012). It allows any nation "jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as a universal concern." *Restatement (Third) of Foreign Relations Law* § 404 (1987). Universal jurisdiction requires "not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior." *Sosa v. Alvarez–Machain,* 542 U.S. 692, 762, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (Breyer, J., concurring in part and concurring in the judgment). The parties agree that piracy is subject to universal jurisdiction, as pirates are considered *hostis humani generis,* the enemies of all humankind. *See Harmony v. United States,* 43 U.S. (2 How.) 210, 232, 11 L.Ed. 239 (1844).

The issue presented by this appeal is whether Shibin, whose conduct took place in Somalia and in Somalia's territorial waters, may be prosecuted as an aider and abettor of the piracies of the *Marida Marguerite* and the *Quest,* which took place on the high seas. Shibin agrees that if his conduct had indeed taken place on the high seas, he could have been found guilty of aiding and abetting piracy. But in this case he participated in the piracies by conduct which took place only in Somalia and on the *Marida Marguerite* while it was located in Somali territorial waters. The issue thus reduces to a question of whether the conduct of aiding and abetting § 1651 piracy must itself take place on the high seas.

Section 1651 punishes piracy as that crime is defined by the law of nations *at the time of the piracy*. *See Dire*, 680 F.3d at 469 (noting that "§ 1651 incorporates a definition of piracy that changes with advancements in the law of nations"). In *Dire*, we held that Article 101 of the United Nations Convention on the Law of the Sea ("UNCLOS") accurately articulates the modern international law definition of piracy. *Id.* at 459, 469.

Article 101 of UNCLOS provides:

> Piracy consists of any of the following acts:
> (a) any illegal *acts* of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and *directed:*
> (i) *on the high seas, against another ship* or aircraft, *or against persons or property on board such ship* or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any *act* of inciting or *of intentionally facilitating an act described in subparagraph (a)* or (b).

UNCLOS art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397, 436 (emphasis added). Thus, as relevant here, Article 101(a) defines piracy to include specified acts "directed on the high seas against another ship ... or against persons or property on board such ship," and Article 101(c) defines piracy to include any act that "intentionally facilitat[es]" any act described in Article 101(a). The parties agree that the facilitating conduct of Article 101(c) is "functionally equivalent" to aiding and abetting criminal conduct, as proscribed in 18 U.S.C. § 2.

While Shibin's conduct unquestionably amounted to acts that intentionally facilitated Article 101(a) piracies on the high seas, he claims that in order for his facilitating conduct to amount to piracy, his conduct must also have been carried out on the high seas. The text, however, hardly provides support for this argument. To the contrary, the better reading suggests that Articles 101(a) and 101(c) address distinct acts that are defined in their respective sections.

Article 101(a), which covers piracies on the high seas, explicitly requires that the specified acts be directed *at ships on the high seas.* But Article 101(c), which defines different piratical acts, independent of the acts described in Article 101(a), is linked to Article 101(a) only to the extent that the acts must *facilitate* Article 101(a) acts. Article 101(c) does not limit the facilitating acts to conduct on the high seas. Moreover, there is no conceptual reason why acts facilitating high-seas acts must themselves be carried out on the high seas. The text of Article 101 describes one class of acts involving violence, detention, and depredation of ships on the high seas and another class of acts that facilitate those acts. In this way, Article 101 reaches all the piratical conduct, wherever carried out, so long as the acts specified in Article 101(a) are carried out on the high seas.

We thus hold that conduct violating Article 101(c) does not have to be carried out on the high seas, but it must incite or intentionally facilitate acts committed against ships, persons, and property on the high seas. *See also United States v. Ali*, 718 F.3d 929, 937, 941, No. 12–3056 (D.C.Cir. June 11, 2013) (similarly interpreting Article 101(c) in the course of holding that the

liability of an aider and abettor of a § 1651 piracy "is not contingent on his having facilitated these acts while in international waters himself").

Citing UNCLOS Article 86, Shibin argues that we should read a "high-seas" requirement into the definition of the facilitating acts described in Article 101(c). Article 86 provides: "The provisions of this Part [Part VII, "High Seas," which includes Article 101] apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." UNCLOS art. 86, 1833 U.N.T.S. at 432.

Our reading of Article 101, however, is not inconsistent with Article 86, as Article 101(a) does indeed identify piratical acts as acts against ships *on the high seas.* The subordinated acts of Article 101(c) are also acts of piracy because they facilitate Article 101(a) acts. Moreover, Article 86 serves only as a general introduction, providing context to the provisions that follow. It does not purport to limit the more specific structure and texts contained in Article 101. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* ——U.S. ——, 132 S.Ct. 2065, 2070, 182 L.Ed.2d 967 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general" (alteration in original) (quoting *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992))).

Additionally, Shibin's argument is inconsistent with the interpretation of Article 101 given by various international authorities, including the United Nations Security Council. *Cf. Dire,* 680 F.3d at 469 (looking to a United Nations Security Council resolution to discern that UNCLOS represents "the definition of piracy under the law of nations"). In 2011, the Security Council adopted Resolution 1976, which reaffirmed that "international law, as reflected in ... [UNCLOS], in particular its articles 100, 101 and 105, sets out the legal framework applicable to combating piracy and armed robbery at sea." S.C. Res. 1976, preambular ¶ 8, U.N. Doc. S/RES/1976 (Apr. 11, 2011). Importantly, the Resolution stressed "the need to investigate and prosecute those who illicitly *finance, plan, organize, or unlawfully profit* from pirate attacks off the coast of Somalia, recognizing that individuals and entities who incite or *intentionally facilitate* an act of piracy are themselves engaging in piracy as defined under international law." *Id.* ¶ 15 (emphasis added). Clearly, those who "finance, plan, organize, or unlawfully profit" from piracy do not do so on the high seas.

Similarly, Security Counsel Resolution 2020, adopted in 2011, recognizes "the 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." S.C. Res. 2020, preambular ¶ 5, U.N. Doc. S/RES/2020 (Nov. 22, 2011) (emphasis added).

These sources reflect, without ambiguity, the international viewpoint that piracy committed on the high seas is an act against all nations and all humankind and that persons committing those acts on the high seas, *as well as those supporting those acts from anywhere,* may be prosecuted by any nation under international law. *See Ali,* 718 F.3d at 941, No. 12–3056.

Shibin makes a similar argument that he made with respect to UNCLOS to the domestic law provisions of 18 U.S.C. §§ 1651 and 2. Thus, he argues that the "on the high seas" requirement contained in § 1651 means that even those who are charged under § 2 for aiding and abetting a § 1651 piracy must act on the high seas. As he did with Article 101, Shibin seeks to import the high seas locational component of § 1651 into § 2. We believe that this argument fairs no better.

To violate § 1651, a principal must carry out an act of piracy, as defined by the law of nations, *on the high seas.* But Shibin was not prosecuted as a principal; he was prosecuted as an aider and abettor under § 2. Section 2 does not include any locational limitation, just as Article 101(c) of UNCLOS does not contain a locational limitation. Section 2 more broadly punishes conduct that "aids, abets, counsels, commands, induces or procures" commission of "an offense against the United States," including conduct punished in § 1651. 18 U.S.C. § 2(a). And nothing in § 1651 suggests that an aider and abettor must satisfy its locational requirement.

It is common in aiding-and-abetting cases for the facilitator to be geographically away from the scene of the crime. For example, to be convicted of aiding and abetting a bank robbery, one need not be inside the bank. *See United States v. Ellis,* 121 F.3d 908, 924 (4th Cir.1997) ("[O]ne's physical location at the time of the robbery does not preclude the propriety of an aiding and abetting charge"); *United States v. McCaskill,* 676 F.2d 995, 1000 (4th Cir.1982) (concluding that driver of the getaway car was liable as an aider-and-abettor); *Tarkington v. United States,* 194 F.2d 63, 68 (4th Cir.1952) ("It is also obvious that there is no merit in the contention that the conviction was invalidated because [the defendant] was not physically present at the bank when the robbery took place"). Similarly, "[o]ne need not be present physically at the time to be guilty as an aider and abettor in an embezzlement." *United States v. Ray,* 688 F.2d 250, 252 (4th Cir.1982).

Nonetheless, *Shibin* relies on *United States v. Ali,* 885 F.Supp.2d 17 (D.D.C.2012), *rev'd* in relevant part, 718 F.3d at 947, No. 12–3056, to contend that we should read a locational limitation into § 2 based on the Supreme Court's interpretation of the predecessor statute. In *United States v. Palmer,* 16 U.S. (3 Wheat.) 610, 633–34, 4 L.Ed. 471 (1818), the Supreme Court concluded that the piracy provisions of the Crimes Act of 1790 did not reach conduct committed by foreign vessels traversing the high seas. To reverse that ruling, Congress revised the offense of general piracy. But in doing so, it did not alter § 10 of the Crimes Act of 1790, which is § 2's predecessor. From this history, Shibin argues that § 2 is therefore a municipal statute, applying only to piracy within United States territory. But the tie between *Palmer* and § 2 is not strong enough to validate Shibin's argument. First, the Supreme Court's comments in *Palmer* on § 2's predecessor are dicta. *See Palmer,* 16 U.S. at 629–30. But more importantly, § 2's predecessor was tied to the crimes proscribed by the Crimes Act of 1790 and was narrower than today's § 2. Thus, *Palmer* did not construe the modern aiding-and-abetting liability. We are satisfied to give § 2, in its present form, its natural reading.

Accordingly, we affirm Shibin's piracy convictions in Counts 1 and 7, based on his intentionally facilitating two piracies on the high seas, even though his facilitating conduct took place in Somalia and its territorial waters.

* * * *

C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. Expansion of the War Crimes Rewards Program

On January 15, 2013, President Obama signed into law the Department of State Rewards Program Update and Technical Corrections Act of 2012, S. 2318. Under the

updated War Crimes Rewards Program, the Department of State may offer and pay cash rewards for information leading to the arrest, transfer, or conviction of foreign nationals accused of crimes against humanity, genocide, or war crimes by any international, mixed, or hybrid criminal tribunal. The original program offered rewards for information only about those indicted by the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone. On April 3, 2013, Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, participated in a special briefing about the expanded War Crimes Reward Program, announcing specific individuals for whom rewards were being offered under the program. Ambassador Rapp's remarks are excerpted below and are available in full at *www.state.gov/j/gcj/us_releases/remarks/2013/207031.htm*. Secretary Kerry also announced the reward offers and described the expanded War Crimes Reward Program on April 3 in a contribution to the Huffington Post, which is available at *www.state.gov/r/pa/prs/ps/2013/04/207033.htm*.

---

* * * *

We're here today to announce the designation of additional fugitives …for which a reward can be paid under recent legislation to expand the State Department's longstanding War Crimes Rewards Program. We're announcing today that the Secretary of State will offer up to $5 million for information leading to the arrests, the transfer, or conviction of three top leaders of the LRA, the Lord's Resistance Army: Joseph Kony, Okot Odhiambo, and Dominic Ongwen, as well as the leader of the Democratic Forces for the Liberation of Rwanda, known as the FDLR, Sylvestre Mudacumura. The nine fugitives that had earlier been designated for the ICTR, the Rwanda tribunal, will remain on the list.

Accountability is a key pillar of the United States Atrocity Prevention Initiative and our national security strategy, which states that the end of impunity and the promotion of justice are not just moral imperatives; they're stabilizing forces in international affairs. We act today so that there can be justice for the innocent men, women, and children who have been subjected to mass murder, to rape, to amputation, enslavement, and other atrocities.

I'd like to tell you just a little about this program and its expansion. It's managed by my office, the Office of Global Criminal Justice, here at the State Department. It originally offered rewards for information leading to the arrest or conviction of individuals indicted by the three international tribunals that were created for the former Yugoslavia, for Rwanda and Sierra Leone. Since 1998, our ability to pay these rewards has proven to be a valuable tool for the United States Government to promote accountability for the worst crimes known to humankind, by generating valuable tips that enable authorities to track down the world's most notorious fugitives from justice.

In the past two years alone, we've made 14 payments at an average of about 400,000 per person, with the largest payment being $2 million. The actual amount depends on a range of factors, including the risk, the informant, the value of the information, and the level of the alleged perpetrator. To date, with the assistance of the War Crimes Reward Programs, no indictee remains at the International Criminal Tribunal for the former Yugoslavia. 161 persons were charged; all of them have been brought to justice. In addition, out of the 92 individuals

indicted by the Rwanda tribunal, only nine have yet to be apprehended. And these nine individuals are still subject to rewards of up to $5 million for information leading to their capture.

This program has sent a strong message to those committing atrocities that the deeds that they have done, for those deeds, they will have to answer in court. Nevertheless, while the program has achieved great success with these three tribunals, it risks becoming obsolete as they gain custody of their last remaining fugitives. To that end, we began to advocate for an expansion of the program to bolster our ongoing efforts to bring other alleged war criminals to justice. In early 2012, Congressman Edward Royce, who then headed a subcommittee and now chairs the full House Foreign Affairs Committee, and Secretary Kerry, who chaired Foreign Relations Committee in the Senate and now, of course, heads our Department, introduced bipartisan legislation to expand and modernize this program. The bill passed both houses unanimously with final legislative approval on January 1st, 2013. On January 15th, 2013, President Obama signed the legislation into U.S. law.

Under this expanded program, the Secretary of State, after interagency consultation and on notice to Congress, may designate individuals for whom rewards may be offered for information leading to their arrest, transfer, or conviction. The designated individuals must be foreign nationals accused by any international tribunal, including mixed or hybrid courts, for crimes against humanity, genocide, or war crimes. This includes the International Criminal Court, but also new mixed courts that may be established in places such as the Democratic Republic of Congo or for Syria.

To that end, the expanded program now targets the alleged perpetrators of the worst atrocities, some of whom have evaded justice for more than a decade. The LRA is one of the world's most brutal armed groups and has survived for over 20 years by abducting women and children and forcing them to serve as porters, sex slaves, and fighters. The International Criminal Court has issued arrest warrants for Joseph Kony and other top LRA leaders on charges of war crimes and crimes against humanity. For too long, the DRC has been plagued by conflict, displacement and insecurity. Innocent civilians have suffered continued atrocities at the hands of armed groups such as the FDLR and M23 that support themselves by pillage of the population and exploitation of precious minerals.

* * * *

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 Twelfth Session of the annual Assembly of States Parties ("ASP") to the International Criminal Court ("ICC") at The Hague on November 21, 2013. Ambassador Rapp's remarks at the general debate are excerpted below and available at *www.state.gov/j/gcj/us_releases/remarks/2013/218069.htm*.

---

* * * *

Today, I would like to speak about the U.S. Government's work on the common cause of bringing justice to the victims of the world's worst crimes. The United States has continued to enhance its efforts on this front, including through robust engagement with the ICC and support for each of the situations in which investigations or prosecutions are underway. In the past year, we have worked with many of you across continents and in different venues to achieve shared goals.

… [T]he 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 regarding the ICC, will be its attention to: (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. In this regard, we take note of the ICC Office of the Prosecutor's new strategic plan and particularly those strategic goals aimed at improving the cost-effectiveness, productivity, quality, and efficiency of the Office. In the past year we have attempted, though our outreach, diplomacy, and support, to contribute to this work in a manner that furthers our own abiding interest in justice and the rule of law. Let me provide a few examples to be more concrete.

We have continually emphasized that it is essential—for justice and for peace—that the fugitives at large in the ICC's current cases be apprehended. I am pleased to recount some significant advances that we have made on this front in the past year. This year U.S. military advisors supported militaries from the AU Regional Task Force, who moved closer to apprehending top Lord's Resistance Army (LRA) commanders and ending the LRA threat once and for all. And in January 2013, President Obama signed legislation expanding the War Crimes Rewards Program, enabling the United States to offer rewards of up to $5 million for information leading to the arrest of ICC fugitives. Under this expanded program, Secretary of State Kerry, who sponsored the legislation as a U.S. Senator, announced reward offers for persons subject to ICC arrest warrants in the Uganda and DRC cases, including Joseph Kony and two other top leaders of the LRA, as well as the leader of the Democratic Forces for the Liberation of Rwanda, Sylvestre Mudacumura. The United States remains steadfast in its commitment to bringing to justice those responsible for terrible atrocities, and as the Rewards expansion demonstrates, we are putting our money where our proverbial mouth is.

The United States also played a key role in the surrender of Bosco Ntaganda to the ICC in March of this year. Ntaganda was a fugitive from justice for nearly seven years. He stands accused of war crimes and crimes against humanity in the DRC involving rape, murder, sexual slavery, and the forced recruitment and use as soldiers of thousands of Congolese children. He returned repeatedly to the battlefield in the eastern DRC, including most recently as the leader of an M23 rebel group faction. But ultimately, it seems, the prospect of trial in The Hague proved more appealing than war in the bush. When Ntaganda—who had also been designated under our War Crimes Rewards Program—voluntarily turned himself in at the U.S. Embassy in Kigali in March, we worked hard to facilitate his surrender to the ICC in cooperation with the Rwandan, Dutch, and British governments. At the time, we noted that removing Ntaganda from the battlefield and bringing him to justice was an important step toward ending the cycle of impunity that has fostered violence and instability in the DRC for far too long. And just this month, we

saw the end of the M23 rebellion and of its threat to the civilian population of the Eastern DRC. Negotiations between the DRC government and M23 have yielded a political resolution that rejects amnesty for the perpetrators of atrocity crimes. We are hopeful that the final political resolution will be signed immediately. Now we must remain vigilant in ensuring that justice for the victims is prioritized, through the ICC's prosecution of Ntaganda, reparation efforts for the victims, and the DRC's proposed establishment of specialized mixed chambers and the reinforcement of other domestic justice institutions to judge the serious offenders who are not charged at the ICC.

This year we have also been confronted with the ongoing importance of witness protection. Any court's ability to protect a witness's identity and safety is a key determinant in its ability to provide justice. From assistance from States, to protective measures, to charges for offenses against the administration of justice, the Court can and has employed a range of tools. All concerned must continue to explore all available tools, and to send a clear message that witness interference or intimidation will not be tolerated. As I have stated here before, these are particularly vexing challenges, and the United States is committed to supporting the quest for solutions, including by working with the Court to respond positively to requests for assistance relating to witness protection.

In addition to witnesses, it is crucial to support the victims of atrocities in ICC situation countries, including through their participation and reparation. I am pleased to see the range of sessions and side events at this year's ASP that are focused on victims' issues. Victims, of course, play an active role in ICC proceedings and related matters. The Rome Statute also includes novel provisions on reparation for victims, and establishes a Trust Fund for Victims. One area in which support to victims is particularly critical is in crimes of sexual violence in conflict. We know that impunity for perpetrators of these crimes affects not just the immediate survivors, but entire communities, and that it undermines the prospects for lasting peace in conflict-affected societies. But sexual violence is not an inevitable consequence of conflict; we can address it, we can deter it, and we can prevent it. To that end, I would like to commend, in particular, the efforts of the UK in spearheading the Preventing Sexual Violence Initiative in which we, along with our G8 partners, seek to focus international attention on preventing the scourge of sexual violence through justice and accountability. Survivors of sexual violence, and in particular child victims, must have access to health, psychosocial, legal, and economic support. Among other things, signatories of the G8 Declaration on Preventing Sexual Violence committed to work to provide adequate services to victims, including through programs such as the Trust Fund for Victims and its implementing partners. This year, the United States pledged $10 million in support of the UK's initiative.

…[I]in any discussion of accountability as a means to prevent and deter mass atrocities, we must always return to the principle of complementarity. The ICC is a court of limited jurisdiction. Even in countries in which the ICC has opened investigations, it cannot and should not take up every case that cries out for justice. States must build the capacity of their own courts to handle atrocity cases and impart justice closer to the victims and affected communities. It is both their right, and their responsibility. Around the globe in ICC situation countries and elsewhere, in domestic and hybrid courts, from DRC's proposed specialized mixed chambers to Guatemala's "high risk" courts to the hybrid Extraordinary African Chambers established by the African Union and Senegal to prosecute Hissène Habré, the United States is following the lead of local efforts by devoting our support and resources to strengthening local partners.

Although the Court has now entered its second decade, relatively speaking it is still a young institution. There are myriad challenges and unforeseen situations that it will face as it grows, and the way that the Court and the States Parties address such challenges will affect the Court's long-term success and its ability to contribute to justice, without which lasting peace is not possible. In this regard, I would like to acknowledge the important work being undertaken at this session of the ASP to engage on issues that have been raised by the African Union and Kenya in recent months. The United States takes these matters seriously and believes that they are best addressed within the framework of the Court and here at the ASP. Among other things, we encourage all States to engage in a constructive manner on these issues, and to consider seriously the proposals related to "presence" of defendants under the Rome Statute. This work, as well as the various sessions and side events devoted to grappling with concerns raised by States over the past year, are all important contributions to the conversation.

Another challenge with which the international community needs to grapple involves the crime of aggression. The United States continues to have many concerns about the amendments adopted in Kampala, including the risk of these amendments working at cross-purposes with efforts to prevent or punish genocide, crimes against humanity, and war crimes—which provide the very ***raison d'être*** for the Court. The States Parties were wise to create breathing space by subjecting the Court's jurisdiction to a decision to be taken after January 1, 2017. The international community should use that breathing space to ensure that efforts to ensure accountability for genocide, crimes against humanity, and war crimes can be consolidated and that measures regarding the amendments requiring attention can be properly considered; and it is our view that States should not move forward with ratifications pending the resolution of such issues.

The ASP, with its 122 member States hailing from every continent on the globe, is well situated to take up new challenges and forge common solutions. We will continue to follow these discussions with great interest, and to remain steadfast in our efforts to achieve justice for the victims of genocide, war crimes, and crimes against humanity.

* * * *

On October 31, 2013, Stephen Zack, U.S. Senior Advisor, delivered remarks at a UN General Assembly meeting on the Report of the International Criminal Court. The remarks, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/216243.htm*.

---

* * * *

Strengthening accountability for those responsible for the worst atrocities remains an important priority for the United States. President Obama has repeatedly emphasized the importance of preventing mass atrocities and genocide as a core national security interest and a core moral responsibility of the United States. The United States is committed to working with the international community to bring concerted international pressure to bear to prevent atrocities and ensure accountability for the perpetrators of these crimes. Although the United States is not a

party to the Rome Statute, we recognize that the ICC can play an important role in a multilateral system that aims to ensure accountability and end impunity.

The ICC, by its nature, is designed only to pursue those accused of bearing the greatest responsibility for the most serious crimes within its jurisdiction when states are not willing or able to investigate or prosecute genuinely. We therefore continue to support positive complementarity initiatives by assisting countries in their efforts to develop domestic accountability processes for atrocity crimes. Accountability and peace begin with governments taking care of their own people. 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, and must develop a shared approach to recurring issues such as coordinated and effective protection for witnesses and judicial personnel. From the Democratic Republic of the Congo to Senegal's efforts with the AU to prosecute Hissène Habré, the United States continues to support efforts to build fair, impartial, and capable national justice systems as well as hybrid tribunals where appropriate.

At the same time, we must strengthen accountability mechanisms at the international level. We will continue to work with the ICC to identify practical ways in which we can work to advance our mutual goals–on a case-by-case basis and consistent with U.S. policy and laws. In the past year, for example, we worked with the Court and other states to help assist in the voluntary surrender to the ICC in March of Bosco Ntaganda, allegedly responsible for atrocities committed in the Democratic Republic of Congo. This was an important moment for all who believe in justice and accountability. And in January, President Obama signed into law an expansion of the United States War Crimes Rewards program to permit the offer of rewards for information leading to the arrest, transfer, or conviction of individuals accused of criminal responsibility for genocide, war crimes or crimes against humanity by any hybrid or international criminal tribunal, including the ICC. Shortly thereafter, we added a number of individuals subject to ICC arrest warrants to our rewards list—including Joseph Kony in the Uganda situation and Sylvestre Mudacumura, still at large in the DRC situation. We look forward to continuing to engage with States Parties and other States on these and other shared issues of concern, such as information sharing and witness protection.

… [I]t is critical that the international community remain committed to working toward coordinated efforts both to prevent atrocities before they occur and to provide accountability for those responsible for atrocities that do happen. Although the international community has made progress on both fronts, much work remains. The United States remains committed to working in partnership with others to achieve these goals. We look forward to continued discussions here at the United Nations and to our upcoming participation as an Observer at the ICC's Assembly of States Parties in The Hague next month.

* * * *

b. Libya

On November 14, 2013, Ambassador Rosemary A. DiCarlo, Deputy U.S. Permanent Representative to the UN, delivered remarks at a UN Security Council briefing by ICC Prosecutor Fatou Bensouda on the situation in Libya. In 2011, the UN Security Council adopted Resolution 1970, which referred the situation in Libya in 2011 to the ICC. See Digest 2011 at 91-93. Ambassador DiCarlo's remarks, excerpted below, are available in

full at http://usun.state.gov/briefing/statements/217585.htm. Ambassador DiCarlo also addressed a UN Security Council briefing on the Libya referral to the ICC on May 8, 2013. Her remarks to the Security Council from May 8, 2013 are available at http://iipdigital.usembassy.gov/st/english/texttrans/2013/05/20130508147025.html#axzz2ycB2Ny9l.

---

* * * *

The United States welcomes the commitment and efforts of the government and people of Libya during their country's transition following forty years of dictatorship. We recognize that the process of building a democratic and secure nation is a long-term endeavor with many challenges. An important part of this process is in the field of the rule of law, where Libya will need to continue to build on ongoing efforts to bolster accountability mechanisms that help support and develop a more robust, fair, and effective system of justice.

In this regard, we welcome Libya's continued commitment to fulfilling its international obligations, including those related to the ICC under Resolution 1970. We also welcome Libya's continuing cooperation in the ongoing proceedings before the ICC. We note with interest the recent memorandum of understanding on burden sharing between Libyan authorities and the ICC regarding investigations and prosecutions.

Under the Rome Statute, the International Criminal Court is complementary to national jurisdiction. The Pre-Trial Chamber's October 11 decision granting Libya's admissibility challenge in the case against Abdullah al-Senussi—the first such decision by the ICC—is a significant development in this regard. We note that the Court found that Libyan authorities are taking concrete and progressive steps in the domestic proceedings against Mr. al-Senussi and that Libya had demonstrated that it is willing and able to genuinely investigate and prosecute the case.

Mr. President, in these proceedings, we are seeing the principle of complementarity applied in the context of a country transitioning out of conflict. The Prosecutor's report notes a number of efforts that Libya has undertaken to develop its justice institutions and mechanisms. These include Libya's new Transitional Justice Law, the Fact Finding and Reconciliation Commission, and a new draft law on rape as a war crime. We welcome these and other initiatives, including those that help build much-needed capacity in the justice system so that justice can be delivered more effectively. Finally, we would like to emphasize the Libyan government must work to ensure that those in detention centers are not held without due process and that they are treated humanely, including in accordance with Libya's April 2013 law criminalizing torture.

In the end, much of the responsibility for ensuring accountability for crimes in Libya will fall to domestic authorities. Even where the ICC has jurisdiction, it cannot pursue every case, nor is it charged with general monitoring or oversight of Libya's overall progress in implementing justice and rule of law initiatives.

In light of this mandate, we appreciate the Prosecutor's statement on how she intends to focus her Office's work as the Court carries out its responsibility to investigate and prosecute those who bear the greatest responsibility for crimes.

The United States stands ready to assist Libya as it works to reform its justice sector, strengthen the rule of law, and advance human rights. We strongly believe that these and other

areas of Libya's transition need to be fully addressed. We look forward to working with the international community, including UNSMIL and other international partners, in a targeted and coordinated way to ensure adequate support to Libya as it undertakes these critical efforts.

The United States also looks forward to continuing our active engagement with the Office of the Prosecutor and the ICC, consistent with our law and policy, to advance accountability for atrocities.

* * * *

c. Kenya

On November 15, 2013, U.S. Permanent Representative to the UN Samantha Power delivered an explanation of vote on the U.S. decision to abstain from a Security Council vote on a request for deferral by Kenya of ICC proceedings against Uhuru Kenyatta and William Ruto (the sitting President and Deputy President of Kenya). In 2010, the ICC opened its investigation relating to alleged crimes against humanity committed during post-election violence in Kenya in 2007 and 2008. See *Digest 2010* at 139. Ambassador Power's remarks, below, are available at *http://usun.state.gov/briefing/statements/217614.htm*.

---

* * * *

Thank you. The United States abstained on this vote because we believe that the concerns raised by Kenya regarding the International Criminal Court proceedings against President Kenyatta and Deputy President Ruto are best addressed within the framework of the Court and its Assembly of States Parties, and not through a deferral mandated by the Security Council. This position is consistent with the view that we shared with the African Union Contact Group at the Council's Informal Interactive Dialogue at the end of October.

Further, the families of the victims of the 2008 post-election violence in Kenya have already waited more than five years for a judicial weighing of the evidence to commence. We believe that justice for the victims of that violence is critical to the country's long-term peace and security. It is incumbent on us all to support accountability for those responsible for crimes against humanity.

At the same time, we want to emphasize our deep respect for the people of Kenya. We share their horror and outrage at the recent Westgate Mall terror attacks and understand their desire both for effective governance and for accountability under the law. We are mindful, as well, of the importance of these issues to the member states of the African Union that have raised similar concerns. We recognize that the situation the Court is confronting in these cases is a new one—the ICC has never before had a trial of a defendant who is also a sitting head-of-state, or a person who may act in such a capacity, and who has appeared voluntarily subject to a summons. Accordingly, we are encouraged that Kenya is continuing to pursue its concerns through an ongoing ICC process.

We are also encouraged that the Assembly of States Parties, which includes the government of Kenya, is working to enable trial proceedings to be conducted in a manner that will not force the defendants to choose between mounting a vigorous legal defense on the one hand and continuing to do their jobs on the other. The Assembly, which under the Rome Statute has responsibility for overseeing the Court's administration, will meet next week, and will have the chance to engage in dialogue and consider amendments that could help address outstanding issues.

Because of our respect for Kenya and the AU, and because we believe that the Court and its Assembly of States Parties are the right venue for considering the issues that Kenya and some AU members have raised, we have decided to abstain rather than vote "no" on this resolution.

The United States and Kenya have been friends and strong partners for half a century. We value the friendship and will continue working with the government and people of Kenya on issues of shared concern, including security against terror, economic development, environmental protection, the promotion of human rights, and justice. We also continue to recognize the important role that the ICC can play in achieving accountability, and are steadfast in our belief that justice for the innocent victims of the post-election violence in Kenya is essential to lasting peace.

* * * *

On November 27, 2013, the ICC's ASP reached consensus on amendments to the ICC's Rules of Procedure and Evidence, including amendments relating to the presence of defendants at trial proceedings. The amendments are available at *www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf*. Ambassador Power issued a statement on the amendments, available at *http://usun.state.gov/briefing/statements/218108.htm*, and excerpted below.

---

* * * *

I applaud the International Criminal Court's (ICC) Assembly of States Parties' achievement in reaching consensus today on a package of amendments to the ICC's Rules of Procedure and Evidence. The United States believes in the importance of accountability for those responsible for crimes against humanity, and we have taken seriously Kenyan concerns about the ongoing trial proceedings.

Earlier this month, when the issue came before the United Nations Security Council, I encouraged Kenya and the African Union to work within the framework of the Assembly of States Parties to enable the proceedings to be conducted in a manner that would not make the Kenyan defendants choose between mounting a vigorous legal defense and continuing to do their jobs. Today, because of the remarkable efforts of the Assembly of States Parties members, including the Kenyan delegation, supported by many African Union member states including South Africa and Botswana, the Assembly of States Parties has done just that.

The situation the ICC is confronting in the Kenya cases is a new one. The ICC has never before tried a defendant who is also a sitting head-of-state and who has appeared voluntarily in Court. I offer my congratulations to the Assembly of States Parties, and particularly the States

Parties who engaged constructively to help refine the Court's own processes and resolved this matter in a manner that appropriately protects the rights and interests of both victims and defendants while allowing the judicial process to proceed without delay.

* * * *

d. Surrender of Bosco Ntaganda

In a March 22, 2013 press statement by Secretary of State John Kerry, the United States welcomed the surrender of Bosco Ntaganda to the International Criminal Court in The Hague. Bosco Ntaganda was subject to two ICC arrest warrants for war crimes and crimes against humanity allegedly committed in the Democratic Republic of the Congo. The statement, available at *www.state.gov/secretary/remarks/2013/03/206556.htm*, follows. NSC Spokesperson Caitlin Hayden also issued a statement (not excerpted herein), available at *www.whitehouse.gov/the-press-office/2013/03/22/statement-nsc-spokesperson-caitlin-hayden-bosco-ntaganda-s-surrender-int*.

> The United States welcomes the removal of one of the most notorious and brutal rebels in the Democratic Republic of the Congo, Bosco Ntaganda, from Rwanda to the International Criminal Court in The Hague. This is an important moment for all who believe in justice and accountability. For nearly seven years, Ntaganda was a fugitive from justice, evading accountability for alleged violations of international humanitarian law and mass atrocities against innocent civilians, including rape, murder, and the forced recruitment of thousands of Congolese children as soldiers. Now there is hope that justice will be done.
>
> Ultimately, peace and stability in the D.R.C. and the Great Lakes will require the restoration of civil order, justice, and accountability. Ntaganda's expected appearance before the International Criminal Court in The Hague will contribute to that goal, and will also send a strong message to all perpetrators of atrocities that they will be held accountable for their crimes.
>
> The United States is particularly grateful to the Rwandan, Dutch, and British Governments for their cooperation in facilitating the departure of Bosco Ntaganda from Rwanda and his expected surrender to The Hague.

e. Darfur

On June 5, 2013, Ambassador Jeffrey A. DeLaurentis, U.S. Alternate Representative to the UN for Special Political Affairs, addressed a UN Security Council briefing by the ICC Prosecutor on the situation in Darfur. Ambassador DeLaurentis's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/210326.htm*.

---

* * * *

The United States welcomes the continued role of the International Criminal Court in the fight against impunity for atrocities committed in Darfur. We note the progress of the proceedings in the Abdallah Banda Abaker Nourain and Saleh Jerbo case and hope this trial will be the first of several concerning the situation in Darfur.

At the same time, it remains clear that the Government of Sudan is still not cooperating with the ICC to execute the outstanding arrest warrants in the Darfur cases, despite its obligations under Security Council Resolution 1593. The subjects of these warrants remain at large in Sudan and continue to cross international borders. The United States stands with the many states that refuse to admit those individuals to their countries and commends those who have spoken out against President Bashir's continued travel. We oppose invitations, facilitation, or support for travel by those subject to ICC arrest warrants in Darfur and we urge other states to do the same.

As the Prosecutor notes, there have been continued instances of non-cooperation. On March 26, the Court issued a decision that the Republic of Chad failed to comply with its obligations when it welcomed Bashir for a visit—his fourth visit to Chad since the ICC issued an arrest warrant on March 4, 2009. Then, on April 25-26, Chad hosted Defense Minister Abdel Raheem Hussein, and on May 11, Chad again hosted President Bashir without any attempt to arrest him. The United States would welcome discussion of follow-up on the ICC's decision, which was referred to this Council.

The Prosecutor's report comes amid ongoing developments related to Darfur that are of great concern to the United States. The UN Independent Expert on the situation of human rights in Sudan notes that the Government of Sudan has not upheld its commitments in the Doha Document for Peace in Darfur to establish credible local justice and accountability mechanisms; nor has it made the Special Court for Darfur operational or requested international observers from the AU and UN for the court. Despite the conviction in February of six Popular Defense Force soldiers accused of killing a community leader in Abu Zereiga, the Secretary-General's latest report on the AU-UN Hybrid Operation in Darfur (UNAMID) expressed serious concern about the lack of accountability for violations of human rights and international humanitarian law in Darfur.

Furthermore, the United States is deeply concerned about the increasing violence in Darfur, including reports of aerial bombardments targeting or indiscriminately affecting civilians, sexual and gender based violence and other crimes, and continuing attacks on UNAMID peacekeepers. As a result, the United Nations estimates that 300,000 people have fled fighting in all of Darfur in the first five months of this year, which is more than the total number of people displaced in the last two years together. On April 19, one peacekeeper was killed and two injured in an attack on the UNAMID Team Site in Muhajariya by individuals wearing Sudanese army uniforms. We condemn in the strongest terms these continuing attacks on UNAMID peacekeepers and Sudan's failure to prosecute those responsible.

The international community must reverse the escalating violence and deteriorating human rights and humanitarian situation in Darfur. Ensuring accountability for serious violations of international law must be part of this effort. Continued impunity for crimes in Darfur has sent a message to Khartoum that there are no consequences for violence against non-combatants, a lesson it has applied tragically not only in Darfur but in the Two Areas as well. The Banda and Jerbo case is an important test, but the Government of Sudan has much more to do, and this Council must insist that Sudan fulfill its obligations.

* * * *

On December 11, 2013, Ambassador DeLaurentis again addressed a UN Security Council briefing by the ICC Prosecutor on the situation in Darfur. Ambassador DeLaurentis's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/218964.htm*.

---

* * * *

…We are pleased to welcome Ms. Fatou Bensouda, Prosecutor of the International Criminal Court, to the Council. We would like to thank her for today's briefing, as she noted, the eighteenth report by an ICC Prosecutor on the situation in Darfur since Resolution 1593 was adopted in 2005.

Madam Prosecutor, the United States reiterates its appreciation to you and your office for your work to advance the cause of justice for the people of Darfur. Your perseverance with these long-standing cases is highly commendable, particularly given the obstacles the ICC faces as a result of the Government of Sudan's continued non-cooperation.

Mr. President, justice will be the cornerstone of a stable and sustainable peace agreement in Darfur. The United States remains deeply concerned that the lack of progress on accountability for atrocities committed in Darfur continues to contribute to instability throughout Sudan. Lasting impunity goes hand in hand with continued violence and insecurity.

The Prosecutor's report is replete with stark reminders of the challenges her office faces in seeking to address the atrocities suffered by the victims in Darfur. It once again details the blatant disregard of the Government of Sudan for its obligation to cooperate with the ICC pursuant to Resolution 1593.

The most concerning element of the Prosecutor's briefing today is that the individuals subject to the ICC's arrest warrants in Darfur continue to remain at large. The Government of Sudan has the responsibility to implement these warrants, yet it has consistently failed to do so while also offering no meaningful measure of justice at the national level. The Government of Sudan must fully cooperate with the ICC and its Prosecutor, and we continue to call for it to do so.

In a direct affront to the charges leveled against them, the individuals subject to outstanding arrest warrants also continue to cross international borders. The international community should remain united against these acts of defiance against justice by preventing such travel. States and regional bodies should ensure that these individuals are not invited to their countries and should not facilitate or support travel by those subject to the arrest warrants.

We welcome the Prosectuor's continued pursuit of justice through her continued work on the case against Abdallah Banda, and we look forward to the start of that trial and the defendant's continued cooperation. Yet there are other very troubling elements of the Prosecutor's report.

Of particular concern are allegations of sexual and gender based violence in Darfur. Such crimes shock the conscience, and the lack of accountability fuels the cycle of violence, resentment, reprisal attacks, and further conflict.

We also continue to be deeply concerned by attacks on UN peacekeepers. While the Government of Sudan claims to be investigating these deplorable incidents, there have been no results and no evidence that these killings have been seriously addressed. Local accountability initiatives, particularly the Special Criminal Court on the Events in Darfur, also remain wanting. We urge observers from the African Union and the United Nations to monitor the Court's proceedings—or lack thereof—and report publicly their observations.

In conclusion, Mr. President, accountability for genocide, war crimes, and crimes against humanity in Darfur is both a moral imperative and an issue of peace and security. The United States places a high priority on promoting justice and lasting peace for all of the people of Sudan. We once again commend Prosecutor Bensouda for her work to investigate and prosecute those most responsible for atrocities committed in Darfur.

* * * *

3. International Criminal Tribunals for the Former Yugoslavia and Rwanda

On April 10, 2013, Erin Pelton, Spokesperson for the U.S. Mission to the UN, issued a statement regarding a UN General Assembly Thematic Debate on the Role of International Criminal Justice in Reconciliation. The United States and several other states boycotted the debate. Ms. Pelton's statement, below, is available at *http://usun.state.gov/briefing/statements/207244.htm*.

> The United States strongly disagrees with the decision of the President of the General Assembly to hold an unbalanced, inflammatory thematic debate today on the role of international criminal justice in reconciliation and will not participate. We believe that ad hoc international criminal tribunals and other judicial institutions in Rwanda, the former Yugoslavia, Sierra Leone, and Cambodia have been critical to ending impunity and helping these countries chart a new, more positive future. We regret in particular that the way today's thematic debate and the related panel discussion are structured fail to provide the victims of these atrocities an appropriate voice.
>
> Today's session is a missed opportunity to strengthen the global system of accountability for those most responsible for atrocities, an important priority of the United States. Holding accountable those responsible for such acts through impartial and independent trials reinforces the rule of law, deters future criminal activity, and reinforces human rights law and international humanitarian law norms. Accountability is also an important component of a holistic transitional justice agenda, which supports long-term peace and reconciliation in countries emerging from armed conflict with legacies of large scale abuse. While we have made progress in these areas, 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.

On June 12, 2013, Ambassador DeLaurentis delivered remarks at a Security Council briefing on the International Criminal Tribunals for the Former Yugoslavia and Rwanda ("ICTY/ICTR"). Ambassador De Laurentis's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/210590.htm*.

* * * *

The prevention of mass atrocities and genocide is both a core national security interest and a moral responsibility of the United States. The prosecution of perpetrators of heinous crimes is essential, not only for the sake of justice and accountability, but also to facilitate transitions from conflict to stability and to deter those who would commit atrocity crimes. Thus, the United States has strongly supported the work of International Criminal Tribunals for the Former Yugoslavia and Rwanda since they began to fulfill dual goals of justice and prevention.

In the 20 years since the Security Council established the ICTY, the Tribunal has made a significant contribution to international justice. The body of work of both the ICTY and the ICTR—established a year later—reflects the bedrock principle of providing fair trials for the accused and the opportunity for every defendant to have his day in Court. This has been a hallmark of international justice since the Nuremberg trials and remains critical to advancing the rule of law internationally.

While no system of justice is perfect, the United States has always respected the rulings of the ICTY and ICTR and celebrates the progress that both Tribunals have made toward completing their work. Only three ICTY trials are expected to continue past the end of this year, all of which are for the late-arrested accused. We look forward to the July 1st opening in The Hague of the branch of the Mechanism for International Criminal Tribunals that will handle any ICTY appeals after this month. The Arusha branch of the MICT has been open for almost a year and has taken some consequential steps, including ordering the transfers of three high-level accused to the courts of Rwanda when they are apprehended. We appreciate the considerable work by both Tribunals to share resources with the MICT to reduce costs. We look forward to further measures to streamline operations while maintaining the highest standards of justice. At the same time, we recognize that budgets for the next few years must support new premises for the MICT Arusha branch, archives for both Tribunals, accommodations for victims and witnesses, outreach activities focusing on reconciliation, and judicial proceedings which may arise.

As a measure of our support to the ICTR and the countries of the Great Lakes, and as Judge Marron and Prosecutor Jallow graciously noted, the United States recently announced an expansion of our reward program for fugitives. Under the War Crimes Rewards Program, the United States now offers rewards of up to $5 million for information leading to the arrest, transfer, or conviction of the nine ICTR fugitives as well as designated foreign nationals accused of crimes against humanity, genocide, or war crimes by any international, mixed, or hybrid criminal tribunal. The list of Rewards subjects now includes Joseph Kony, two other leaders of the Lord's Resistance Army, and Sylvestre Muducumura, sought by the International Criminal Court for crimes allegedly committed in the DRC.

We also note the importance of resolving the issue of the relocation of acquitted and released persons in Tanzania and, to this end, welcome the ICTR's new Strategic Plan.

Mr. President, what we have supported in the past twenty years is a system of justice that aims to hold accountable those responsible for some of the most monstrous crimes known to humankind and prevent them from recurring. The tribunals continue to play an indispensable role in establishing global respect for the rule of law. And the United States' commitment to working with the international community toward peace and justice remains steadfast.

* * * *

On October 14, 2013, William P. Pope, Senior Advisor for the U.S. Mission to the UN, delivered remarks on the report of the ICTY, ICTR, and Residual Mechanism for International Criminal Tribunals ("MICT") in New York. His remarks are excerpted below and available in full at *http://usun.state.gov/briefing/statements/215558.htm*.

---

* * * *

This year marks the 20th anniversaries of the creation of the ICTY, and, subsequently, the ICTR. As we all recall, these tribunals were set up in response to the horrors committed in Rwanda and Yugoslavia in the 1990s, when the slaughter of hundreds of thousands led to a wave of international revulsion and to cries for justice. The ICTR and ICTY were founded on the idea that those responsible for mass atrocities, no matter what rank or official position, must be brought to justice. Once the ICTY and ICTR were fully up and running, they began thoroughly addressing serious issues of international justice. Today the two courts have tried more than 200 defendants accused of heinous crimes, including top military and political leaders. The tribunals have operated on the principles of fairness, impartiality, and independence. They have also built up a robust body of international humanitarian law.

With the historic work of the tribunals now nearing completion, the United States heartily commends the efforts of both tribunal Presidents to enact cost-saving managerial and administrative measures, and to transfer the remaining functions of the tribunals to the Mechanism for International Criminal Tribunals, MICT. At the same time, we recognize that the exact closure dates will depend on the completion of ongoing and soon-to-begin trials and appeals.

Turning to the ICTY, we note that it continues to focus on the completion of all trials and appeals, rendering 13 trial, appellate and contempt judgments between August 2012 and July 2013. We are pleased that the Hague branch of the MICT began operating in July 2013. We also salute the continuing work of the ICTY to build capacity amongst judges, prosecutors and defense counsel in the former Yugoslavia. The United States urges all governments in the region to continue to work towards reconciliation, avoiding statements that inflame tensions, and to continue to bring war criminals to justice in local courts.

Regarding the ICTR, we note with satisfaction that the tribunal has wrapped up its workload of trials and continues completing appeals, hopefully by 2015. The MICT in Arusha opened in 2012 and is operating smoothly. The United States urges regional governments to work with the tribunal on the relocation of several persons who have served their sentences but are unable to return to Rwanda. We call upon all states to cooperate with the ICTR in apprehending all remaining fugitives and bringing these accused mass murderers to trial.

The United States remains committed to working with the United Nations and the international community to help protect populations from mass atrocities, through tribunals and all other institutions and initiatives at our disposal.

* * * *

4. Special Court for Sierra Leone

On September 26, 2013, the Appeals Chamber of the Special Court for Sierra Leone issued a decision upholding the conviction of former President of Liberia Charles Taylor for war crimes and crimes against humanity. Secretary Kerry issued a press statement, below, available at *http://www.state.gov/secretary/remarks/2013/09/214823.htm*.

_____

* * * *

Today's ruling upholding the conviction of former Liberian President Charles Taylor marks a milestone for the people of Sierra Leone and Liberia, and for international criminal justice.

In holding Charles Taylor accountable for war crimes and crimes against humanity, the Appeals Chamber of the Special Court of Sierra Leone has brought a measure of justice to the people of Sierra Leone, and helped to cement the foundation on which reconciliation can proceed.

This fight against impunity for the worst crimes known to humankind is personal for me.

The last piece of legislation I helped to pass as a Senator expanded and modernized the State Department's War Crimes Rewards Program.

As I was awaiting confirmation to become Secretary of State, the bill came to President Obama's desk and he signed it into law.

We need tools like this to help ensure that criminals like Charles Taylor answer for their crimes.

I am proud of the role that the United States played in drafting and negotiating UN Security Council Resolution 1315 (2000), which paved the way for the Special Court that convicted Taylor and has now brought its trials and appeals to a close.

The United States has been a strong supporter of the Court and its work for a simple reason: We refuse to accept a world where those responsible for crimes of this magnitude live in impunity.

* * * *

5. Special Tribunal for Lebanon

The State Department issued a press statement on December 30, 2013, available at *www.state.gov/r/pa/prs/ps/2013/219182.htm*, in which the United States welcomed Lebanon's decision to meet its 2013 funding obligations to the Special Tribunal for Lebanon. The press statement went on to say:

> We recognize and commend caretaker Prime Minister Mikati's strong leadership in ensuring that the government met this important commitment. We fully support the work of the Tribunal and its efforts to find and hold accountable those responsible for reprehensible and destabilizing acts of violence in Lebanon.
>
> The December 27 assassination bombing in Beirut is a stark reminder that for too long, Lebanon has suffered from a culture of impunity for those who use murder and terror to promote their political agenda against the interests of the Lebanese people. The Tribunal, working with the Government of Lebanon, will help end this impunity by providing a transparent, fair process to determine responsibility for the terrorist attack that killed former Prime Minister Hariri and scores of others.
>
> Continued financial support and ongoing cooperation by Lebanon's political, judicial, and law enforcement authorities are critical to the Tribunal's work. That is why the United States has provided strong financial support to the Tribunal since its inception, and we will continue to do so. We urge the international community to continue to support the Tribunal and the Government of Lebanon to achieve the shared goals of ensuring justice and ending impunity. We stand with the Lebanese people in these efforts and will continue to do so.

6. Khmer Rouge Tribunal ("ECCC")

In 2013, 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 June 26, 2013, Deputy Secretary of State William Burns signed the required certification that the United Nations and Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the ECCC. 78 Fed. Reg. 78,463 (Dec. 26, 2013). Deputy Secretary Burns 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), as carried forward by the Full-Year Continuing Appropriation Act, 2013 (Div. F, Pub. L. 113–6). See *Digest 2010* at 145 for background on the original certification requirement.

7. Bangladesh International Crimes Tribunal

In January 2013, Bangladesh's International Crimes Tribunal ("ICT") announced the conviction and death sentence of Abul Kalam Azad for crimes against humanity committed during Bangladesh's 1971 Liberation War. The State Department issued a press statement on January 22, 2013, noting the sentence, which occurred after a trial in absentia. The press statement is available at *www.state.gov/r/pa/prs/ps/2013/01/203143.htm* and included the following:

The United States supports bringing to justice those who commit such crimes. However, we believe that any such trials must be free, fair, and transparent, and in accordance with domestic standards and international standards Bangladesh has agreed to uphold through its ratification of international agreements, including the International Covenant on Civil and Political Rights.

As Bangladesh addresses the legacy of atrocities committed during the Liberation War and as we await further verdicts by the Bangladesh International Crimes Tribunal, the United States urges the Government of Bangladesh to adhere to the due process standards that are part of its treaty obligations, and to fully respect the rule of law.

Cross References

Reviewability of visa denial based on terrorism-related activity, **Chapter 1.C.2.**
Visa and information sharing agreements, **Chapter 1.C.3.**
Namibia's reservation to the Terrorism Financing Convention, **Chapter 4.A.2.**
Extraterritoriality, **Chapter 5.B.2.**
ILC's work on the obligation to extradite or prosecute, **Chapter 7.D.3.**
Maritime security and law enforcement, **Chapter 12.A.5.**
Wildlife trafficking, **Chapter 13.C.1.**
Terrorism sanctions, **Chapter 16.A.4.**
Transnational crime sanctions, **Chapter 16.A.8.**
Syria Justice and Accountability Center, **Chapter 17.B.1.c.**
Lord's Resistance Army, **Chapter 17.B.4.**
Use of force issues related to counterterrorism, **Chapter 18.A.1.**
Detainee criminal prosecutions, **Chapter 18.C.4.**
Implementation of UNSCR 1540, **Chapter 19.D.**

CHAPTER 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

1. U.S.-Chile Extradition Treaty

See Chapter 3.A.1. for discussion of the U.S.-Chile Extradition Treaty signed in 2013.

2. Objection to Reservation by Namibia

On October 17, 2013, the U.S. Mission to the UN sent a diplomatic note to the United Nations, in its capacity as depositary for the International Convention for the Suppression of the Financing of Terrorism, conveying its objection to a reservation made by the Government of Namibia to the Convention. The body of the diplomatic note is set forth below.

---

* * * *

The United States Mission to the United Nations presents its compliments to the United Nations, in its capacity as depositary for the International Convention for the Suppression of the Financing of Terrorism, and refers to the reservation made by the Government of Namibia upon ratification of the International Convention for the Suppression of the Financing of Terrorism, with Annex (1999) (the Convention), October 18, 2012.

The Government of the United States of America, after careful review, considers the reservation to be contrary to the object and purpose of the Convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place and who carries them out.

The Government of the United States also considers the reservation to be contrary to the terms of Article 6 of the Convention, which provides: "Each State Party shall

adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States therefore objects to the reservation made by the Government of Namibia upon ratification of the Convention. This objection does not, however, preclude the entry into force of the Convention between the United States and Namibia.

* * * *

3. Multilateral Nuclear Environment Programme in the Russian Federation ("MNEPR")

On May 14, 2013, the U.S. deposited its instrument of acceptance to the MNEPR. The MNEPR creates an international programme which aims to foster cooperation and assistance to the Russian Federation in regards to the safety of spent nuclear fuel and radioactive waste management. The United States joined the MNEPR prior to signing a bilateral Protocol to the MNEPR in June, providing for ongoing cooperative threat reduction activities by the United States and Russia. See Chapter 19.B.6.c.

4. Arms Trade Treaty

On September 25, 2013, the United States signed the Arms Trade Treaty ("ATT"), joining 114 other States that had signed by that date. The ATT requires States Parties to regulate international transfers of conventional arms, with the ultimate goal of preventing illicit trade and fostering international peace and security. See Chapter 19.J. for further discussion of the negotiation and conclusion of the Arms Trade Treaty.

B. LITIGATION INVOLVING TREATY LAW ISSUES

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

As discussed in *Digest 2012* at 97-100, the United States filed a brief in the U.S. Supreme Court in opposition to the petition for certiorari in *Bond v. United States*, No. 12-158. The petitioner, Carol Anne Bond, was convicted of using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1). Closely tracking the language of the Chemical Weapons Convention, Section 229 criminalizes "knowingly" "possess[ing]" or "us[ing]" a "chemical weapon." Petitioner had used two toxic chemicals to attempt to poison another woman who had become pregnant as a result of an affair with petitioner's husband. Among the

issues raised on appeal was whether "local" conduct such as petitioner's is the proper subject of the Treaty Power.

The U.S. Court of Appeals for the Third Circuit held, on appeal of the case in 2012, that the U.S. statute implementing the Chemical Weapons Convention is a valid exercise of Congress's Treaty Power under the Constitution. See *Digest 2011* at 111-17 for excerpts from U.S. briefs submitted in the court of appeals. The U.S. Supreme Court granted the petition for certiorari. The United States filed its brief in the Supreme Court on August 9, 2013. Excerpts below (with footnotes and citations to the record omitted) include the argument that the application of the statute to Ms. Bond was authorized by Congress's power to enact laws necessary and proper to execute the Treaty Power. The brief is available at

---

* * * *

As the court of appeals held, Congress had the authority to prohibit petitioner's conduct under its power under the Necessary and Proper Clause to implement a treaty. That authority is broad in order to achieve its purpose: empowering the Nation to carry out its international legal commitments in furtherance of U.S. foreign policy and national security goals.

Petitioner concedes that the Convention itself is "valid," …

"Instead, [petitioner] is raising a much more limited and narrowly focused as-applied challenge," contending that the facially valid Act, implementing a valid treaty, "cannot be constitutionally applied to her in the circumstances of this case." According to this argument, any particular application of treaty-implementing legislation can be successfully challenged as unconstitutional if the particular judge concludes that the application involves "local" activities. Moreover, petitioner contends that this is such a case, and that her conviction should therefore be set aside. Petitioner is mistaken. There is simply no basis in the Constitution, history, or this Court's precedents for carving out particular applications of a facially valid statute that implements a valid treaty on the ground that the conduct at issue is too local.

1. The Treaty Power is exclusively federal

The Treaty Clause grants the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. Art. II, § 2, Cl. 2. Unlike the various "legislative Powers" specifically enumerated in Article I, Section 8, the Constitution assigns the Treaty Power to the President and Senate as a separate "Article II power." *United States v. Lara*, 541 U.S. 193, 201 (2004).

The Supremacy Clause, in turn, provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Thus, it is well-established that the Treaty Clause allows the federal government "to enter into and enforce a treaty *** despite state objections" and that a valid treaty preempts inconsistent state law. *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976).

The Constitution expressly makes the federal grant of treaty-making authority exclusive by prohibiting States from "enter[ing] into any Treaty, Alliance, or Confederation." Art. I, § 10, Cl. 1; see *id*. Cl. 3 (prohibition on States' entering into "any Agreement or Compact" with a foreign power without first obtaining the consent of Congress). Moreover, "the treaty-making

power was never possessed or exercised by the states separately; but was originally acquired and always exclusively held by the Nation, and, therefore, could not have been among those carved from the mass of state powers, and handed over to the Nation." George Sutherland, *Constitutional Power and World Affairs* 156 (1919) (Sutherland); see generally *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-318 (1936) (*Curtiss-Wright*). Thus, the Tenth Amendment's reservation of rights to the States is "no barrier" to the adoption of treaties and to the enactment of treaty-implementing legislation. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

Although the Treaty Clause "does not literally authorize Congress to act legislatively," *Lara*, 541 U.S. at 201, the Necessary and Proper Clause empowers Congress to enact "Laws" that are "necessary and proper for carrying into Execution" all powers conferred in the Constitution, including the Treaty Power, Art. I, § 8, Cl. 18. Accordingly, while treaties are the supreme law of the land under the Supremacy Clause, when "treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (brackets and citation omitted); see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

2. It has long been settled that the Treaty Power extends to matters ordinarily within the jurisdiction of the States

The court of appeals correctly held that Congress's prohibition of petitioner's conduct was an appropriate exercise of its Necessary and Proper authority to implement a treaty and did not implicate any other constitutional constraints. The Constitution's text, structure, and history, as well as longstanding treaty practice and an unbroken line of precedents, both before and after *Missouri v. Holland*, 252 U.S. 416 (1920), all support that conclusion.

a. Petitioner's argument that the federal government cannot effectuate its treaty obligations if doing so would result in regulation in areas of traditional state authority has been advanced—and rejected—numerous times since the Founding.

i. *Framing of the Constitution*. The national government's inability to ensure treaty compliance—and need to rely on the States when attempting to do so—were among the principal defects in the Articles of Confederation that led to adoption of the Constitution.

Under the Articles of Confederation, Congress concluded numerous treaties, but because it lacked the necessary authority to enact laws to implement them, it typically passed resolutions urging the state legislatures to do so. Samuel B. Crandall, *Treaties: Their Making and Enforcement* 37-38 (2d ed. 1916) (Crandall). The States routinely ignored these resolutions. *Id.* at 39-42. …

Other nations also expressed reluctance to enter into agreements with the United States because they lacked confidence in the American government's power to implement binding agreements, given the need for state implementation. …

Given this experience, the Framers viewed the inability of Congress to prevent the breach of treaties as one of the chief defects of the Articles of Confederation. Crandall 49, 51…

The Constitution addressed the federal government's impotence under the Articles of Confederation to ensure treaty compliance by assigning the treaty-making power exclusively to the federal government and by ensuring that the power was "disembarrassed *** of an exception [in the Articles of Confederation], under which treaties might be substantially frustrated by regulations of the States." *The Federalist No. 42*, at 211 (James Madison). At the same time, the Framers chose not to impose subject-matter limitations on the Treaty Power because "[t]he various contingencies which may form the object of treaties, are, in the nature of things,

incapable of definition." 3 *Elliot's Debates* 363 (Edmund Randolph); see *id*. at 504 (Edmund Randolph).

The Framers safeguarded the interests of the States by requiring that treaties be approved by two-thirds of the Senate, which they saw as the protector of State sovereignty given the States' equal representation and the fact that Senators were (at that time and until ratification of the 17th Amendment in 1913) chosen by state legislatures. …

* * * *

b. This Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920) (Holmes, J.), rearticulated this well-established understanding of the Treaty Power and demonstrates why Section 229 falls squarely within the federal government's authority to ensure compliance with its treaty obligations.

i. In the Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702 (Migratory Bird Convention), the United States and Great Britain mutually agreed to protect certain species of birds that, in their annual migrations, crossed between the United States and Canada. The treaty further provided that each country would "propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution" of the treaty, art. VIII, which the United States accomplished through the Migratory Bird Treaty Act, ch. 128, 40 Stat. 755. That statute prohibited the killing, capturing, or selling of any of the migratory birds included within the terms of the treaty except as permitted by certain regulations.

Missouri argued that "the statute [was] an unconstitutional interference with the rights reserved to the States by the Tenth Amendment" and sought to enjoin its enforcement. *Holland*, 252 U.S. at 430-431. The Court explained that "[t]o answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States," because the Constitution "delegated expressly" the treaty-making power to the national government and provided that such treaties were "the supreme law of the land." *Id*. at 432 (citing U.S. Const. Arts. II, § 2, and VI).

The Court accordingly rejected Missouri's argument that "a treaty cannot do" "what an act of Congress could not do unaided." *Holland*, 252 U.S. at 432. The Court explained that while "the great body of private relations usually fall within the control of the State," "a treaty may override its power" according to the express design of the Constitution. *Id*. at 434-435. The Migratory Bird Convention did not "contravene any prohibitory words to be found in the Constitution," and the implementing statute, which closely tracked the treaty, was "a necessary and proper means to execute the powers of the Government." Id. at 431-433.

The Court found compelling practical reasons for the Founders' conferral of a broad Treaty Power on the federal government because treaties often deal with matters of the "sharpest exigency for the national well being." *Holland*, 252 U.S. at 433. And observing that the Constitution expressly renders States "incompetent to act" on treaties, the Court further explained that it was "not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Ibid*. (citation omitted).

ii. *Holland* makes clear that Section 229 is a necessary and proper effectuation of U.S. treaty obligations. Petitioner contends that the Court in *Holland* affirmed the Migratory Bird Convention only after weighing for itself "the relative national and state interests" at stake. That is incorrect. The Court noted that "the great body of private relations usually fall within the

control of the State" and held as a categorical matter that "a treaty may override its power." 252 U.S. at 434 (citing eight decisions of this Court in support); see *id*. at 432 (supporting same rule based on text and structure of Constitution). The Court later observed that "a national interest of very nearly the first magnitude" was involved in the Migratory Bird Convention and that Missouri's interest was insubstantial, *id*. at 435, but it nowhere suggested that its holding depended on a balancing of these interests. And petitioner points to no decision of this Court invalidating an exercise of the Treaty Power through application of any such balancing test.

In all events, *Holland*'s discussion of the Migratory Bird Convention itself is not directly relevant to petitioner's claim because petitioner here concedes that the CWC is valid. Petitioner nonetheless appears to argue that *Holland*'s determination that the implementing legislation was constitutional is inapplicable here because in *Holland* there was a "tight nexus between the treaty and the legislation." But the same "tight nexus" is present here. Upholding the application of the Act to petitioner's conduct does not imply a general "police power" to legislate solely to "protect the public" or safeguard "public safety." *Kebodeaux v. United States*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring in the judgment) (citation omitted). Rather, the Act aims at distinctly international and national concerns embodied in a valid treaty: the attainment of a global scheme to protect against the malicious use of chemical weapons while preserving beneficial, socially desirable uses and commerce—aims vital to national security.

Even assuming the Necessary and Proper Clause applies identically to treaty-implementation legislation as to other legislation, this Court's recent decisions on the scope of Congress's necessary-and-proper power in the domestic context leave no doubt that Section 229 was constitutionally applied to petitioner. *E.g.*, *United States v. Comstock*, 130 S. Ct. 1949 (2010). Analysis under that precedent also refutes petitioner's suggestion that upholding her conviction would imply a limitless congressional power to legislate on all local matters, thereby displacing state authority. …

First, the Constitution "grants Congress broad authority to enact federal legislation," *Comstock*, 130 S. Ct. at 1956, and that principle applies no less here than elsewhere. Indeed, federal authority is at its apex on matters related to foreign affairs. *Curtiss-Wright*, 299 U.S. at 315-318. Second, Section 229 adds incrementally to pre-existing and extensive federal regulation of harmful chemicals, cf. *Comstock*, 130 S. Ct. at 1958-1961, and implements a treaty on weapons—a quintessentially international subject matter. Third, Congress's judgment to adopt penal legislation that mirrored the terms of the Convention and thus regulated comprehensively was plainly reasonable. Cf. *id*. at 1961-1962. Fourth, the statute does not displace the authority of the States. Cf. *id*. at 1962-1963. Pennsylvania remained free to prosecute petitioner, *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (dual sovereign doctrine), …. Fifth, "the links" between the Act and the Treaty Power "are not too attenuated." *Comstock*, 130 S. Ct. at 1963. Indeed, the prohibition at issue here "closely adheres to the language of the … Convention," which itself addresses a matter at the historical core of treaty-making. The statute's links to the treaty are tangible, direct, and strong. *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring). Accordingly, under Comstock's analysis, Section 229 is valid necessary-and-proper legislation, and upholding it does not remotely suggest that "any one government [has] complete jurisdiction over all the concerns of public life." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

iii. In the more than two centuries of American history, this Court has never invalidated Congress's implementation of a treaty on federalism grounds. In declining to do so, *Holland* articulated a settled understanding announced and applied by this Court in numerous cases before and after *Holland* itself. *Holland*, 252 U.S. at 434 (citing earlier cases); see *Lara*, 541

U.S. at 201 (citing *Holland*); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172,204 (1999) (citing *Holland*); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691-692 (1979) (citing *Holland*); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (citing *Holland*); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (citing *Holland*).

* * * *

3. There is no basis for overruling Holland

The Court should reject petitioner's invitation to overrule *Holland*. This Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States v. IBM Corp*., 517 U.S. 843, 856 (1996) (citation omitted). No such special justification is present here. And "[s]tare decisis has added force" when the Political Branches have "acted in reliance on a previous decision." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Since the founding, U.S. diplomats have negotiated with foreign powers armed with the assurance that the United States possesses the authority to ensure implementation of its treaty obligations, even in areas generally reserved to the States.

a. The rule articulated in *Holland* (and applied repeatedly by this Court both before and after) has not proven "unworkable in practice." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (citation omitted). To the contrary, the Nation's experience with treaty-making demonstrates that the Framers did not envision a judicially enforceable "too local" limit on congressional power to implement a treaty and were correct in their conclusion that requiring both Presidential approval and the concurrence of two-thirds of the Senate would provide robust protection for the interests of the States in the treaty-making process. And to enact implementing legislation, the House of Representatives must also agree to the new law, thus providing another layer of safeguards.

The Senate has frequently imposed conditions or reservations on treaties to reflect federalism concerns. *E.g.*, *United Nations Convention Against Corruption*, S. Exec. Rep. No. 18, 109th Cong., 2d Sess. 9 (2006) (resolution of advice and consent) ("The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism.")…

The Executive Branch also takes into account federalism concerns—as well as the practical necessity of securing the support of two-thirds of the Senate—in developing the United States' position in treaty negotiations. For example, U.S. treaty negotiators can steer negotiations away from provisions that would needlessly federalize an issue best left to individual States or persuade other nations to address federalism in the treaty itself. *E.g.*, *Council of Europe Convention on Cybercrime*, S. Treaty Doc. No. 11, 108th Cong., 1st Sess. XXI-XXII, 21-22 (2003) (providing federalism carve-out in Article 41).

b. It is petitioner's proffered alternative, not *Holland*, that is unworkable. Petitioner suggests that if the President and Senate want to achieve an important foreign policy or national security objective through a treaty that would require regulation of a matter otherwise within the States' jurisdiction, then the national government must look to "state law" to implement the U.S. obligation.

But it was the national government's crippling need to rely on the States to implement U.S. treaty obligations under the Articles of Confederation, and the resulting denigration of American authority and negotiating power on the world stage, that led to the framing of the

Constitution's treaty provisions in the first place. Those provisions cannot now sensibly be read to require the very same chaotic practice of mandatory State treaty-implementation they were intended to end. While the Federal Government may choose to rely on state law to put the United States in compliance with a treaty obligation, that does not mean the Court should invalidate the political branches' considered judgment that the best way to ensure United States compliance with the obligation at issue here was to pass a comprehensive federal law. The Constitution gives the federal government exclusive power to enter into and negotiate treaties, and the Framers concluded that the federal government must have the concomitant power to ensure compliance.

Petitioner's suggestion that the treaty implementation power of the United States be subject to a case-by-case negation whenever a judge determines that the conduct regulated is too "local" or not of sufficiently "international" interest would compound the unworkability of her proffered alternative to *Holland*. American treaty negotiators must have confidence that the federal government possesses the authority to ensure compliance with U.S. treaty obligations and also have a clear understanding of the scope of their authority. Subjecting treaty-implementing legislation to ad-hoc, after-the-fact review and nullification on localism grounds would undermine both imperatives. Likewise, negotiators from other countries must have confidence that U.S. negotiators can deliver on their promises before agreeing to make their own commitments. *The Federalist No. 64*, at 329 (John Jay) ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it."). If U.S. treaty-implementation measures are judicially negated after-the-fact, the underlying international law treaty obligations would remain, and the United States could be subject to countermeasures, such as other states' retaliatory suspension of their treaty obligations to the United States. Restatement (Third) of the Foreign Relations of the United States § 905 & cmt. b, at 380, 381 (1987).

* * * *

…Through the Convention, the United States manifested its judgment that use and proliferation of chemical weapons represented a grave threat to the national security of the United States. By entering into the Convention, it secured other nations' categorical commitment against such use and proliferation—"under any circumstances" not expressly permitted by the Convention. In return for that benefit and to support that nonproliferation goal, the United States made reciprocal commitments, including the commitment to enact penal legislation forbidding individuals from using chemical weapons "under any circumstances" not expressly permitted by the Convention. That was a commitment that the President and two-thirds of the Senate believed necessary to make in order to secure the foreign-policy, national-security, and economic benefits that would flow from the Convention.

Congress therefore enacted legislation coextensive with the Nation's treaty obligations. The implementing legislation banned conduct like petitioner's while exempting use of toxic chemicals only for "peaceful purposes" and other purposes expressly exempted by the Convention itself. Congress did not add additional exemptions, such as one for "local" use of a chemical weapon. Indeed, the fashioning of legislative exceptions not found in the Convention itself could have encouraged other States Parties to adopt their own novel exceptions, thus undermining both the Convention and the national security interests of the United States. The Treaty Power should not be read to require that very same exemption in the guise of an "as-applied" adjudication. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013)

(warning against "the danger of unwarranted judicial interference in the conduct of foreign policy"); *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (it would be "danger[ous]" to find a "prosecution barred based on *** foreign policy concerns" that the Court "ha[s] neither aptitude, facilities nor responsibility to evaluate") (internal quotation marks omitted). Here, the President, two-thirds of the Senate (and then majorities of both Houses in passing the Act) determined that the Nation's paramount chemical weapons nonproliferation goals would be furthered by agreeing to the Convention and that the comprehensive penal legislation it called for was an integral part of that global nonproliferation framework. The courts should not second-guess that considered judgment.

c. *Holland* has not been undermined by subsequent decisions. *Holland* itself recognized that implementing legislation cannot override the "prohibitory words" of the Constitution applicable to all exercises of federal power, 252 U.S. at 433, and *Covert*, 354 U.S. at 16-17 (plurality opinion), reaffirmed that rule. Accord, *e.g.*, *Geofroy*, 133 U.S. at 267. Indeed, the *Covert* plurality emphasized that "there is nothing in [*Holland*] which is contrary to the position" taken in *Covert*. 354 U.S. at 18 (plurality opinion). The plurality explained that *Holland* "was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government." *Ibid*. "To the extent that the United States can validly make treaties," the plurality continued, "the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." *Ibid*.

* * * *

The flat constitutional prohibition on state treaty-making plainly distinguishes exercises of the Treaty Power from exercises of other enumerated powers, which inherently "presuppose[] something not enumerated." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). Given that the Constitution "expressly forbid[s]" States from entering into treaties, the Court has recognized that "[i]f the national government has not the power to do what is done by such treaties, it cannot be done at all." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880). As Attorney General Cushing explained in 1857, "[t]hat is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency." 8 Op. Att'y Gen. at 415. Without the power to implement treaty obligations, "the United States is not completely sovereign." *Curtiss-Wright*, 299 U.S. at 318; see *Holland*, 252 U.S. at 433.

* * * *

2. Constitutionality of MARPOL Amendment Procedure

In 2013, the U.S. District Court for the District of Alaska issued its decision on the U.S. motion to dismiss a case brought by the state of Alaska and joined by the Resource Development Council ("RDC") challenging the procedure by which an emissions control area ("ECA") off the coast of Alaska was established pursuant to the International Convention for the Prevention of Pollution from Ships ("MARPOL"), including Annex VI, and domestic implementing legislation (the Act to Prevent Pollution from Ships, "APPS," 33 U.S.C. §§ 1901 to 1915). *Alaska v. Kerry*, 972 F.Supp.2d 1111 (D. Alaska, 2013). The court granted the motion to dismiss and denied Alaska's motion for an injunction. The

court first considered the applicability of the political question doctrine to the first cause of action in the complaint, which alleged violations of the APPS and the Administrative Procedure Act ("APA") in the establishment of the ECA. The court agreed with the United States that the first cause of action raises a nonjusticiable political question and is therefore not subject to judicial review. The court next considered the claims under the Treaty Clause of the U.S. Constitution and the separation of powers doctrine, specifically, claims that the executive branch did not have the domestic authority to implement the amendment to MARPOL establishing the Alaska ECA because the amendment did not receive the advice and consent of the Senate nor was it implemented by legislation. As a threshold matter, the court held that whether domestic implementation of the ECA through the APPS presents an unconstitutional delegation of authority was not a political question. The section of the opinion discussing the Treaty Clause is excerpted below (with most footnotes omitted).

---

* * * *

…The parties agree that MARPOL and Annex VI were enacted into domestic law by APPS. The State maintains that the subsequent North American ECA amendment at issue in this litigation never came validly into force in the United States, as the Senate did not approve it and Congress did not implement it. The Defendants disagree, maintaining that both the Senate and Congress authorized the Secretary of State to accept the ECA amendment ex ante, and that such approach is constitutionally permissible.

i. Political Question Doctrine.

* * * *

… [I]n *Hopson v. Kreps* the Ninth Circuit held "that the criteria enunciated [in *Baker*] generally do not apply to claims that the executive has exceeded specific limitations on delegated authority." Indeed, the language the Supreme Court used in *Baker* renders the inapplicability of the *Baker* factors to this issue even clearer. The Supreme Court explained that "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." Given this clear directive, the Court agrees with RDC that "[b]ecause the Constitution sets forth the requirement of Senate consent in the Treaty Clause, determining whether the Treaty Clause requires Senate consent to the ECA amendment falls squarely within the Court's province." Thus, the Court has subject matter jurisdiction over this issue and may consider it under Rule 12(b)(6).

ii. Senate Approval.

The [Second Amended Complaint or] SAC asserts that the Secretary of State's acceptance of the ECA amendment "did not create domestic federal law under the Treaty Clause . . . because it was not made by the President with the advice and consent of the Senate. Similarly, RDC asserts that "the Treaty Clause necessarily applies with equal force to treaty amendments, preventing them from becoming U.S. law without Senate advice and consent."

Preliminarily, the parties dispute whether Congress intended renewed Senate advice and consent to be part of the acceptance process for MARPOL Annex amendments. The Defendants maintain that the Senate gave its advice and consent when it approved Annex VI with the understanding that future designations of ECAs would not be referred to the Senate for further action. RDC asserts that Congress intended the prospective approval of amendments to apply only to technical amendments to MARPOL. It cites to the legislative history of the bill that became APPS, H.R. 6665, to support this assertion. The bill was referred to the House Committee on Merchant Marine and Fisheries, which produced a report recommending its passage. In the report's section-by-section analysis, the committee commented on the section that later became 33 U.S.C. § 1909. The committee explained that "[t]his section requires the advice and consent of the Senate to any proposed amendments to the MARPOL Protocol Articles." However, it explained that amendments to MARPOL Annexes were subject to a different process involving the Secretary of State:

> This rapid amendment process provides for relatively rapid updating of technical provisions without requiring the traditional, but more cumbersome, treaty revision process that will still be required for the MARPOL Protocol Articles. This rapid amendment process is necessary to stay abreast of new technology, thereby ensuring effective control of pollution from ships operating in the marine environment.

The Federal Defendants assert that "RDC fails to acknowledge [a] threshold, dispositive textual issue," which is that a limitation to technical amendments does not appear in the statutory language of APPS. Rather, they contend, "the ECA amendment fits within the express terms of Section 1909(b)," and "the ECA designation 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." They identify documents in the legislative history of the ratification of Annex VI that support their position, several of which are also cited by the Environmental Defendants. RDC asserts that the Federal Defendants "selectively quote" documents in the legislative history and maintains that a closer look indicates the Senate "understood the executive could implement only certain types of amendments" without additional approval.

The Court finds that overall, the parties' citations clearly indicate the Senate was aware that certain types of amendments would be approved without further Senate involvement. This Court need not determine exactly what references to "technical" amendments in the House committee report may have meant, as the plain language of the statute is unambiguous and therefore dispositive: 33 U.S.C. § 1909(a) specifically requires "the advice and consent of the Senate" for amendments to MARPOL proper. However, Section 1909(b) expressly exempts certain amendments—including "proposed amendment[s] to Annex I, II, V, or VI to the Convention"—from that requirement.

iii. Congressional Implementation of the ECA Amendment.

The SAC also asserts that "[t]he ECA amendment . . . never became domestic federal law because it was never implemented pursuant to legislation passed by both houses of Congress." RDC supports the State's arguments in its briefing. The Federal Defendants disagree, contending that the North American 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 [the APPS] legislation passed by both houses of Congress." The Clean Air Defendants and the Environmental Defendants support the Federal Defendants' position.

The State relies on *Medellin v. Texas* to support its arguments. *Medellin* involved a judgment of the International Court of Justice ("ICJ"), *Avena*, which resolved a dispute between several Mexican nationals, including Medellin, and the United States. The ICJ found that the United States had violated an article of the Vienna Convention in its dealings with those individuals who had been convicted in state courts within the United States. The President issued a memorandum stating that the United States would meet its obligations under *Avena* by having state courts give effect to that decision. Medellin filed a habeas corpus petition in Texas state court seeking to enforce his rights under *Avena*. The state court dismissed the petition on the grounds that *Avena* and the President's memorandum were not directly enforceable federal domestic law that would preempt the state limitation on the filing of successive habeas petitions. The Supreme Court agreed with the state court. It explained that the relevant treaty sources indicated that ICJ judgments were binding only between nations who were parties in the suit. Because *Avena* had not been implemented in the United States through legislation, it was not binding on the state court. The Supreme Court also held that the President's memorandum did not make the *Avena* decision enforceable domestic law because the President was not authorized by the relevant treaty sources or congressional action to implement the judgment.

The Federal Defendants distinguish *Medellin* from the present action, pointing out that *Medellin* turned on whether the relevant treaties were self-executing, as it was undisputed that no implementing legislation existed. Here, by contrast, there is no dispute that MARPOL is non-self-executing and that there is a specific legislative act authorizing its implementation. APPS expressly implements amendments to Annex VI by making it "unlawful to act in violation of the MARPOL Protocol" and by defining "MARPOL Protocol" to include "any modification or amendments to the Convention, Protocols or Annexes which have entered into force for the United States."

The Federal Defendants assert that "[t]o 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." They cite examples of implementing legislation for other treaties that involved ex ante authorization for entering into and amending international agreements. The Federal Defendants also cite a history of the Secretary of State's acceptance of prior MARPOL Annex amendments under Section 1909(b) that predates the 2008 APPS amendment implementing Annex VI.189 The Federal Defendants assert that as Congress enacted APPS against this background of ex ante authorization, Congress should be presumed to have intended to preserve it.

The State acknowledges that "it appears that the Executive has accepted regulations and amendments to international agreements and treaties that purport to be domestically enforceable without further action by Congress or even an agency rulemaking." But the State maintains that this history does not establish this practice as lawful, since as the Supreme Court stated in Medellin, '[p]ast practice does not, by itself, create power.'" However, in making that statement in Medellin, the Supreme Court quoted *Dames & Moore v. Regan*.[193] The full sentence in *Dames* reads: "Past practice does not, by itself, create power, but 'long-continued practice, known to and

[193] *Medellin*, 552 U.S. at 496 (quoting *Dames*, 453 U.S. 654, 686 (1981)).

acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.'"[194] Given Congress's long history of enacting legislation that authorizes the executive branch to accept and render enforceable amendments to international agreements, and the fact that MARPOL Annex amendments have been previously enforced through the *ex ante* authority of 33 U.S.C. § 1909(b), the Court finds that Congress should be presumed to have intended that MARPOL Annex amendments, including the North American ECA, that have been accepted by the Secretary of State would constitute enforceable domestic law without further implementation by Congress.

The legislative history of APPS supports this interpretation. The State asserts that when the Senate approved Annex VI in 2006, senators stated that Annex VI "'will require implementing legislation,'" which the State argues indicates they "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."

But the Federal Defendants persuasively contend that the State's reliance on this 2006 report is misplaced because it "ignores the chronology of the ratification of Annex VI and amendments to APPS." First the Senate approved Annex VI, then Congress amended APPS to include Annex VI; thus, at the time of the report cited by the State, Annex VI did indeed still "require implementing legislation." The Court therefore does not read the Senate report cited by the State as indicating anything beyond a recognition that Annex VI was not self-executing.

Accordingly, the Court finds that when the Senate approved Annex VI, and when Congress passed the amended version of APPS implementing Annex VI, they intended that the Secretary of State's acceptance of an ECA amendment at a future date would be effective domestic law without further Senate approval and would be implemented through the existing version of APPS without further congressional action.

* * * *

3. *Lakes Pilots Association v. U.S. Coast Guard*

On September 30, 2013, the U.S. District Court for the Eastern District of Michigan issued an opinion and order in *Lakes Pilots Association, Inc. v. U.S. Coast Guard*, No. 2:11-cv-15462, denying the parties' cross-motions for summary judgment. As discussed in *Digest 2012* at 112-15, the United States filed its motion and brief in support in 2012, arguing that summary judgment was appropriate because the plaintiffs had no enforceable rights under the international agreement between the United States and Canada which formed a crucial part of their challenge. The court found that, even assuming that plaintiffs could rely on the international agreement to make the argument that the Coast Guard's determinations were contrary to law, the administrative record before the court lacked important factual information necessary

[194] *Dames*, 453 U.S. at 686 (quoting *United States v. Midwest Oil Co*., 236 U.S. 459, 474 (1915)). The *Dames* Court also quoted Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which states that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." *Dames*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. 579, 610-611 (1952)).

for the court to determine if the Coast Guard acted reasonably. Therefore, the court remanded to the Coast Guard for further consideration.

Cross References

Extradition treaty with Chile, **Chapter 3.A.1.**
MLAT with Jordan, **Chapter 3.A.2.**
Asset sharing agreement with Andorra, **Chapter 3.B.4.b.**
Asset sharing agreement with Panama, **Chapter 3.B.4.c.**
Pursuing U.S. ratification of the Disabilities Convention, **Chapter 6.B.5.**
ILC's work on subsequent agreements and subsequent practice in relation to interpretation of treaties, **Chapter 7.D.1.**
ILC's work on reservations to treaties, **Chapter 7.D.2.**
ILC's work on provisional application of treaties, **Chapter 7.D.3.**
Marrakesh Treaty to Facilitate Access for the Blind, **Chapter 11.E.1.**
United States joining Patent Law Treaty, **Chapter 11.E.3.**
United States-Kiribati maritime boundary treaty, **Chapter 12.A.2.a.**
Entry into force of Arctic SAR agreement, **Chapter 12.A.6.**
Minamata Convention on Mercury, **Chapter 13.A.2.**
Transmittal to the U.S. Senate for advice and consent of fisheries conventions and amendment, **Chapter 13.B.5.**
Convention on Supplementary Compensation for Nuclear Damage, **Chapter 19.B.5.**
MNEPR, **Chapter 19.B.6.c.**

CHAPTER 5

Foreign Relations

A. EXECUTIVE BRANCH DISCRETION OVER FOREIGN RELATIONS

Detroit International Bridge: Constitutionality of International Bridge Act

On August 30, 2013, the United States filed its brief in support of its motion to dismiss the third amended complaint brought by plaintiffs, Detroit International Bridge Company ("DIBC") and Canadian Transit Company ("CTC"). Plaintiffs sued multiple federal defendants, including the Department of State, in U.S. District Court for the District of Colombia, alleging multiple claims based, *inter alia*, on the decisions to grant a Presidential Permit allowing a new bridge to be constructed across the Detroit River and to approve an agreement between Michigan and Canada pertaining to the new bridge. Plaintiffs alleged, *inter alia*, that the new bridge would compete with their existing bridge and prevent them from building an additional bridge span. *DIBC et al. v. United States*, No. 10-CV-476 (D.D.C.). See Chapter 11.F.2. regarding issuance of the permit. Excerpts from the U.S. brief appear below (with footnotes and citations to the record omitted). The brief is available at *www.state.gov/s/l/c8183.htm*. The first excerpt is from the section in which the United States addresses plaintiffs' claim that the International Bridge Act, under which the permit for the new bridge was granted and the Michigan-Canada agreement approved, is unconstitutional. The second excerpt is from the brief's discussion of plaintiffs' claims under the Administrative Procedure Act ("APA"). Both excerpts discuss the discretion afforded the executive branch in matters affecting foreign relations.

_____

* * * *

A. Factual Background

Congress enacted the original "Act to authorize the construction and maintenance of a bridge across Detroit River within or near the city limits of Detroit, Michigan" on March 4, 1921 (the "1921 ATC Act"). 41 Stat. 1439. The statute gave the American Transit Company permission to build, operate and maintain a bridge in or near Detroit, Michigan. Before it could begin construction, however, ATC was required to obtain the "proper and requisite authority" for construction from the Canadian government. *Id.* Congress specifically reserved the right to "alter, amend, or repeal this Act." *Id.* at Sec. 3.

Two months later, on May 3, 1921, the Canadian Parliament passed an "Act to incorporate The Canadian Transit Company" ("CTC"). 11-12 George V. Ch. 57 (Can.) (the "1921 CTC Act"). The 1921 CTC Act established the CTC, and provided it with a wide range of authority to build a number of infrastructure works including a bridge. *Id.* at Sec. 1-8. The 1921 CTC Act provided CTC the right to "construct, maintain, and operate a railway and general traffic bridge across the Detroit River from some convenient point, at or near Windsor, Ontario" to somewhere in Michigan. *Id.* at Sec. 8(a). The CTC Act granted the permission to build 20 miles of railway, lay gas pipes, water pipes, and electrical cables and imbued CTC with the powers of a Canadian railway company. *Id.* at 8(a-j). The 1921 CTC Act also prohibited actual construction without "an Act of the Congress of the United States or other competent authority…authorizing or approving" the bridge. *Id.* at Sec. 9. The remainder of the Act permitted a number of activities such as issuing bonds, borrowing money, mortgaging property, and giving equal rights of passage to other companies, among others. *Id* at Secs. 10-21.

Over the course of the next several years, Congress passed three minor amendments to the 1921 ATC Act, extending the deadlines for ATC to begin and complete construction, and giving ATC the right to sell, assign, transfer, or mortgage its interests under the 1921 ATC Act. *See* "the 1924 ATC Amendment," 43 Stat. 103; the "1925 ATC Amendment," 43 Stat. 1128; and the "1926 ATC Amendment," 44 Stat. 535 (together with the 1921 ATC Act collectively referred to as the "ATC Acts"). None of these statutes altered the original language of the authorization to "construct, maintain, and operate" a bridge in or near Detroit, Michigan. Each of them expressly reserved the United States' right to "alter, amend, or repeal" the law.

The bridge was opened in 1929, and came to be known as the Ambassador Bridge. In 1972, Congress passed the International Bridge Act ("IBA"), which provided advance Congressional consent to international bridges subject to approvals by various executive agencies. 33 U.S.C. § 535 *et seq*. Among the provisions of the IBA, Congress gave its consent for States to enter into agreements with the governments of Canada or Mexico for the construction, maintenance of operation of bridges. *Id.* at 535a. Congress conditioned the effectiveness of the agreements on the approval of the Secretary of State. *Id.* The IBA also recognized that the construction of international bridges implicated the President's authority over foreign affairs, and provided that a bridge could not be constructed without the President's approval. *Id.* at 535b.

Plaintiffs allege that they now seek to build a new span of the Ambassador Bridge (the "New Span") to upgrade the existing facility and decrease maintenance costs. At the same time, the State of Michigan is working with Canada to construct a new bridge between Windsor, Ontario and Detroit, Michigan (referred to alternatively as the Detroit River International Crossing ("DRIC") or the New International Trade Crossing ("NITC")). Through numerous causes of action, Plaintiffs allege that the Federal Defendants' actions with regard to the New Span and the NITC violate the United States Constitution, and the ATC Acts and CTC Acts, as

well as the 1909 Boundary Waters Treaty between the United States and Canada. All of Plaintiffs' claims either lack jurisdiction or fail to state a valid claim for relief. They must be dismissed under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

B. Count One Fails To State A Valid Claim Of Unconstitutional Delegation Of Power Under the 1972 International Bridge Act

The State Department's authority to approve the Crossing Agreement was properly granted by Congress in the 1972 International Bridge Act. Plaintiffs' claim that the IBA is an unconstitutional delegation is incorrect on its face, both as to their characterization of the grant of authority and as to their assertion that there is no intelligible principle to guide the Department's exercise of that authority. Count One should therefore be dismissed under rule 12(b)(6).

1. The 1972 IBA does not delegate Congress' power under the foreign compacts clause

Plaintiffs assert that the IBA unconstitutionally delegates to the State Department Congress's power under Article 1, § 10 of the U.S. Constitution to consent to agreements or compacts between states and foreign powers. This is demonstrably incorrect as a matter of statutory language and legislative history. In fact, Congress itself has exercised its Article 1, § 10 power by consenting in advance to such agreements or compacts relating to international bridges. 33 U.S.C. § 535a. At the same time, Congress conditions the effectiveness of any such agreement on its approval by the Secretary of State. *Id.*

At the time of enactment, Congress made clear that it was separating Congress's consent to interstate compacts, on the one hand, and the conditioning of their effectiveness on approval by the Secretary of State, on the other. The House report accompanying the Act expressly discussed the two different decisions, noted the extensive discussion on the subject of constitutionality that had taken place in the hearing on the Act, and adverted to (and attached) a memorandum on the subject provided by the Legal Adviser of the Department of State. H.R. Rep. 92-1303, 92nd Cong., 2d Sess. 4 (1972). The report observed that advance consent to compacts was necessary to accomplish the purpose of the IBA:

> Since this proposed act is designed to eliminate the necessity of ad hoc congressional consideration of international bridges, it would be anomalous to grant consent…but then require ad hoc [congressional] approval of the agreements pursuant to which they were to be constructed.

Id. The Legal Adviser's memorandum to Congress concluded that "Congress may, under the Constitution, grant consent in advance to compacts and agreements between states and their subdivisions and foreign governments, and . . . such consent may be conditioned on approval of the terms of such agreements by the Department of State." *Id*. at 15. The report also made clear why Congress wished the Department of State to approve such compacts and agreements. The Legal Adviser's memorandum to Congress observed:

> In the past, bridge agreements…have not been reviewed by anyone at the federal level for possible impact on foreign policy. We believe such a review would be in the national interest, and further believe that the Secretary of State would be an appropriate person to conduct such a review.

Id. at 12. Accordingly, Plaintiffs' claim that the IBA is an unconstitutional delegation of power ignores the fact that Congress was well aware of the constitutional limits of its power, and specifically drafted the statute to avoid an impermissible delegation. Congress is the entity giving its consent to the agreements between the States and foreign nations. The agreement's effectiveness is conditional on the Secretary of State's approval after review for foreign policy

concerns. The Secretary of State has not been delegated Congress' foreign compact clause power, and Plaintiffs cannot therefore state a valid claim under the non-delegation doctrine.

2. Even if the non-delegation doctrine was applicable, Congress supplied an intelligible principle to guide the State Department's actions

Plaintiffs' assertion that the IBA lacks an intelligible principle to guide the Secretary of State's decision-making when approving these agreements is simply incorrect on its face. There is no dispute that Congress may delegate its legislative power to the other branches as long has it has set forth "an intelligible principle to which the person or body authorized to act is directed to conform." *TOMAC v. Norton*, 433 F.3d 852, 866 (D.C. Cir. 2006) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001)). The statute here satisfies the constitutional requirements.

The Supreme Court has summarized its jurisprudence on this point as follows: "[I]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman*, 531 U.S. at 474 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). …

If findings of impermissible delegations are rare, they are rarer still when Congress delegates authority over matters of foreign affairs. The Supreme Court has explained that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in the domestic area." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *see also U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting that in foreign affairs Congress has long granted the Executive "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."). This is so because of the "changeable and explosive nature" of international affairs and because the Executive must be able to quickly react to information that cannot be easily relayed to and evaluated by Congress. *Zemel*, 381 U.S. at 17. Moreover, when transacting with foreign nations, the Executive must act with "caution and unity of design." *Curtiss-Wright*, 299 U.S. at 319 (internal quotations and citations omitted). The Supreme Court has concluded that it is therefore unwise to require Congress to establish narrow standards when delegating authority over foreign affairs. *Id*. at 321-22. When looking for the broad general directive that will satisfy the intelligible principle test, the court need not be constrained to testing the statutory language in isolation. *TOMAC*, 433 F.3d. at 866 (citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)). Rather, "the statutory language may derive content from the 'purpose of the Act, its factual background and the statutory context in which they appear.'" *Id*. (quoting *Am. Power & Light Co.*, 329 U.S. at 104). The court must therefore consider the legislative history and factual circumstances surrounding the passage of the IBA in determining whether or not there is an intelligible principle guiding Section 535a of the IBA. *See id*.

Here, there is a framework formed by the statute, the legislative history, Executive Order 11423, 33 Fed. Reg. 11741, as amended, and the long-recognized authority of the Executive branch in matters of foreign policy. 33 U.S.C. §§ 535a, 535b; *see also Presidio Bridge Co. v. Sec'y of State*, 486 F. Supp. 288, 296 (W.D. Tex. 1980) (examining the legislative history of the IBA and noting it is to be read in concert with Executive Order 11423). This framework provides the intelligible principle governing the State Department's review of the terms of any crossing agreement, including this one. *Michigan Gambling Opposition*, 525 F.3d at 381 (intelligible

principle discerned after reviewing the purpose and structure of the challenged statute, which should not be read in isolation). Plaintiffs' proposed attempt to bring a sweeping constitutional challenge to the IBA does not withstand scrutiny.

First, the statute itself is concerned only with international bridges crossing the borders between the United States and Mexico or Canada. 33 U.S.C. § 535. The agreements covered by the statute are agreements between States and the governments of Canada or Mexico. 33 U.S.C. § 535a. It is clear even from these bare facts that the thrust of Congressional concern in the statute centers on matters of foreign policy and international relations with bordering countries. In addition, the State Department's central role in United States foreign policy provides sufficient indication that Congress intended that the State Department's review of agreements between States and foreign countries was to focus on foreign policy interests of the United States. Finally, the legislative history of the 1972 IBA provides even more clarity as to the principle Congress articulated for the State Department to apply. As noted above, the Report from the House Committee on Foreign Affairs explains that the State Department was to review the agreements for "possible impact on foreign policy." H.R. REP. NO. 92-1303, at 12 (1972).

Moreover, the IBA was a coordinated effort between the Executive branch and the Legislative branch to create a uniform system for approval of international bridges. *Presidio Bridge Co.*, 486 F. Supp. at 295-96 ("after four years of work in drafting a bill, the President issued an Executive Order anticipating its final passage…the bill…was passed by a Congress that was well aware of both the provisions of the order and the reason for its existence."). Executive Order 11,423 was drafted in anticipation of the IBA, which would grant advance Congressional approval of international bridges. *Presidio Bridge Co.*, 486 F. Supp. at 296 ("the two documents are compatible with, and companions to one another"); *see also* Executive Order 11423, 33 Fed. Reg. 11741. The Executive Order explains that "the proper conduct of foreign relations requires that executive permission be obtained for the construction and maintenance …of facilities connecting the United States with a foreign country." 33 Fed. Reg. at 11741. Taken together, the statute, legislative history, and Executive Order confirm the principle guiding the State Department's approval of these agreements: they must be reviewed for impacts on U.S. foreign policy and foreign relations. This guidance would handily satisfy the intelligible principle requirement even if the delegation concerned authority over domestic affairs. Given that the delegated authority is a matter of foreign affairs, there is essentially no question that it survives constitutional scrutiny.

This reading of the statute in light of its history is analogous to the Supreme Court's reading of the statute at issue in *Zemel*. In that case, the Supreme Court found that Congress properly granted the State Department the authority to refuse to validate U.S. passports for travel to Cuba. *Zemel*, 381 U.S. at 7. While the statutory language in *Zemel* simply granted the Secretary the authority to grant and issue passports without an explicit guiding principle, the Supreme Court held that the statute "must take its content from history: it authorizes only those passport refusals and restrictions which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Id*. at 17-18 (omitting internal quotation and citation). Thus, the *Zemel* court found it sufficient that Congress delegated authority to the State Department with an understanding of the manner in which the State Department would implement that authority. *Id*. It was not necessary for Congress to spell it out in the statute. *Id*. As explained above, this broad delegation was acceptable to the Court because it would be unwise to restrict the State Department's actions with a narrower standard given the delicate and quickly changing nature of international relations. *Id*. at 17; *see also Curtiss-Wright*, 299 U.S. at 321-22.

Similarly, here, Congress has authorized the State Department to approve agreements with the understanding that the Department will do so only after reviewing such agreements for "impacts on foreign policy." H.R. REP. NO. 92-1303, at 11-15 (1972). Indeed, Congress' understanding of how the State Department will exercise the delegated power is even more clear in this case than it was in *Zemel* because here that understanding is explicitly expressed in the House Committee Report. *Id*. In contrast, the *Zemel* court inferred Congress' understanding from the State Department's "prior administrative practice." *Zemel*, 381 U.S. at 17-18.

The delegation in the IBA thus clearly meets the standard for an intelligible principle as applied to delegations concerning foreign affairs. *Id.; see also Curtiss-Wright*, 299 U.S. at 324, 328 (explaining that the Court should not be hasty to disturb the longstanding legislative practice of delegating broad authority over foreign affairs). A claim challenging the constitutionality of a delegation carries the heavy burden of showing the complete lack of an intelligible principle. *See National Broadcasting Co.*, 319 U.S. at 225-26; *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998). Because the language, history, and factual context make clear that the State Department is to approve only agreements consistent with U.S. foreign policy, Plaintiffs cannot allege any set of facts which would entitle them to relief on Count One.

* * * *

E. Counts Six And Seven Must Be Dismissed Because Plaintiffs Cannot Establish Standing And Because They Are Not Reviewable Under The APA

* * * *

3. Issuance of the Presidential Permit and approval of the Crossing Agreement are not subject to judicial review because they are agency actions committed to agency discretion by law

Even if the Court were to conclude that the issuance of Presidential Permit by the State Department constituted agency action, rather than Presidential action, the APA still provides no basis for the Court to review Plaintiffs' claims because issuance of the permit and the approval of the Crossing Agreement were undertaken pursuant to executive authority over foreign relations and therefore were committed to agency discretion by law. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997) (holding that State Department issuance of visas was unreviewable under the APA as agency action "committed to agency discretion by law.") (citation omitted); *see also Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975); 5 U.S.C. § 701(a)(2). "If in the [statute] Congress delegated to the President authority to make a decision in the province of foreign affairs, clearly the courts would have no authority to second-guess the President's decisions or those of his designees with respect thereto." *Rainbow Navigation, Inc. v. Dep't of Navy*, 620 F.Supp. 534, 541 (D.D.C. 1985) *aff'd*, 783 F.2d 1072 (D.C. Cir. 1986) (citing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933)).

In *Legal Assistance for Vietnamese Asylum Seekers*, the D.C. Circuit was faced with a claim challenging the State Department's issuance of visas and noted that "the agency is entrusted by a broadly worded statute with balancing complex concerns involving security and diplomacy." 104 F.3d at 1353. "[W]here the President acted under a congressional grant of discretion as broadly worded as any we are likely to see, and where the exercise of that discretion

occurs in the area of foreign affairs, we cannot disturb his decision simply because some might find it unwise or because it differs from the policies pursued by previous administrations." *Id.* (quoting *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 282 (D.C. Cir. 1989)). "In light of the lack of guidance provided by the statute and the complicated factors involved in consular venue determinations, we hold that plaintiffs' claims under both the statute and the APA are unreviewable because there is 'no law to apply.'" *Legal Assistance*, 104 F.3d at 1353.

Here, the IBA provides broad discretion to the President (in the case of Presidential Permits under 33 U.S.C. § 535b) and to the State Department directly (in the case of approvals of international agreements in 33 U.S.C. § 535a), in areas that involve complex concerns regarding foreign relations, diplomacy, and national interest. "By long-standing tradition, courts have been wary of second-guessing executive branch decisions involving complicated foreign policy matters." *Legal Assistance*, 104 F.3d at 1353. Were this Court to attempt to review the decisions on the Presidential Permit or the Crossing Agreement, there would be no clear standard against which the Court could measure whether the decisions were actually consistent with United States foreign policy (in the case of Crossing Agreements), or whether they were in the national interest (in the case of Presidential Permits). Accordingly, these decisions are not reviewable under the APA, and Counts Six and Seven must be dismissed for failure to state a claim.

* * * *

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 2013 developments in a selection of cases brought under the ATCA and the TVPA in which the United States participated. Several cases involving claims under the TVPA are discussed in Chapter 10.

2. Extraterritorial Reach of ATS: *Kiobel v. Royal Dutch Petroleum Co.*

As discussed in *Digest 2012* at 127-28, the United States submitted a supplemental brief in the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* in 2012 on the question of whether the ATS allows a cause of action for violations occurring outside the territory of the United States. The Supreme Court issued its opinion on that issue on April 17, 2013. 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2011* at 129-36.

The Court was unanimous in holding that the claims in this particular case should be dismissed, but there were three separate opinions concurring in the Court's judgment. The majority of the Court reasoned that the principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Justice Kennedy wrote a separate concurring opinion emphasizing that the majority opinion properly leaves "open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute." Justice Alito's concurrence, in which Justice Thomas joined, advocates a broader application of the presumption against extraterritoriality than the Court's formulation such that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred –unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations." Justice Breyer's concurrence, in which Justices Ginsburg, Sotomayor, and Kagan joined, agrees "with the Court's conclusion" that there was no jurisdiction in this particular case, but "not with its reasoning." Specifically, Justice Breyer wrote:

> …I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Excerpts from the majority opinion follow.

* * * *

The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign. Respondents contend that claims under the ATS do not, relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," *Morrison v. National Australia Bank Ltd.*, 561 U.S. ——, ——, 130 S.Ct. 2869, 2878, 177 L.Ed.2d 535 (2010), and reflects the "presumption that United States law governs domestically but does not rule the world," *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007).

This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (*Aramco*). As this Court has explained:

> "For us to run interference in ... a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 [77 S.Ct. 699, 1 L.Ed.2d 709] (1957). The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.

We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad. See, *e.g.*, *Aramco*, *supra*, at 246, 111 S.Ct. 1227 ("These cases present the issue whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad"); *Morrison*, *supra*, at ——, 130 S.Ct., at 2876–2877 (noting that the question of extraterritorial application was a "merits question," not a question of jurisdiction). The ATS, on the other hand, is "strictly jurisdictional." *Sosa*, 542 U.S., at 713, 124 S.Ct. 2739. It does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law. But we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.

Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns. As the Court explained, "the potential [foreign policy] implications ... of recognizing.... causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*, at 727, 124 S.Ct. 2739; see also *id.*, at 727–728, 124 S.Ct. 2739 ("Since many attempts by federal courts to craft remedies

for the 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, 124 S.Ct. 2739 ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution"). These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.

These concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are "'specific, universal, and obligatory.'" *Id.,* at 732, 124 S.Ct. 2739 (quoting *In re Estate of Marcos, Human Rights Litigation,* 25 F.3d 1467, 1475 (C.A.9 1994)). As demonstrated by Congress's enactment of the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, identifying such a norm is only the beginning of defining a cause of action. See *id.,* § 3 (providing detailed definitions for extrajudicial killing and torture); *id.,* § 2 (specifying who may be liable, creating a rule of exhaustion, and establishing a statute of limitations). Each of these decisions carries with it significant foreign policy implications.

The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.

III

Petitioners contend that even if the presumption applies, the text, history, and purposes of the ATS rebut it for causes of action brought under that statute. It is true that Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad. See, *e.g.,* 18 U.S.C. § 1091(e) (2006 ed., Supp. V) (providing jurisdiction over the offense of genocide "regardless of where the offense is committed" if the alleged offender is, among other things, "present in the United States"). But to rebut the presumption, the ATS would need to evince a "clear indication of extraterritoriality." *Morrison,* 561 U.S., at ——, 130 S.Ct., at 2883. It does not.

To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality. See, *e.g., id.,* at ——, 130 S.Ct., at 2881–2882; *Small v. United States,* 544 U.S. 385, 388, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005); *Aramco,* 499 U.S., at 248–250, 111 S.Ct. 1227; *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 287, 69 S.Ct. 575, 93 L.Ed. 680 (1949).

Petitioners make much of the fact that the ATS provides jurisdiction over civil actions for "torts" in violation of the law of nations. They claim that in using that word, the First Congress "necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil." Supp. Brief for Petitioners 18. For support, they cite the common-law doctrine that allowed courts to assume jurisdiction over such "transitory torts," including actions for personal injury, arising abroad. See *Mostyn v. Fabrigas,* 1 Cowp. 161, 177, 98 Eng. Rep. 1021, 1030 (1774) (Mansfield, L.) ("[A]ll actions of a transitory nature that arise abroad may be laid as happening in an English county"); *Dennick v. Railroad Co.,* 103 U.S. 11, 18, 26 L.Ed. 439 (1881) ("Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the

parties").

Under the transitory torts doctrine, however, "the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place." *Cuba R. Co. v. Crosby,* 222 U.S. 473, 479, 32 S.Ct. 132, 56 L.Ed. 274 (1912) (majority opinion of Holmes, J.). The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law. The reference to "tort" does not demonstrate that the First Congress "necessarily meant" for those causes of action to reach conduct in the territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality.

Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign. See *Morrison, supra,* at ——, 130 S.Ct., at 2883 (noting that "[a]ssuredly context can be consulted" in determining whether a cause of action applies abroad). We explained in *Sosa* that when Congress passed the ATS, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S., at 723, 724, 124 S.Ct. 2739; see 4 W. Blackstone, Commentaries on the Laws of England 68 (1769). The first two offenses have no necessary extraterritorial application. Indeed, Blackstone—in describing them—did so in terms of conduct occurring within the forum nation. See *ibid.* (describing the right of safe conducts for those "who are here"); 1 *id.,* at 251 (1765) (explaining that safe conducts grant a member of one society "a right to intrude into another"); *id.,* at 245–248 (recognizing the king's power to "receiv[e] ambassadors at home" and detailing their rights in the state "wherein they are appointed to reside"); see also E. De Vattel, Law of Nations 465 (J. Chitty et al. transl. and ed. 1883) ("[O]n his entering the country to which he is sent, and making himself known, [the ambassador] is under the protection of the law of nations ...").

Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS. Each concerned the rights of ambassadors, and each involved conduct within the Union. In 1784, a French adventurer verbally and physically assaulted Francis Barbe Marbois—the Secretary of the French Legion—in Philadelphia. The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided. *Respublica v. De Longchamps,* 1 Dall. 111, 1 L.Ed. 59 (O.T.Phila.1784); *Sosa, supra,* at 716–717, and n. 11, 124 S.Ct. 2739. And in 1787, a New York constable entered the Dutch Ambassador's house and arrested one of his domestic servants. See Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L.Rev. 467, 494 (1986). At the request of Secretary of Foreign Affairs John Jay, the Mayor of New York City arrested the constable in turn, but cautioned that because "'neither Congress nor our [State] Legislature have yet passed any act respecting a breach of the privileges of Ambassadors,'" the extent of any available relief would depend on the common law. See Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 641–642 (2002) (quoting 3 Dept. of State, The Diplomatic Correspondence of the United States of America 447 (1837)). The two cases in which the ATS was invoked shortly after its passage also concerned conduct within the territory of the United States. See *Bolchos,* 3 F. Cas. 810 (wrongful seizure of slaves from a vessel while in port in the United States); *Moxon,* 17 F. Cas. 942 (wrongful seizure in United States territorial waters).

These prominent contemporary examples—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.

The third example of a violation of the law of nations familiar to the Congress that enacted the ATS was piracy. Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country. See 4 Blackstone, *supra,* at 72 ("The offence of piracy, by common law, consists of committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"). This Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application. See, *e.g., Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 173–174, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (declining to apply a provision of the Immigration and Nationality Act to conduct occurring on the high seas); *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 440, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 to the high seas). Petitioners contend that because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad.

Applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. See 4 Blackstone, *supra,* at 71. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves. See *Morrison,* 561 U.S., at ——, 130 S.Ct., at 2883 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms"); see also *Microsoft Corp.,* 550 U.S., at 455–456, 127 S.Ct. 1746.

Petitioners also point to a 1795 opinion authored by Attorney General William Bradford. See Breach of Neutrality, 1 Op. Atty. Gen. 57. In 1794, in the midst of war between France and Great Britain, and notwithstanding the American official policy of neutrality, several U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone. In response to a protest from the British Ambassador, Attorney General Bradford responded as follows:

> So far ... as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas *are* within the jurisdiction of the ... courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in ... those courts.... But some doubt rests on this point, in consequence of the terms in which the [applicable criminal law] is expressed. But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States....” *Id.,* at 58–59.

Petitioners read the last sentence as confirming that "the Founding generation understood the ATS to apply to law of nations violations committed on the territory of a foreign sovereign." Supp. Brief for Petitioners 33. Respondents counter that when Attorney General Bradford referred to "these acts of hostility," he meant the acts only insofar as they took place on the high seas, and even if his conclusion were broader, it was only because the applicable treaty had extraterritorial reach. See Supp. Brief for Respondents 28–30. The Solicitor General, having once read the opinion to stand for the proposition that an "ATS suit could be brought against American citizens for breaching neutrality with Britain only if acts did not take place in a foreign country," Supp. Brief for United States as *Amicus Curiae* 8, n. 1 (internal quotation marks and brackets omitted), now suggests the opinion "could have been meant to encompass ... conduct [occurring within the foreign territory]," *id.*, at 8.

Attorney General Bradford's opinion defies a definitive reading and we need not adopt one here. Whatever its precise meaning, it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain. The opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.

Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. As Justice Story put it, "No nation has ever yet pretended to be the custos morum of the whole world...." *United States v. The La Jeune Eugenie,* 26 F. Cas. 832, 847 (No. 15,551) (C.C.Mass.1822). It is implausible to suppose that the First Congress wanted their fledgling Republic—struggling to receive international recognition—to be the first. Indeed, the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing.

The United States was, however, embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States. Bradley, 42 Va. J. Int'l L., at 641. Such offenses against ambassadors violated the law of nations, "and if not adequately redressed could rise to an issue of war." *Sosa,* 542 U.S., at 715, 124 S.Ct. 2739; cf. The Federalist No. 80, p. 536 (J. Cooke ed. 1961) (A. Hamilton) ("As the denial or perversion of justice ... is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned"). The ATS ensured that the United States could provide a forum for adjudicating such incidents. See *Sosa, supra,* at 715–718, and n. 11, 124 S.Ct. 2739. Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.

Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. See *Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 77–78 (C.A.D.C.2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). Moreover, accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.

We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. "[T]here is no clear

indication of extraterritoriality here," *Morrison*, 561 U.S., at ——, 130 S.Ct., at 2883, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.

IV

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. ——, 130 S.Ct., at 2883–2888. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

* * * *

3. Cases Decided Subsequent to *Kiobel*

a. Balintulo v. Daimler AG *(Apartheid litigation)*

On August 21, 2013, the U.S. Court of Appeals for the Second Circuit decided a case that had been held in abeyance pending the Supreme Court's decision in *Kiobel*, *Balintulo et al. v. Daimler AG, Ford Motor Co., and IBM Corp.*, 727 F.3d 174 (2d. Cir. 2013). Defendants in the case sought a writ of mandamus from the court of appeals to the district court to resolve the ATS claims in their favor. Plaintiffs sought damages from the named corporate defendants for alleged aiding and abetting of violations of customary international law committed by the South African government during the apartheid era. The court of appeals denied the writ as unnecessary because the *Kiobel* decision, along with the opportunity to move for dismissal in the district court, would allow defendants to seek dismissal through a motion for judgment on the pleadings in the district court. The United States had submitted a statement of interest, as well as multiple amicus briefs at various stages in the long-running litigation. See *Digest 2009* at 140-44; *Digest 2008* at 236-38; and *Digest 2005* at 400-11. For further background on the case, see *Digest 2007* at 226-27 and *Digest 2004* at 354-61. Excerpts follow from the opinion of the court of appeals (with footnotes and citations to the record omitted).

_____

* * * *

As we have now made clear, *Kiobel* forecloses the plaintiffs' claims because the plaintiffs have failed to allege that any relevant conduct occurred in the United States. The plaintiffs resist this obvious impact of the *Kiobel* holding on their claims. The Supreme Court's decision, they argue, does not preclude suits under the ATS based on foreign conduct when the defendants are American nationals, or where the defendants' conduct affronts significant American interests identified by the plaintiffs. Curiously, this interpretation of *Kiobel* arrives at precisely the

conclusion reached by Justice Breyer, who, writing for himself and three colleagues, only concurred in the judgment of the Court affirming our decision to dismiss all remaining claims brought under the ATS. *See Kiobel,* 133 S.Ct. at 1671 (Breyer, J., concurring). The plaintiffs' argument, however, seeks to evade the bright-line clarity of the Court's actual holding—clarity that ensures that the defendants can obtain their desired relief without resort to mandamus. We briefly highlight why the plaintiffs' arguments lack merit.

a.

The Supreme Court's *Kiobel* decision, the plaintiffs assert, "adopted a new presumption that ATS claims must 'touch and concern' the United States with 'sufficient force' to state a cause of action." The plaintiffs read the opinion of the Court as holding only that "mere corporate presence" in the United States is insufficient for a claim to "touch and concern" the United States, but that corporate citizenship in the United States is enough. *Id.* at 11 ("[I]nternational law violations committed by U.S. citizens on foreign soil 'touch and concern' U.S. territory with 'sufficient force' to displace the *Kiobel* presumption."). Reaching a conclusion similar to that of Justice Breyer and the minority of the Supreme Court in *Kiobel*, the plaintiffs argue that whether the relevant conduct occurred abroad is simply one prong of a multi-factor test, and the ATS still reaches extraterritorial conduct when the defendant is an American national. *Id.* at 8–11.

We disagree. The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States. *Kiobel,* 133 S.Ct. at 1662, 1668– 69. The majority framed the question presented in these terms no fewer than three times; it repeated the same language, focusing solely on the location of the relevant "conduct" or "violation," at least eight more times in other parts of its eight-page opinion; and it affirmed our judgment dismissing the plaintiffs' claims because "all the relevant conduct took place outside the United States," *id.* at 1669. Lower courts are bound by that rule and they are without authority to "reinterpret" the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants. *See Agostini v. Felton,* 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *see also Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 66–67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Accordingly, if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.

In the conclusion of its opinion, the Supreme Court stated in dicta that, even when claims brought under the ATS "touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel,* 133 S.Ct. at 1669 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, ——U.S. ——, 130 S.Ct. 2869, 2883–88, 177 L.Ed.2d 535 (2010)). As the Court observed in *Morrison*, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 130 S.Ct. at 2884. But since *all* the relevant conduct in *Kiobel* occurred outside the United States—a dispositive fact in light of the Supreme Court's holding—the Court had no reason to explore, much less explain, how courts should proceed when *some* of the relevant conduct occurs in the United States.

b.

The plaintiffs also assert that "the *Kiobel* presumption is displaced here" because of the compelling American interests in supporting the struggle against apartheid in South Africa. These case-specific policy arguments miss the mark. The canon against extraterritorial application is "a presumption about *a statute's meaning.*" *Morrison,* 130 S.Ct. at 2877 (emphasis supplied). Its "wisdom," the Supreme Court has explained, is that, "[*r*]*ather than guess anew in*

each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 2881 (emphasis supplied). For that reason, the presumption against extraterritoriality applies to the *statute*, or at least the part of the ATS that "carries with it an opportunity to develop common law," *Sosa*, 542 U.S. at 731 n. 19, 124 S.Ct. 2739, and "allows federal courts to recognize certain causes of action," *Kiobel*, 133 S.Ct. at 1664. In order "to rebut the presumption, the ATS [*i.e.*, *the statute*] would need to evince a clear indication of extraterritoriality." *Id.* at 1665 (quotation marks omitted). Applying this approach in *Kiobel*, the Supreme Court held as a matter of statutory interpretation that the implicit authority to engage in common-law development under the ATS does not include the power to recognize causes of action based solely on conduct occurring within the territory of another sovereign. In *all* cases, therefore the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign. In other words, a common-law cause of action brought under the ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should.

* * * *

b. Sarei v. Rio Tinto

On June 28, 2013, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the claims in *Sarei v. Rio Tinto* in accordance with a remand order from the U.S. Supreme Court issued on the basis of the Court's decision in *Kiobel*. 722 F.3d 1109 (9th Cir. 2013). See *Digest 2011* at 137 for background on the case. See also *Digest 2001* at 337-39; *Digest 2002* at 333–43, 357, 574–75; *Digest 2006* at 431–50; Digest 2007 at 227-31; *Digest 2008* at 238–44.

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES

1. *Bernstein v. Kerry*

On April 1, 2013, the United States filed a motion to dismiss in a case brought by Americans residing in Israel challenging the U.S. provision of foreign assistance to the Palestinian Authority and for the West Bank and Gaza. Among other things, plaintiffs' complaint asserts that the U.S. government failed to comply with certain limits and requirements, including those relating to support for terrorism, in statutes authorizing foreign assistance to the Palestinian Authority and other organizations active in the West Bank and Gaza. The plaintiffs asked the U.S. District Court for the District of Columbia to grant mandamus relief compelling the U.S. government to seek recovery of these funds. The U.S. brief in support of its motion to dismiss presents three arguments: first, that the plaintiffs lack standing; second, that the case presents a political question; and third, that there is no mandamus jurisdiction or any other identified right of action. The excerpt below comes from the section of the brief on the political question

doctrine. The brief in its entirety is available at *www.state.gov/s/l/c8183.htm*. The U.S. reply brief is also available at *www.state.gov/s/l/c8183.htm*. On August 26, 2013, the district court issued its opinion granting the motion to dismiss based on the plaintiffs' lack of standing. *Bernstein v. Kerry*, 962 F. Supp. 2d 122 (D.D.C. 2013).

_____

* * * *

Plaintiffs' claims in this action should also be dismissed as nonjusticiable pursuant to well established principles of the political question doctrine. The political question doctrine, the roots of which go back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803), counsels courts to abstain from ruling on questions properly reserved to the political branches of government. The Supreme Court has set forth the following formulation for determining whether an issue constitutes a political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). For the doctrine to apply, the Court "need only conclude that one [*Baker*] factor is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

While not every case that touches on foreign affairs presents a political question, those which challenge Executive Branch foreign policy determinations do:

> [T]he 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 decisions of a kind for which the Judiciary has neither the 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 & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); accord *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) ("An examination of the specific areas in which courts have invoked the political question doctrine reveals that national security, military matters and foreign relations are 'quintessential sources of political questions.'" (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010)).

Whether a question is justiciable turns on whether it presents a legal question or a policy question that turns "'on standards that defy judicial application.'" *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *Baker*, 369 U.S., at 211). The questions that Plaintiffs seek to litigate in this case, to the extent that they have any meaningful content, are foreign policy questions that are constitutionally committed to the political branches and for which there are no judicially manageable standards.

Plaintiffs seek to have this Court second guess policy decisions to provide, and the manner in which the Government provides, foreign assistance to the Palestinian Authority and for the West Bank and Gaza. But these determinations are quintessentially policy-based determinations of the kind that are committed to the political branches. See, *e.g.*, *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (holding that whether a particular organization "threatens the security of the United States" is not justiciable because "it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch"). As described above, Congress has set forth certain conditions relating to foreign assistance to the Palestinian Authority and for the West Bank and Gaza, but those conditions charge the President and Secretary of State with determining whether there is a factual basis to certify to conditions or to waive restrictions based upon an assessment of the national security interests of the United States. Many of the conditions on the provision of assistance for the West Bank and Gaza or the Palestinian Authority are contained in the annual appropriations act for the Department of State and the U.S. Agency for International Development, which Congress generally modifies and enacts each year. To the extent that Plaintiffs raise questions about the nature of the Palestinian Authority, such as whether it is actually a state, or whether it is controlled by HAMAS, these too are clearly determinations committed to the political branches. *E.g.*, *United States v. Pink*, 315 U.S. 203, 229 (1942) (President's recognition power is "not limited to a determination of the government to be recognized" but "includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.").

Finally, Plaintiffs' challenge to foreign policy assessments such as whether the United Nations Relief and Works Agency (UNRWA) complies with the conditions on which the U.S. has provided contributions are similarly barred by the political question doctrine. The determination of what constitutes adequate steps and whether a foreign entity is meeting them are policy judgments for which there are no judicially manageable legal standards. See, *e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("policies in regard to the conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); *Oetjen v. Central Leather Co*., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *Ange v. Bush*, 752 F. Supp. 509, 513 (D.D.C. 1990) ("The judicial branch . . . is neither equipped nor empowered to intrude into the realm of foreign affairs where the Constitution grants operational powers only to the two political branches and where decisions are made based on political and policy considerations. The far-reaching ramifications of those decisions should fall upon the shoulders of those elected by the people to make those decisions.").

Plaintiffs' complaint makes clear that this suit is merely an "attempt to litigate [their] disagreement with how this country's foreign policy is managed," and such policy disagreements are properly resolved within the political branches, and are thus nonjusticiable. *Eveland v. Director of CIA*, 843 F.2d 46, 49 (1st Cir. 1988). Plaintiffs, for example, complain that the Secretary of State could not have reached certain conclusions about the Palestinian Authority's efforts to combat terrorism because, in Plaintiffs' view, the Palestinian Authority has "not taken reasonable steps to arrest terrorists," among other things. See Compl. ¶ 116. Assuming that the Secretary of State has reached a conclusion contrary to Plaintiffs' view of the world, the judicial process is inherently ill-suited to the resolution of such disputes. Where, as here, the proper venue for the resolution of a disputes is in the political branches, the Court should dismiss the case as nonjusticiable.

* * * *

2. *Alaska v. Kerry*

See Chapter 4.B.2. for discussion of the district court's opinion in *Alaska v. Kerry*, which included consideration of the political question doctrine.

Cross References

Piracy, **Chapter 3.B.6.**
Zivotofsky *case regarding executive branch authority over state recognition*, **Chapter 9.C.**
Ahmed v. Magan *(TVPA)*, **Chapter 10.B.4.**
Manoharan v. Rajapaksa *(TVPA)*, **Chapter 10.C.**
Permit for new international trade crossing in Detroit, **Chapter 11.F.2.**
Daimler AG v. Bauman (*TVPA)*, **Chapter 15.E.2.**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On April 19, 2013, the Department of State released the 2012 Country Reports on Human Rights Practices. The Department of State submits the reports to Congress annually 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/*; Secretary of State John Kerry's remarks on the release of the reports are available at *www.state.gov/secretary/remarks/2013/04/207791.htm*.

2. UN General Assembly Third Committee Resolutions

On November 19, 2013, the UN General Assembly's Third Committee adopted four resolutions relating to ongoing, serious human rights abuses in Iran, North Korea, and Burma. Ambassador Samantha Power, U.S. Permanent Representative to the UN, delivered a statement on the resolutions, excerpted below and available at *http://usun.state.gov/briefing/statements/217757.htm*.

_____

* * * *

On Iran, the Third Committee resolution expressed deep concern regarding ongoing human rights violations, including torture, restricting the fundamental freedoms of assembly, opinion and expression, and the systematic targeting of human rights defenders by the Government of

Iran. The resolution called on the government to fully abide by its human rights obligations, eliminate discrimination against religious and ethnic minorities, address pervasive gender inequality, and respond positively to the UN Special Rapporteur's request to visit Iran to carry out his mandate.

On North Korea, the General Assembly rightly expressed serious concern about the deteriorating human rights situation, including torture, inhumane conditions of detention, public executions, and "all pervasive and severe" restrictions on the freedoms of thought, conscience, religion, expression and peaceful assembly. The resolution urged the government to cooperate both with the Secretary-General's Special Rapporteur for Human Rights as well as with the Human Rights Council's newly established commission of inquiry.

In contrast to the other … resolutions, this year's resolution on Burma was able to welcome the government's efforts to build democratic institutions. Nonetheless, we share the General Assembly's concern that arbitrary arrests and detentions of Burmese human rights defenders continue. Today's resolution urges the government to address these issues, as well as the violence, displacement and dire economic conditions affecting ethnic and religious minorities, including the Rohingya in the Rakhine State and Muslim minorities throughout the country.

Through the adoption of these resolutions, the international community has once again demonstrated its support for the fundamental freedoms and dignity of individuals around the world, as enshrined in the Universal Declaration of Human Rights.

* * * *

3. ICCPR

On July 3, 2013, the United States filed its response to the Human Rights Committee's list of issues concerning the 2011 Fourth Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"). The U.S. response is available at *www.state.gov/j/drl/rls/212393.htm*. The review of the Fourth Periodic Report of the United States, scheduled for the Human Rights Committee's 109th session, was postponed at the request of the United States due to the U.S. federal government shutdown during the month of October. The review was subsequently rescheduled for March 13-14, 2014 during the Committee's 110th session.

4. Human Rights Council

a. Overview

The United States continued its participation on the Human Rights Council ("HRC") in 2013, after its election to a second term in 2012. On February 26, 2013, at the 22nd session of the HRC, Esther Brimmer, Assistant Secretary of State for International

Organization Affairs, delivered the first U.S. intervention of its second term. Assistant Secretary Brimmer summarized the key achievements of the HRC during the United States' first term and identified work that remains for the HRC. Her remarks are excerpted below and available at *http://geneva.usmission.gov/2013/02/26/esther-brimmer-presents-u-s-priorities-at-hrc-22-commencement/*.

* * * *

… In September 2009, I delivered the first U.S. intervention as a member of this esteemed body, in which the United States pledged to pursue broad international cooperation, both with traditional partners and across longstanding divides, to advance universal human rights and strengthen the Human Rights Council's ability to achieve its essential mandate. I set out four aspirations that this Council must work to attain: universality, dialogue, principle, and truth. And in the three and a half years since the United States first joined the Human Rights Council, we have seen much progress toward these aspirations, and have reached a number of impressive achievements, principally through broad cooperation and collaboration by this Council's diverse membership.

First among these achievements has been the Human Rights Council's heightened willingness and capacity to address heinous human rights violations. Over the past three years, the Council has taken concrete measures, often in real-time, that shine the spotlight on abuses, and muster international political will toward ending them. It is not a coincidence that violence can imperil human rights, and the Human Rights Council has not shied away from acting amidst ongoing instability and violence. Faced with crises in Libya and Cote d'Ivoire, the Council quickly established new mechanisms for documenting human rights abuses and violations, which have built a strong foundation for future accountability processes and helped maintain international pressure on human rights violators. This Council spoke the truth about human rights violations and abuses in some of the world's most difficult crises, and we must continue to do so.

Another remarkable advance was Resolution 16/18, through which the Council—after years of chronic division—came together to combat religious intolerance, including discrimination and violence. We applaud the leadership that Turkey, Pakistan, and other countries have shown on this resolution, and appreciate as well the support of the OIC Secretary-General. The international consensus on this issue offers a practical and effective means to fight intolerance, while avoiding the false choice of restricting the complementary and mutually-dependent freedoms of religion and expression. In today's networked world, hateful, insulting, and intolerant speech can be marginalized and defeated, not by less speech, but by more, only by encouraging positive and respectful expression. Countless examples have taught us that attempting to outlaw free expression is as dangerous as it is ineffective. That is why Resolution 16/18's catalogue of positive tools to fight intolerance—including education, nondiscrimination laws, and protecting places of worship—is so important, and why we must all continue our joint efforts to translate this consensus into concrete implementation of those policies. This pursuit of honest, open dialogue among member states was one of the themes I pledged the United States would pursue during our first term on the Council, and we will continue to do so during the coming three years.

The Council also has demonstrated its commitment to another benchmark I underscored in 2009, namely the universality of human rights obligations. In establishing the first ever special rapporteur on freedom of peaceable assembly and freedom of association, the Council took an important step towards helping to protect and realize these crucial rights. The Council's creation of a working group on discriminatory impediments to women's human rights demonstrated our commitment to combat continuing gender bias in all its forms. By formally recognizing that lesbian, gay, bisexual, and transgender men and women enjoy the same human rights as everyone else, the Council helped advance true universality of human rights worldwide. And completion of the first round of Universal Periodic Reviews, in which the human rights record of every single UN member state was subject to scrutiny before the Human Rights Council, has demonstrated that no country is exempt from the universality of its human rights obligations.

But as I speak here today for the first time since the United States was elected to a second term on the Human Rights Council, I must say that for all these achievements, the work of the Council remains unfinished, so long as any of us cannot exercise those fundamental rights that we all share by virtue of our common humanity. It is toward those unfinished tasks that we must devote ourselves in this twenty-second session, and beyond.

The Council's work remains unfinished so long as the Assad regime continues its outrageous attacks on innocent civilians, and disregards its international human rights obligations. The Human Rights Council acted quickly and courageously as one of the earliest voices to condemn these heinous depredations, and through multiple regular and special sessions has continued to call for an end to the violence. Given the essential role the independent commission of inquiry has played, the United States will strongly support at this session the extension of the commission's mandate for another year.

The Council's work remains unfinished so long as millions of North Koreans face untold human rights abuses amidst a daily struggle for survival. Principle demands that the countless human rights violations exacted by the Pyongyang government merit international condemnation and accountability. That is why the United States will support the call by High Commissioner Pillay and Special Rapporteur Marzuki for a mechanism of inquiry to document the DPRK's wanton human rights violations.

The Council's work remains unfinished so long as Sri Lanka continues to fall short in implementing even the recommendations of its own Lessons Learned and Reconciliation Commission, or in addressing the underlying sources of its longstanding ethnic conflict. Last year's HRC resolution encouraged brave civil society groups on the ground to continue their efforts, and the United States will introduce another resolution at this session to ensure that the international community continues to monitor progress, and to again offer assistance on outstanding reconciliation and accountability issues. The United States hopes this resolution will be a cooperative effort with the Sri Lankan government.

And the Council's work remains unfinished so long as it continues to unfairly single out Israel, the only country with a stand-alone agenda item. Until this Council ceases to subject Israel to an unfair and unacceptable bias, its unprincipled and unjust approach will continue to tarnish the reputation of this body, while doing nothing to support progress toward the peace among Israelis and Palestinians that we all desire so deeply.

* * * *

The United States participated in three sessions of the HRC in 2013. The key outcomes of each session for the United States are summarized in fact sheets issued by the State Department. The key outcomes at the 22nd session, described in a March 25, 2013 fact sheet, available at *www.state.gov/r/pa/prs/ps/2013/03/206606.htm*, include: resolutions on Sri Lanka, North Korea, Syria, Iran, Burma, Libya, and Mali as well as resolutions relating to cross-cutting human rights priorities relating to human rights defenders, genocide prevention, and freedom of religion or belief and combating religious intolerance. The key outcomes at the 23rd session are described in a June 19, 2013 fact sheet, available at *http://geneva.usmission.gov/2013/06/20/key-u-s-outcomes-at-the-un-human-rights-council-23rd-session/*. They include responses to the situations in Syria, Belarus, Eritrea, and Egypt and resolutions on freedom of expression, and women's human rights. The key outcomes at the 24th session are summarized in the State Department's October 1, 2013 fact sheet, available at *www.state.gov/r/pa/prs/ps/2013/10/215010.htm*. They include responses to the situations in Syria, Sudan, the Democratic Republic of the Congo, the Central African Republic, Somalia, and Sri Lanka, as well as resolutions on freedom of assembly and association, on preventing reprisals, condemning female genital mutilation, on the rights of indigenous peoples, and on human rights in sports and the Olympics.

b. Actions regarding Syria

The HRC adopted several additional resolutions addressing the crisis in Syria in 2013 and supported the ongoing work of the Commission of Inquiry ("COI"). Resolution 22/24, adopted at the 22nd session on March 22, 2013, was co-sponsored by the United States. U.S. Ambassador to the HRC Eileen Chamberlain Donahoe introduced the resolution in a statement available at *http://geneva.usmission.gov/2013/03/22/syria-8/*. She said:

> This resolution calls further international attention to the brutality of the Assad regime and the ongoing serious violations of international humanitarian law and international human rights law in Syria. We are grateful that the COI will continue its important work to document violations and abuses committed by all parties to the conflict.

On May 29, 2013, during the 23rd session of the HRC, as a result of a joint request made by Qatar, Turkey, and the United States, the HRC held an urgent debate on "The deteriorating situation of human rights in the Syrian Arab Republic, and the recent killings in Al Qusayr." Ambassador Donahoe's statement during the Urgent Debate is available at *https://geneva.usmission.gov/2013/05/29/u-s-statement-at-the-urgent-debate-on-syria/*. She said:

> The assault on Qusayr is the latest regime attempt to use sectarian-driven war to divide the Syrian people. We are deeply concerned about the risks of increasing sectarian violence from all sides. We condemn Hizballah's direct role in the

> hostilities, a role which inflames regional tensions, escalates violence inside Syria, and incites instability in Lebanon. The regime has an opportunity to calm these tensions now by ending its assault.
>
> There can be no lasting peace in Syria without justice for the horrific crimes committed in Qusayr and elsewhere. There is no place in a future Syria for Assad or members of his regime who have ordered or committed atrocities. As the international community works to support a political settlement, based on the principles outlined in the Geneva Communiqué, we also must also support the groundwork for accountability.
>
> The Assad regime and its supporters who commit crimes against the Syrian people should know that the world is watching, and they will be held accountable.

Ambassador Donahoe also introduced one of the resolutions on Syria at the 23rd session of the HRC on June 14, 2013. Her statement is available at *http://geneva.usmission.gov/2013/06/14/ambassador-donahoes-introduction-statement-on-syria/*. Ambassador Donahoe described the resolution in her introduction:

> …This resolution condemns in the strongest terms all massacres taking place in Syria, such as most recently in Al-Qusayr, and the intervention of all foreign combatants in Syria, including those fighting on behalf of the regime and in particular Hezbollah, because their involvement and role in ongoing atrocities further exacerbates the deteriorating human rights and humanitarian situation.
>
> The resolution also focuses on the continued lack of cooperation of the Government of the Syrian Arab Republic with the commission of inquiry, in particular the persistent denial of access to Syria for members of the commission. It is long past time that the Syrian government cooperate with the mechanisms of this Council.

Ambassador Donahoe delivered another statement after Resolution 23/26 was adopted on June 14, 2013 by a vote of 37 in favor, one against, with nine abstentions. Her statement on the adoption of the resolution, excerpted below, is available at *http://geneva.usmission.gov/2013/06/14/the-u-s-the-adoption-of-the-resolution-on-the-human-rights-situation-in-syria/*.

* * * *

The resolution had several purposes, the first of which is to press for immediate unfettered access for the commission of inquiry. The resolution welcomes the statement by the Syria Opposition Coalition of June 5, 2013 offering cooperation with the commission of inquiry in opposition-

controlled areas, and denounces the Syrian authorities' denial of access which has hampered investigation of widespread and systematic gross violations of human rights as well as violations of international humanitarian law.

Further, the resolution condemns in the strongest terms the continued widespread and systematic violence by Syrian authorities and government-affiliated shabbiha militias, as well as human rights abuses and violations of international law by all parties including anti-government armed groups. The resolution notes the finding of the commission of inquiry that the intensity and scale of the violations committed by government forces and affiliated militia are unmatched.

The United States welcomes the clarity of the resolution's condemnation of the massacres taking place in Syria, and the denunciation of the role of foreign fighters, especially Hizbollah, fighting on behalf of the regime. Recalling the most recent urgent debate on the massacre in Al-Qusayr, the resolution condemns the influx of all foreign combatants, in particular Hizbollah, whose involvement has had a significant deleterious effect on the human rights and humanitarian situation on the ground, which has serious negative consequences for neighboring countries.

Hizbollah's intervention on behalf of the regime is unacceptable, and could have devastating consequences for Syria and the entire region. The UN Secretary General, the High Commissioner for Human Rights, and the independent Commission of Inquiry have all condemned Hizbollah's intervention. It is only appropriate that the HRC do so as well.

The desperate humanitarian situation inside Syria is deepening. Access for relief efforts is an urgent priority. The resolution we have just adopted also demands that Syrian authorities facilitate the access of humanitarian organisations to all people in need, by allowing aid agencies to use the most efficient routes and providing authorization for cross-border humanitarian operations. One week ago, the UN issued the largest appeal in its history to help those caught up in the conflict. Humanitarian agencies have estimated that over 10 million Syrians may be in need of aid by year's end. With this resolution the Human Rights Council urges all donors to act rapidly to provide financial support for this enormous and essential effort.

This tragic chapter in Syria's history began over 800 days ago with the Assad regime's decision to meet peaceful protests with violence, a response which started this conflict that has killed more than 90,000 people. We reiterate our call, united with the Syrian people and members of the international community, for an immediate end to all violations of human rights and abuses, but especially the Assad regime's egregious, widespread and continued violations of human rights and international humanitarian law.

The international community must continue to support documentation and other efforts to lay the groundwork for accountability for human rights violations, even as work continues toward a political settlement based on the principles outlined in the Geneva Communiqué. The United States is helping Syrians prepare for this accountability by supporting the documentation of violations committed by all sides of the conflict, and bolstering the capacity of civil society organizations to build the foundations for lasting peace.

The Human Rights Council is again showing its determination and responsibility in using the authority and tools entrusted to it to respond to urgent crises in real time. It is also rightly fulfilling the important role of drawing global attention to gross violations of human rights and collecting the evidence necessary to ensure future accountability for human rights violations and crimes against humanity.

* * * *

Before the 24th session of the HRC began in September 2013, the Assad regime committed a chemical weapons attack on August 21, 2013, causing the death of over one thousand people, including hundreds of children. For more on the United States response to this chemical weapons attack, see Chapter 19.F.1. Ambassador Donahoe referred to the August 21 attack in her September 16, 2013 statement at the presentation of the report by the UN commission of inquiry on Syria at the 24th session of the HRC. Her statement, excerpted below, is available in full at *http://geneva.usmission.gov/2013/09/16/u-s-statement-presentation-of-report-by-un-commission-of-inquiry-on-syria/*.

_____

* * * *

For more than two years, the regime of Bashar Al-Asad has turned the full force of its firepower against the Syrian people, including most recently its use of chemical weapons in the Damascus suburbs on August 21. The world will not forget the horrific images of innocent children choking as they inhaled the toxic fumes, nor will we forget the more than 100,000 people who have died during this conflict.

We deplore the acceleration of civilian deaths, including from constant regime attacks during Ramadan. We equally deplore the increasing deaths due to torture in regime facilities, the continued detention of numerous human rights activists without due process, and the impact of shelling on civilians. We echo the Commission's recommendations for the government to cease these violations and grant unfettered Commission access to Syria.

We reiterate the need for accountability for the violations and abuses committed in Syria and call on the international community to support such efforts. We also call on the Syrian people to refrain from acts of retributive violence and to focus on building a sustainable peace that includes justice and accountability.

* * * *

At its 24th session, the HRC adopted another resolution on Syria. Ambassador Donahoe introduced the resolution in a statement available at *http://geneva.usmission.gov/2013/09/27/u-s-introduces-resolution-on-syria-at-the-human-rights-council/*. She described the resolution as follows:

> The resolution that we present today has three key aims. First, to condemn in the strongest terms the ongoing violations of international humanitarian law and the violations and abuses of international human rights law. Second, to call for full and unfettered access throughout Syria for the UN mandated commission of inquiry and humanitarian agencies. Third, to highlight the need for accountability for serious violations of international humanitarian law and human rights law. The resolution thus encourages states to take steps to support and enable current and future accountability efforts.

Resolution 24/22 was adopted on September 27, 2013 with 40 votes in favor, one against, and six abstentions. Ambassador Donahoe participated in a joint press briefing with representatives of the United Kingdom, Turkey, and France following adoption of the resolution. The transcript of her remarks at that press briefing is available at *http://geneva.usmission.gov/2013/09/27/transcript-press-briefing-following-adoption-of-hrc-resolution-on-syria/*.

c. Actions regarding Sri Lanka

On March 21, 2013, at its 22nd session, the HRC adopted a resolution on promoting reconciliation and accountability in Sri Lanka that followed up on resolution 19/2 adopted in 2012. See *Digest 2012* at 140 for background on resolution 19/2. Ambassador Donahoe introduced resolution 22/1 in a statement available at *http://geneva.usmission.gov/2013/03/21/sri-lanka-resolution-2*. Ambassador Donahoe described the resolution in her introduction:

> This resolution welcomes and acknowledges important progress that has been made in certain areas in Sri Lanka, but also recognizes that much remains to be done. Through this resolution, we encourage the Government of Sri Lanka to implement the constructive recommendations of the Lessons Learnt and Reconciliation Commission (LLRC) and the recommendations in the High Commissioner's report, to take additional measures to fulfill its obligations and commitments on accountability and reconciliation, and to address concerns on issues of the rule of law and human rights in Sri Lanka. The United States stands ready to assist with this vital work.
>
> In addition, this resolution highlights the constructive role of the OHCHR and special procedures mandate holders in providing technical assistance and advice on addressing these concerns, encouraging the government of Sri Lanka to cooperate with those actors. The United States is grateful for the active and constructive engagement of many delegations on this text, which reflects input from a wide range of cross-regional delegations. We are committed to working constructively with Sri Lanka and the international community to help address these challenges. To that end, together with all of our co-sponsors and supporters, the United States asks that this Council adopt this resolution.

The resolution was adopted on March 21, 2013 with 25 votes in favor, 13 against, and eight abstentions. Ambassador Donahoe's statement following adoption of the resolution is available at *http://geneva.usmission.gov/2013/03/21/srilanka/*. Secretary of State John Kerry also issued a press statement after the HRC vote, available at *www.state.gov/secretary/remarks/2013/03/206486.htm*. Secretary Kerry's statement included the following:

Today's vote in the UN Human Rights Council encourages the Government of Sri Lanka to continue on the path toward lasting peace and prosperity following decades of civil war and instability. This resolution, which builds on a similar 2012 resolution, reaffirmed that Sri Lanka must take meaningful action on reconciliation and accountability in order to move forward. The United States, together with international partners, calls upon the Government of Sri Lanka to fulfill its public commitments to its own people on these longstanding issues.

While some important progress has been made, there is much work still to be done. We look to the Government of Sri Lanka to implement the recommendations of the Lessons Learnt and Reconciliation Commission (LLRC) and to reverse recent negative developments on rule of law and human rights. The United States stands ready to assist with this vital work. I look forward to continuing our engagement with the Government of Sri Lanka and strengthening our friendship with the Sri Lankan people.

B. DISCRIMINATION

1. Race

a. Periodic report of the United States to the Committee on the Elimination of Racial Discrimination

On June 12, 2013, the United States submitted its Periodic Report to the United Nations Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). As explained in the introduction to the report, the United States submitted its initial, second, and third periodic reports in September 2000 as one document ("Initial Report") and submitted its fourth, fifth, and sixth period reports as one document in April 2007 ("2007 Report"). See *Digest 2000* at 347-50 and *Digest 2007* at 293-315. The United States submitted a one-year follow-up report on January 13, 2009. The 2013 submission responds to the Committee's requests for the seventh, eighth, and ninth periodic reports of the United States and provides an update on progress since the submission of its prior reports. Excerpts below address selected legal issues regarding U.S. implementation of CERD since 2008. The full report is available at *www.state.gov/j/drl/rls/cerd_report/210605.htm.*

* * * *

2. The United States has always been a multi-racial and multi-ethnic society, and its pluralism is increasing. We have made great strides over the years in overcoming the legacies of slavery,

racism, ethnic intolerance, and destructive laws, policies, and practices relating to members of racial and ethnic minorities. Indeed, fifty years ago, the idea of having a Black/African American President of the United States would not have seemed possible; today, it is a reality. We recognize, however, that the path toward racial equality has been uneven, racial and ethnic discrimination still persists, and much work remains to meet our goal of ensuring equality for all. Our nation's Founders, who enshrined in our Constitution their ambition "to form a more perfect Union," bequeathed to us not a static condition, but a perpetual aspiration and mission. This Report shares our progress in implementing our undertakings under the CERD and on related measures to address racial discrimination.

* * * *

6. … [T]here are cases where we may not agree with the legal or factual premises underlying a given request for information or where concluding observations do not bear directly on obligations under the Convention; nevertheless, in the interest of promoting dialogue and cooperation, we have provided requested information to the degree possible. …

* * * *

16. The United States legal system provides for special measures when circumstances so warrant. …Recently, DOJ actively defended the undergraduate admission program of the University of Texas, which was challenged by two unsuccessful White candidates for undergraduate admission. The Texas program adopts a holistic approach—examining race as one component among many—when selecting among applicants who are not otherwise eligible for automatic admission by virtue of being in the top ten percent of their high school classes. The U.S. Court of Appeals for the Fifth Circuit upheld the University's limited use of race as justified by a compelling interest in diversity and as narrowly tailored to achieve a critical mass of minority students. The Supreme Court heard arguments in the case, Fisher v. Texas, in October 2012, and is expected to decide the case by June 2013. In its *amicus curiae* brief, the Solicitor General argued, on a brief signed by several federal agencies, that, like the University, the United States has a compelling interest in the educational benefits of diversity, and that the University's use of race in freshman class admissions to achieve the educational benefits of diversity is constitutional.

* * * *

18. Recent laws relating to discrimination, including discrimination based on race, color, and national origin, or minority groups, include:

- The Lilly Ledbetter Fair Pay Act, signed by President Obama in 2009, provides that the statute of limitations for bringing a wage discrimination claim, including claims alleging wage discrimination based on race or national origin, runs from the time an individual is "affected by application of a discriminatory compensation decision . . . including each time wages, benefits, or other compensation is paid." The law overrides a Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co*., 500 U.S. 618 (2007).
- The Genetic Information Nondiscrimination Act of 2008 governs the use of genetic information in health insurance and employment decisions. Protected genetic

information includes genetic services (tests, counseling, education), genetic tests of family members, and family medical history. As it relates to racial and ethnic discrimination, this law prohibits an insurer or employer from refusing to insure or employ someone with a genetic marker for disease associated with certain racial or ethnic groups, such as sickle cell trait.

- The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (Shepard-Byrd Act) creates a new federal prohibition on hate crimes, 18 U.S.C. 249; simplifies the jurisdictional predicate for prosecuting violent acts undertaken because of, inter alia, the actual or perceived race, color, religion, or national origin of any person; and, for the first time, allows federal prosecution of violence undertaken because of the actual or perceived gender, disability, sexual orientation or gender identity of any person.
- The American Recovery and Reinvestment Act of 2009 provided funding for programs that will help reduce discrimination and improve the lives of members of minority populations through education, training, and programs to end homelessness.
- The Patient Protection and Affordable Care Act (ACA) of 2010 provides many Americans access to health insurance. Section 1557 extends the application of federal civil rights laws to any health program or activity receiving federal financial assistance, any program or activity administered by an executive agency, or any entity established under Title 1 of the ACA.
- The Tribal Law and Order Act of 2010 gives tribes greater authority to prosecute and punish criminals; expands recruitment, retention, and training for Bureau of Indian Affairs (BIA) and tribal officers; includes new guidelines and training for domestic violence and sex crimes; strengthens tribal courts and police departments; and enhances programs to combat drug and alcohol abuse and help at-risk youth.
- The Claims Resolution Act of 2010 provides funding and statutory authorities for settlement agreements reached in the *In re Black Farmers Discrimination Litigation* (brought by Black/African American farmers who filed late claims in an earlier case concerning discrimination by the U.S. Department of Agriculture (USDA) in the award and servicing of farm loans), and also for several settlement agreements reached with regard to indigenous issues – the *Cobell* lawsuit (alleging U.S. government mismanagement of individual Indian money accounts), and four major Native American water rights cases.
- The Fair Sentencing Act of 2010 reduces sentencing disparities between powder cocaine and crack cocaine offenses, capping a long effort to address the fact that those convicted of crack cocaine offenses are more likely to be members of racial minorities.
- The financial reform legislation of 2010 includes a new consumer protection bureau that will help address the unjustified disproportionate effect of the foreclosure crisis on communities of color.
- The Violence Against Women Reauthorization Act of 2013, signed by President Obama in March of this year, reauthorizes critical grant programs created by the original Violence Against Women Act (VAWA) and subsequent legislation, establishes new programs, and strengthens federal laws. Section 3 prohibits discrimination on the basis of, inter alia, actual or perceived race or national origin in any VAWA-funded program or activity.

* * * *

32. With regard to the recommendation in paragraph 13 of the Committee's Concluding Observations that the United States establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state, and local levels, the United States fully agrees that mechanisms designed to strengthen coordination are critical, and numerous such mechanisms do exist. The framework within which human rights are promoted and coordinated in the United States is described in paragraphs 124 – 130 of the Common Core Document. All federal agencies with mandates related to non-discrimination, including DOJ, EEOC, ED, HUD, DHS, DOL and others, coordinate within the federal government, as well as with state and local authorities, human rights commissions, and non-governmental entities. For example, a hallmark of DOJ's civil rights work in this Administration is partnership and collaboration – strengthening relationships with other agencies, state Attorney General offices throughout the nation, and community and civil society partners to leverage resources and coordinate efforts to maximize impact. DOJ/CRT coordinates enforcement of Title VI of the Civil Rights Act of 1964 and assists other agencies with Title VI and other enforcement responsibilities, ensuring that recipients of federal financial assistance (including state and local governments) do not discriminate in their programs, including on the basis of race, color and national origin. Over the last four years, DOJ has provided training, technical assistance, and counsel to civil rights offices in federal government agencies, and has reviewed other agencies' Title VI implementing regulations and guidance. DOJ has also created a Title VI Interagency Working Group, which facilitates interagency information sharing to strengthen Title VI enforcement efforts at the federal level. Additionally, several of the UPR Working Groups and the Equality Working Group were created with a view to further strengthening coordination and U.S. domestic implementation of human rights treaty obligations and commitments related to non-discrimination and equal opportunity.

* * * *

47. With regard to Article 4 and paragraph 18 of the Committee's Concluding Observations, the United States is deeply 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 has been accomplished without banning speech or restricting freedom of expression, assembly or association. We believe that banning and punishing offensive and hateful speech is neither an effective approach to combating 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. In addition, we believe that governments 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. It is incumbent upon both governments and members of society to model respect, welcome diversity of belief, and build respectful societies based on open dialogue and debate.

51. Consistent with the First Amendment, we do not permit speech that incites imminent violence. This is a limited exception to freedom of expression, and such speech is only unlawful when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Speech may also be restricted based on its content if it falls within the narrow class of "true threats" of violence. Moreover, numerous federal and state laws in the United States prohibit hate crimes. Federal statutes punish acts of violence or hostile acts motivated by bias based on race, ethnicity, or color and intended to interfere with the participation of individuals in certain activities such as employment, housing, public accommodation, and use of public facilities. See, e.g., 19 U.S.C. 245 (federally protected activities), 18 U.S.C. 3631 (housing). In addition, 47 states have hate crimes laws, as do U.S. territories. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act is a significant expansion of federal hate crimes laws. The Act creates a new criminal code provision, 18 U.S.C. 249, that criminalizes the willful causing of bodily injury (or attempting to do so with fire, firearm, or other dangerous weapon) when the crime was committed because of the actual or perceived race, color, religion, national origin of any person and that, unlike Section 245, does not require proof of intention to interfere with a federally protected activity. The law also provides funding and technical assistance to state, local and tribal jurisdictions to help them prevent, investigate, and prosecute hate crimes. Subsequent to enactment of the Shepard-Byrd Act, DOJ/CRT worked with U.S. Attorneys' Offices, the Federal Bureau of Investigation (FBI), and DOJ/CRS across the country to ensure that federal prosecutors, federal law enforcement agents, state and local law enforcement officers, non-governmental organizations, and interested members of the public were trained on the Act's requirements. Of particular importance, DOJ/CRT has trained law enforcement officers who are the first responders to assaults or other acts of violence so that they know what questions to ask and what evidence to gather at the scene to allow prosecutors to make an informed assessment of whether a case should be prosecuted as a hate crime.

* * * *

62. Regarding paragraph 22 of the Committee's Concluding Observations, the United States faces challenges in both its provision of legal representation to indigent criminal defendants and its provision of free and affordable civil legal services to the poor and middle class. We recognize that these challenges are felt acutely by members of racial and ethnic minorities.

63. To address these issues, DOJ established the Access to Justice Initiative (ATJ) in March 2010. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. ATJ has worked to expand research and funding to improve the delivery of indigent defense services. In 2012, DOJ's Office of Justice Programs awarded nearly $3 million in grants for this purpose and has committed to approximately $2 million additional in 2013. ATJ has also worked to strengthen defender services in tribal courts and, in partnership with the BIA, has launched the Tribal Court Trial Advocacy Training Program, which provides free trainings to public defenders, prosecutors, and judges who work in tribal courts.

64. To strengthen civil legal services, ATJ is working with other federal agencies to determine whether existing federal safety-net grant programs could perform more successfully by incorporating legal services. Specifically, ATJ staff has established partnerships with agencies

working to promote access to health and housing, education and employment, and family stability and community well-being, to remove unintended barriers that prevent legal aid providers from participating as grantees or sub-grantees. ATJ also supports expanded civil legal research through collaboration with legal scholars and the American Bar Foundation. ATJ is providing technical assistance to more than a dozen states considering creation of new access to justice commissions, which generally support civil legal services at the state level. Responding to a challenge from ATJ, the Conference of Chief Justices unanimously adopted a resolution in 2010 urging the approximately two dozen states without active commissions to establish them, *http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol8Access.html*. ATJ staff has also worked with the American Bar Association (ABA) Resource Center for Access to Justice Initiatives, and the Public Welfare Foundation to develop a national strategy for establishing and strengthening commissions, and ATJ staff now serves on a new national ABA Access to Justice Commission Expansion Project Advisory Committee.

* * * *

66. With regard to paragraph 20 of the Committee's Concluding Observations, a number of steps have been taken in recent years to address racial disparities in the administration and functioning of the criminal justice system. The Fair Sentencing Act, enacted in August 2010, reduced the disparity between more lenient sentences for powder cocaine charges and more severe sentences for crack cocaine charges, which are more frequently brought against minorities. Based on a request by the Attorney General, the Sentencing Commission voted to apply retroactively the guideline amendment implementing the Fair Sentencing Act. As of December 2012, 6,626 federal crack offenders' sentences had been reduced as a result of retroactive application of the Fair Sentencing Act. Of these, 93.5% were Black/African American or Hispanic/Latino. DOJ also intends to conduct further statistical analysis and issue annual reports on sentencing disparities in the criminal justice system, and is working on other ways to implement increased system-wide monitoring steps. DOJ has also pledged to work with the Sentencing Commission on reform of mandatory minimum sentencing statutes and to implement the recommendations set forth in the Commission's 2011 report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System. Finally, at the state and local level, many law enforcement authorities are implementing innovative solutions. For example, the Vera Institute for Justice has launched a program in several municipalities to help prosecutors' offices identify potential bias and to respond when bias is found.

* * * *

118. Since 2009, DOJ/CRT has worked to reinvigorate its pattern or practice enforcement program to combat de facto discrimination in the workplace. Between 2009 and 2012 DOJ filed 32 lawsuits under Title VII to address cases where there is a pattern or practice of employment discrimination, and it has obtained substantial relief for victims in cases brought by DOJ as well as cases referred by the EEOC. For example, DOJ/CRT challenged New York City Fire Department's (FDNY's) use of written firefighter examinations, which disproportionately screened out qualified African American and Latino applicants without enabling FDNY to predict job performance. In July 2009, a federal court ruled that New York City's use of the examinations constituted a pattern or practice of discrimination. The court ultimately ordered

New York City to pay up to $128 million in back pay damages to those unfairly rejected from jobs – DOJ's largest-ever damages award in an employment discrimination case – as well as to provide priority job offers for 293 victims of the city's discrimination. The court also ordered the city to develop and implement new hiring practices at the FDNY, including a new written examination, which, unlike the challenged exams, actually tests for the skills and abilities that are important to the firefighter position. DOJ/CRT also successfully challenged the state of New Jersey's use of a written examination to decide who to promote to police sergeant, on the basis that the test disproportionately excluded African American and Hispanic police officers from promotions and did not test for the skills necessary to do the job. An agreement reached with New Jersey requires the state to use a new procedure to promote police officers based on merit, not race or national origin, and also to provide up to $1 million in back pay and priority promotions to qualified officers who were denied promotions on a discriminatory basis.

* * * *

176. Regarding the recommendation in paragraph 29 of the Committee's Concluding Observations, the United States, in announcing its support for the United Nations Declaration on the Rights of Indigenous Peoples, went to great lengths to describe its position on various issues raised by the Declaration, *http://www.state.gov/documents/organization/153223.pdf*. Concerning the Committee's recommendation that the Declaration be used as a guide to interpret CERD treaty obligations, the United States does not consider that the Declaration – a non-legally binding, aspirational instrument that was not negotiated for the purpose of interpreting or applying the CERD – should be used to reinterpret parties' obligations under the treaty. Nevertheless, as stated in the United States announcement on the Declaration, the United States underlines its support for the Declaration's recognition in the preamble that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights.

177. In response to paragraph 30 of the Committee's Concluding Observations, the United States strongly supports accountability for corporate wrongdoing regardless of who is affected, and implements that commitment through its domestic legal and regulatory regime, as well as its deep and ongoing engagement with governments, businesses, and NGOs in initiatives to address these concerns globally. The United States is a strong supporter of the business and human rights agenda, particularly regarding extractive industries whose operations can so dramatically affect the living conditions of indigenous peoples. In the context of extractive industries, one way we work to promote better business practices is through participation in the Voluntary Principles on Security and Human Rights Initiative (VPI), a multi-stakeholder initiative that promotes implementation of a set of principles that guides extractive companies on providing security for their operations in a manner that respects human rights. The Voluntary Principles discuss, inter alia, consultations with local communities, respect for human rights, and appropriate handling of allegations of human rights abuses in the context of maintaining the safety and security of business operations. The U.S. government has devoted significant resources to ensuring that the VPI has stable foundations to focus more effectively on implementation and outreach efforts. Working with other participants, the United States has helped develop an institutional framework to increase the efficiency and efficacy of VPI. Additionally, in the annual Country Reports on Human Rights Practices, the State Department

has in recent years increased efforts to highlight the impacts and the lack of accountability surrounding the extraction of natural resources, including with regard to indigenous peoples.

* * * *

b. Human Rights Council

At the 22nd session of the HRC, the United States voted "no" on the resolution entitled "Intergovernmental Working Group on the Comprehensive Follow-Up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and the Effective Implementation of the Durban Declaration and Programme of Action." 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, *Digest 2011* at 159-62, and *Digest 2012* at 148-50. The U.S. explanation of vote from the 22nd session of the HRC in March 2013 is excerpted below.

_____

* * * *

The United States is profoundly committed to combating racism and racial discrimination and we firmly believe the United Nations must continue to work with all people and nations to find concrete ways to combat racism and racial discrimination wherever they occur.

We will continue to work in partnership with all countries of goodwill to uphold the human rights of all individuals and combat racism, racial discrimination, and related forms of intolerance in all forms and all places.

Our concerns about the 2001 Durban Declaration and Programme of Action (DDPA) and its follow up are well known, including its unfair and unacceptable singling out of Israel and its endorsement of overly broad restrictions on freedom of expression.

Due to these concerns with the DDPA and given that the Intergovernmental Working Group is focused on implementation of the DDPA, we cannot support renewing the Working Group's mandate, as this resolution does.

We must therefore vote no on this text.

* * * *

Also at the 22nd session of the HRC, the United States abstained from a resolution on racism and education due to its emphasis on the DDPA. U.N. Doc. A/HRC/RES/22/34. The U.S. explanation of vote on the resolution follows.

_____

* * * *

The United States strongly supports the goal of this resolution introduced by Brazil, Portugal, Mozambique, and other core group members: promoting education as a way to eliminate racism and racial discrimination. The United States is committed to working with our global partners,

both bilaterally and multilaterally, in the fight against racism and racial discrimination, including through education. Early last year the United States and Brazil helped the UN Educational, Scientific, and Cultural Organization (UNESCO) launch a multilateral initiative, "Teaching Respect for All," to combat racism and promote tolerance. The program will develop policy guidelines and materials that will be made available to interested educators and policymakers wishing to integrate the anti-discrimination theme into existing curricula. In April, the materials will be introduced on a pilot basis in ten countries, including Brazil.

Domestically, the United States federal government, as part of its role in public education to support and partner with states, has made it a priority to develop or strengthen initiatives to continue to close achievement and opportunity gaps in education. The U.S. Department of Education's efforts to address racial discrimination have included issuing guidance to help school districts avoid racial isolation and achieve diversity in schools and to address the civil rights implications of student-on-student harassment or bullying based on race, color, and national origin.

Against this backdrop, we were pleased when Council members began negotiating this resolution. We hoped that this Council would be able to address an important issue concerning racism while avoiding contentious debates over the 2001 Durban Declaration and Programme of Action (DDPA).

Regrettably, at the insistence of a small number of delegations, the resolution focuses heavily on the DDPA, unnecessarily and excessively preserving and reiterating its language. Our objections to the Durban process and resulting outcome documents are well known. It is unnecessary and inappropriate for this resolution to commemorate or entrench statements made in the DDPA adopted more than ten years ago. Instead, it should focus states on the real-world challenges with respect to combating racism and racial discrimination, including through education.

For these reasons, the United States must call a vote and abstain on this resolution.

* * * *

The United States again voted "no" on the annual resolution entitled "From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance." See *Digest 2012* at 147 for the U.S. explanation of vote on the resolution at the 21st session of the HRC. The U.S. explanation of vote from the 24th session of the HRC in September 2013 is excerpted below.

* * * *

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. It is an ongoing challenge. 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.

We remain deeply concerned about speech that advocates national, racial, or religious hatred, particularly when it constitutes incitement to violence, discrimination, or hostility. However, based on our own experience, the United States remains convinced that the best antidote to offensive speech is not bans and punishments but a combination of three key elements: robust legal protections against discrimination and hate crimes, proactive government outreach to racial and religious groups, and the vigorous protection of freedom of expression, both on-line and off-line.

We regret that we cannot support this resolution 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 providing a concrete approach for the international community to combat racism and racial discrimination. Our concerns about the Durban Declaration and Program of Action and the outcome of the Durban review conference are well-known, including the DDPA's unfair and unacceptable singling out of Israel and the endorsement of overly broad restrictions on freedom of expression that run counter to the U.S. commitment to robust free speech.

We are also concerned about the resolution's insistence that the UN General Assembly adopt in full the Working Group of Experts on People of African Descent's proposed Programme of Action for a Decade for People of African Descent. The Programme of Action's proposal to create several new human rights instruments and programs, will—in our view—do little to advance the needs of those it attempts to serve. At the very least this initiative should be subject to a full and transparent intergovernmental debate.

Finally, we underscore our concerns about the additional costs this resolution will impose on the UN's regular budget. In view of the significant constraints on the UN's regular budget, and the limited ability of member states to provide increasing amounts of resources to enable OHCHR to perform the substantial amount of work that this body has requested, we stress the need for this body to consider carefully the resource implications of such requests before making them.

For these reasons we cannot support this resolution and have voted no.

* * * *

c. UN General Assembly

The United States supported the UN General Assembly resolution proclaiming an international decade for people of African descent, adopted without a vote on December 23, 2013. U.N. Doc. A/RES/68/237. The U.S. explanation of position on the resolution is excerpted below.

_____

* * * *

The United States remains fully and firmly committed to upholding the human rights of all people and to combating racism and racial discrimination. We are pleased to join consensus on this resolution and look forward to the work ahead in helping to elaborate what we hope will be a successful program of action for the International Decade for People of African Descent.

Our own history demonstrates that when we reduce discrimination faced by minority women, men, and children, including those of African descent—whether in the fields of education, access to credit, entrepreneurship, or employment opportunities—we all benefit from their talents and contributions. The United States has long recognized the importance of commemorating and celebrating these contributions, including through an annual African American History Month. We support a global effort to promote knowledge of, and respect for, the cultural heritage and contributions to societies of people of African descent.

We welcome the additional time allotted for work on the program of action. We also appreciate that the final version of that program of action will not be based solely on the draft prepared by the Working Group on Persons of African Descent. We have previously expressed concerns about the Working Group's draft, to the extent it calls for multiple new instruments and mechanisms of questionable value.

* * * *

2. Gender

a. Sexual violence in conflict and emergencies

(1) United Nations

On March 12, 2013, the UN Secretary-General presented a report on sexual violence in conflict. U.N. Doc. S/2013/149. The UN held an open debate on the subject of sexual violence in conflict on April 17, 2013 at which Ambassador Rosemary DiCarlo, U.S. Deputy Permanent Representative to the United Nations, delivered remarks. Ambassador DiCarlo's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/207646.htm*.

* * * *

Madame President, we welcome the Secretary General's report on sexual violence in conflict. Tragically, the report and today's briefings remind us that this issue is a global problem. It is also complex and multifaceted, from sexual violence used as a tool for coercive population displacement to forced marriages by armed groups to the challenges of widespread unreporting of abuse and the plight of children born out of rape.

Today, I would like to draw attention to the need for greater emphasis on prevention, including at the communal level and within the UN system for engaging parties to conflict to address sexual violence and for integrating sexual violence prevention and response efforts into security and justice sector reform.

At the community level, improving prevention of sexual violence requires better understanding of existing protection mechanisms and leveraging grassroots networks that can

provide local information to inform prevention efforts. There is progress in this area, for example, the Community Policing Centers run by displaced persons in camps in Darfur and the enlistment of imams as advocates for sexual violence prevention in South Darfur.

For UN missions, better prevention involves equipping peacekeepers and civilian staff with the guidance and expertise to respond to early information about threats of large-scale abuses. The training modules designed by the United Nations are a positive step in that direction, as is the creation of the UN International Network of Female Police Peacekeepers, which links over a thousand UN female police officers around the world to share best practices as well as advocate and mentor female police.

Bringing deeper gender expertise to UN field missions is essential for enhanced prevention of sexual violence. UN leadership in New York and in the field should commit to greater presence of gender experts and women protection advisors in UN missions. Furthermore, the deployment of such experts should be routine in UN technical assessment missions. We note the particular need for this expertise in Libya to address the root causes of sexual violence perpetrated during the conflict and the resulting trauma.

Encouraging parties to conflict to discuss sexual violence within their ranks, though challenging, is another critical avenue of prevention. The agreements that Special Representative Bangura brokered in the Central African Republic are models of this engagement. Changing behavior of armed parties requires political will as well as better monitoring and reporting and, where appropriate, the credible threat of consequences, such as "naming and shaming" and sanctions. Furthermore, mediators and envoys should routinely address conflict-related sexual violence in their ceasefire and peace negotiations.

But the spectrum of action for countering sexual violence must not be limited to the conflict and its conclusion. It must be prioritized throughout peace processes, including in the disarmament, demobilization and reintegration phase and in security sector reform. Rigorous vetting should ensure that perpetrators and those who have directed sexual violence are denied entry to the security sector. There should be strong protection mechanisms for civilians in close proximity of cantonment sites. The best way to ensure these protections is for women themselves to participate meaningfully in SSR and DDR program design and implementation and to have more women working and leading in the security sector. It is clear that female survivors of sexual violence are more likely to report to a female police officer or a women's police station, as our experience in Haiti has borne out. And women's civil society organizations need greater capacity to monitor, inform, and provide security services in conjunction with law enforcement authorities.

We must also build reformed national justice sectors and local institutions that can hold accountable those responsible for sexual violence while international criminal justice mechanisms continue to play their important role in ending impunity for these crimes. In last week's Declaration on Preventing Sexual Violence in Conflict, the G8 reaffirmed that rape and other forms of serious sexual violence in armed conflict are war crimes and emphasized the need to promote justice and accountability for such crimes.

These issues are hardly theoretical. The scourge of sexual violence persists. We are alarmed by horrific abuses occurring in Syria, including against men and boys … The United States continues to support the documenting of evidence of atrocities committed by all sides for use in future Syrian-led transitional justice and accountability processes. Beyond Syria, the United States has proven its commitment to prevent and address gender-based violence around the world, providing more than $100 million in 2012 to these efforts.

In closing, I want to commend the excellent work Special Representative Bangura and her staff are doing, and urge the entire UN system to give due attention to prevention efforts and facilitate the deployment of necessary expertise to conflict areas. The United States looks forward to continuing collaboration with all those who seek to end the scourge of sexual violence in conflict, including through a new Council resolution to address outstanding challenges on these issues.

* * * *

As alluded to by Ambassador DiCarlo in her remarks above, the Security Council considered a new resolution on women, peace, and security in 2013 that focuses specifically on the problem of sexual violence in conflict. U.N. Doc. S/RES/2106. Ambassador DiCarlo welcomed the adoption of the resolution on June 24, 2013 in a statement, excerpted below, and available at *http://usun.state.gov/briefing/statements/211047.htm*.

* * * *

The United States welcomes this opportunity to reaffirm the indispensable role of women in bringing peace and security to countries embroiled in conflict or emerging from it. Women's active—indeed integral—involvement in peace processes and transitional justice mechanisms, including to address sexual violence, is critical to laying the foundation for lasting peace.

The resolution that we have adopted today reinforces our collective efforts to prevent conflict-related sexual violence, hold perpetrators accountable for their crimes, and provide support and justice to the survivors. It also recognizes that national governments have primary responsibility for addressing this issue.

We see signs of progress, as some national governments are making justice systems more responsive and accessible to survivors of sexual violence. For example, Sierra Leone's new Sexual Offense Law gives stiff minimum sentences to perpetrators. Sri Lanka's Women's Protection Units provide female staff at police stations and privacy for women to report crimes. And this May, Somalia committed to ensuring the protection of victims, witnesses, journalists, and others who report on sexual violence—a necessity for strengthening legal cases and bringing these issues into the public sphere. Special Representative Bangura deserves special thanks for her significant work with authorities to reduce sexual violence in Somalia, Central African Republic, and the Democratic Republic of the Congo.

Mr. President, we applaud and appreciate the critical role that civil society, especially local women's groups, play in assisting survivors by providing them with medical care, counseling, and a political voice, and by facilitating their access to justice. The United States is proud to support Congolese organizations that provide free legal aid for survivors as well as training to provide provincial lawyers and mobile courts—courts that heard almost 3,000 cases in the DRC last year. The efforts of local civil society remain vital and deserve even greater support from national authorities and the international community.

We also commend international initiatives that bolster national capacity on this issue. The United Kingdom and Foreign Secretary Hague, in particular, deserves praise for leading the G8's development of an international protocol on the investigation and documentation of rape and

other forms of sexual violence in conflict. Through efforts like Justice Rapid Response, UN Women and others have provided valuable technical support to promote accountability by helping to document evidence for judicial processes. And the Security Council has adopted targeted sanctions against those who commit, command or condone sexual violence in places like the DRC. We strongly encourage UN sanctions committees to expand their use of this tool to fight impunity.

Indeed, we have made strides in addressing sexual violence in conflict, but there is still a long way to go. More countries should criminalize conflict-related sexual violence. Provisions that prohibit amnesty for perpetrators must be put into cease-fire and mediation agreements. And it is imperative that the international community and senior UN officials, at headquarters and in the field, support the mandate of the Special Representative of the Secretary-General on sexual violence in conflict.

Mr. President, the Security Council must continue to treat this threat to international peace and security with utmost gravity. Sexual violence in conflict cannot and must not be viewed narrowly as just a "women's issue," as sexual violence remains a horrific weapon of war that destroys individuals, devastates communities, and even destabilizes countries. Above all, let us remember, sexual violence is not cultural, it is criminal.

* * * *

(2) U.S. "Safe from the Start" Initiative

On September 23, 2013, Secretary Kerry announced the launch of a new U.S. initiative, "Safe from the Start," to prevent and respond to gender-based violence in humanitarian emergencies worldwide. The State Department media note announcing the initiative is available at *www.state.gov/r/pa/prs/ps/2013/09/214552.htm*, and is excerpted in Chapter 17. The United States initially committed $10 million to the initiative, to be used to fund the hiring of specialized staff and the development of programs and methods by the UN High Commissioner for Refugees ("UNHCR"), the International Committee of the Red Cross ("ICRC"), and other humanitarian agencies and organizations. The initiative builds on the U.S. National Action Plan on Women, Peace and Security and the U.S. Strategy to Prevent and Respond to Gender-based Violence Globally.

On November 13, 2013 in London, Assistant Secretary of State Anne C. Richard provided the U.S. intervention at the "Call to Action on Protection of Girls and Women in Emergencies" event co-sponsored by the United Kingdom and Sweden. Secretary Kerry also delivered remarks by video at the event, which are available at *www.state.gov/secretary/remarks/2013/11/215049.htm*. Excerpts follow from Assistant Secretary Richard's remarks, which are available at *www.state.gov/j/prm/releases/remarks/2013/219011.htm*.

* * * *

As you'll hear by video from our Secretary of State John Kerry—the United States fully supports this agenda. We look forward to playing a leading role in the Call to Action going forward and urge other countries to join us.

We've heard again and again today just how high the stakes are for women and girls in emergencies—these can be matters of life and death and are always life-changing. We recognize that significant progress has been made over the last several years in strengthening our response to gender-based violence (GBV) during emergencies.

I continue to be struck by what I heard when I met with protection experts from humanitarian organizations right after becoming the Assistant Secretary for the Bureau of Populations, Refugees, and Migration in Spring 2012. The experts listed recent crises where different excuses were floated for not reacting quickly to address GBV: chaos in post-earthquake Haiti, cultural sensitivities in Pakistan, and security problems in the Dadaab camp in Kenya.

We also hear that "life saving" interventions must take precedence over protection of women and girls. Action to prevent and respond to GBV is often too little, too late. The unacceptable reality is that we are still failing. I fear that we are failing women and girls affected by the Syria crisis right now. And we need to make sure that our commitments today actually make women and girls safer tomorrow, throughout the world.

For our part, the United States is committing new resources to prevent threats to women and girls and ensure that survivors receive appropriate care—not as an afterthought, but as standard practice. In September of this year, Secretary Kerry announced an initial commitment of $10 million as the foundation of our new initiative, *Safe from the Start*, which will go toward building core capacity of our leading partner organizations to address GBV from the earliest phases of emergencies.

These resources will be used to hire new staff, launch programs to make a difference in the field, and build the evidence base to expand our learning about what works to prevent harm to women and girls. This will require a long-term investment for the United States. This effort builds on U.S. policy initiatives such as the U.S. National Action Plan on Women, Peace and Security and the U.S. Strategy to Prevent and Respond to Gender Based Violence Globally.

In addition to our financial and policy commitments, we will be strengthening our own capacity as a government to address these issues through all aspects of our foreign policy and foreign assistance. Finally, we need to hold our own feet to the fire and make sure we follow through on these good interventions on the ground, where it counts.

* * * *

b. Eliminating violence against women

The United States participated in a clustered interactive dialogue on freedom of expression and violence against women at the 23rd session of the HRC on June 3, 2013. The portion of the statement of the U.S delegation relating to eliminating violence against women appears below. The portion on freedom of expression appears in Section M.2., *infra*. The statement in its entirety is available at *http://geneva.usmission.gov/2013/06/03/clustered-interactive-dialogue-on-freedom-of-expression-and-violence-against-women/*.

_____

* * * *

The United States thanks Special Rapporteur Manjoo for her on-going work to address violence against women and welcomes her report on the State responsibility for eliminating violence against women. Women and girls everywhere should be able to live free from violence, exploitation, and abuse, and this report is an important contribution toward upholding the enjoyment of those rights.

The United States is committed to preventing and addressing violence against women and girls, and has prioritized this issue at home and around the world. In 1994, the U.S. Congress passed the Violence Against Women Act (VAWA), a critical step in changing the way violence against women is addressed in the United States. The United States Department of Justice implements the VAWA and provides financial and technical assistance to communities across the country to develop programs, policies, and practices aimed at ending intimate partner violence, sexual assault, and stalking, including legal assistance to survivors, court improvement, and training for law enforcement and courts. Between 1993 and 2007, the number of women killed by an intimate partner declined by 35 percent in the United States.

President Obama signed the reauthorization of the VAWA into law in March 2013. This most recent iteration closes jurisdictional gaps that had long compromised Native American women's safety and access to justice; ensures lesbian, gay, bisexual, and transgender victims have access to the services they need; and expands protections for immigrant women who experience violence.

In December 2011, the United States released its National Action Plan on Women, Peace, and Security (NAP) to empower women to act as equal partners in preventing conflict and building peace in countries threatened and affected by war, violence and insecurity. Through the NAP, the United States will support the development of effective accountability and transitional justice mechanisms that address crimes committed against women and girls.

To further advance our efforts to protect women and girls from violence, the United States released its first U.S. Strategy to Prevent and Respond to Gender-Based Violence Globally in August 2012. The Strategy calls on executive agencies to execute a comprehensive and multi-sector approach to preventing and responding to gender-based violence around the world.

The United States is committed to addressing violence against women and advancing gender equality as a cornerstone of our foreign policy.

* * * *

On June 14, 2013, the HRC adopted resolution 23/25, "Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence." U.N. Doc. A/HRC/RES/23/25. Ambassador Donahoe delivered the U.S. statement welcoming the resolution. Her statement is excerpted below and available at *http://geneva.usmission.gov/2013/06/14/u-s-welcomes-resolution-on-violence-against-women-and-girls/*.

_____

* * * *

The United States welcomes the resolution entitled "Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence." We strongly support this Council's continuing commitment to the human rights of women and girls everywhere and to insisting upon the elimination of all forms of violence against women and girls. By renewing the mandate of the Special Rapporteur on violence against women, its causes and consequences, this Council is sustaining a vital tool in global efforts to eliminate violence against women and girls.

Ending the global scourge of violence against women and girls will require comprehensive support services for survivors, accountability for perpetrators, redoubled efforts to prevent abuse, and the common recognition that women and girls have inalienable human rights and fundamental freedoms. These efforts should be directed to ending all forms of gender-based violence, including intimate partner violence, which is the most prevalent form of violence against women and girls globally. One in three women worldwide will experience gender-based violence in her lifetime, and in some countries, 70 percent of females are affected. Members of particularly vulnerable populations, including women and girls with disabilities, lesbians and transgender persons, and indigenous women and girls are at increased risk.

Intimate partner violence and this resolution's particular focus, sexual violence, must be prevented and addressed through a holistic approach. The World Health Organization defines intimate partner violence to include "acts of physical aggression, psychological abuse, forced intercourse and other forms of sexual coercion, and various controlling behaviours such as isolating a person from family and friends or restricting access to information and assistance." Violence perpetuates a cycle of violence; evidence shows that children who witness or experience violence are more likely to perpetrate violence and/or experience violence as adults. Emerging evidence shows that in post-conflict situations, intimate partner or domestic violence can increase due to a general breakdown in rule of law or societal norms.

Violence seriously jeopardizes the physical and mental health of women and girls, including, in many instances, their sexual and reproductive health. Respecting and promoting the human rights of women—including the right to have control over and decide freely and responsibly on matters related to their sexuality free from coercion, discrimination, and violence—must be at the heart of our efforts to end violence against women and girls or we will never succeed.

To that end, we are pleased that this resolution recognizes the strong connection between sexual and reproductive health and reproductive rights and efforts to address and end violence against women, including rape. Reproductive rights, originally defined in the International Conference on Population and Development's Program of Action adopted in 1994 and elaborated and reaffirmed in numerous intergovernmental documents since then, provide the foundation for our global effort. Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so. The implementation of these instruments is contributing significantly to progress on preventing, mitigating, and ultimately eliminating violence against women and girls.

For women, the risk of pregnancy is also an important possible outcome of rape. We are pleased to note that the Commission on the Status of Women and CPD recognized the significance for survivors of access to emergency contraception, safe abortion, and post-exposure prophylaxis for HIV and other sexually transmitted infections. This Council should do the same.

The United States remains deeply concerned by incidents of rape and other forms of sexual violence in armed conflict, as well as in other situations of violence or instability. We must ensure that those who perpetrate these crimes are held accountable. In that regard, we strongly support the resolution's call for States that contribute to UN operations to take all appropriate measures to address and prevent rape and other forms of sexual violence, including by investigating and, as appropriate, prosecuting allegations of misconduct. We also underscore the important role that trained experts play in investigating allegations of mass rapes or systematic sexual violence. In this regard, we welcome the efforts of the Office of the High Commissioner for Human Rights, UN Women, and others in expanding the availability of gender, linguistic, and regional experts for deployment for these important investigations.

In conclusion, the United States is pleased to renew our commitment to supporting the Council as it redoubles its efforts to eliminate all forms of violence against women and girls.

* * * *

c. Commission on the Status of Women

The Commission on the Status of Women held its 57th session in 2013, focusing on violence against women and girls. Ambassador Susan Rice, U.S. Permanent Representative to the UN,[*] welcomed the adoption of the agreed conclusions at the 57th session on March 17, 2013. Ambassador Rice's statement appears below and is available at *http://usun.state.gov/briefing/statements/206341.htm*.

* * * *

I enthusiastically welcome the adoption of strong Agreed Conclusions at the 57th Session of the Commission on the Status of Women. This year's Commission focused on the global scourge of violence against women and girls, and the Agreed Conclusions represent vital international recognition that women and girls everywhere have a right to live free from violence, exploitation, and abuse.

Importantly, the Conclusions call for robust measures to prevent violence against women and girls, accountability for gender-related violence and crimes, and comprehensive efforts to support women and girls at risk. They also acknowledge the central importance of sexual and reproductive health and reproductive rights and reinforce that States have a duty—regardless of their political, economic, and cultural systems—to promote and protect all human rights and fundamental freedoms of women and girls.

While we are very pleased with the outcome, the United States remains disappointed that the Conclusions did not explicitly recognize that women and girls should not suffer violence or discrimination based on their actual or perceived sexual orientation or gender identity. Basic rights must apply to everyone, and the United States will continue to fight relentlessly to ensure equality for all people regardless of who they are or whom they love.

[*] Editor's Note: Susan Rice left her post as U.S. Ambassador to the UN on June 25, 2013 to become National Security Adviser to President Obama. On August 5, 2013 Samantha Power was sworn in as U.S. Ambassador to the UN.

The Agreed Conclusions mark a milestone in our fight for the safety and dignity of women and girls everywhere. The United States celebrates this progress as we pledge to redouble our efforts to protect and support the fundamental rights of all women and girls, both at home and around the world.

* * * *

d. U.S. actions

On January 30, 2013, President Obama issued a memorandum on "Coordination of Policies and Programs To Promote Gender Equality and Empower Women and Girls Globally." 78 Fed. Reg. 7989 (Feb. 4, 2013); Daily Comp. Pres. Docs. 2013 DCPD No. 00057 (Jan 30, 2013). Section 1 of the memorandum establishes the position of Ambassador at Large for Global Women's Issues within the State Department. The presidential memorandum follows.

_____

* * * *

Promoting gender equality and advancing the status of all women and girls around the world remains one of the greatest unmet challenges of our time, and one that is vital to achieving our overall foreign policy objectives. Ensuring that women and girls, including those most marginalized, are able to participate fully in public life, are free from violence, and have equal access to education, economic opportunity, and health care increases broader economic prosperity, as well as political stability and security.

During my Administration, the United States has made promoting gender equality and advancing the status of women and girls a central element of our foreign policy, including by leading through example at home. Executive Order 13506 of March 11, 2009, established the White House Council on Women and Girls to coordinate Federal policy on issues, both domestic and international, that particularly impact the lives of women and girls. This commitment to promoting gender equality is also reflected in the National Security Strategy of the United States, the Presidential Policy Directive on Global Development, and the 2010 U.S. Quadrennial Diplomacy and Development Review.

To elevate and integrate this strategic focus on the promotion of gender equality and the advancement of women and girls around the world, executive departments and agencies (agencies) have issued policy and operational guidance. For example, in March 2012, the Secretary of State issued *Policy Guidance on Promoting Gender Equality to Achieve our National Security and Foreign Policy Objectives*, and the United States Agency for International Development (USAID) Administrator released *Gender Equality and Female Empowerment Policy*. The Millennium Challenge Corporation issued *Gender Integration Guidelines* in March 2011 to ensure its existing gender policy is fully realized. My Administration has also developed a National Action Plan on Women, Peace, and Security, created pursuant to Executive Order 13595 of December 19, 2011, to strengthen conflict resolution and peace processes through the inclusion of women, and a Strategy to Prevent and Respond to Gender-based Violence Globally, implemented pursuant to Executive Order 13623 of August 10, 2012, to combat gender-based

violence around the world. Improving interagency coordination and information sharing, and strengthening agency capacity and accountability will help ensure the effective implementation of these and other Government efforts to promote gender equality and advance the status of women and girls globally.

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to further strengthen the capacity of the Federal Government to ensure that U.S. diplomacy and foreign assistance promote gender equality and advance the status of women and girls worldwide, I hereby direct the following:

Section 1. Strengthening Capacity and Coordination to Promote Gender Equality and Advance the Status of Women and Girls Internationally.

(a) Enhancing U.S. global leadership on gender equality requires dedicated resources, personnel with appropriate expertise in advancing the status of women and girls worldwide, and commitment from senior leadership, as exemplified by the critical and historic role played by the Office of Global Women's Issues at the Department of State. To assure maximum coordination of efforts to promote gender equality and advance the status of women and girls, the Secretary of State (Secretary) shall designate a coordinator (Coordinator), who will normally also be appointed by the President as an Ambassador at Large (Ambassador at Large) subject to the advice and consent of the Senate. The Ambassador at Large, who shall report directly to the Secretary of State, shall lead the Office of Global Women's Issues at the Department of State and provide advice and assistance on issues related to promoting gender equality and advancing the status of women and girls internationally.

(b) The Ambassador at Large shall, to the extent the Secretary may direct and consistent with applicable law, provide guidance and coordination with respect to global policies and programs for women and girls, and shall lead efforts to promote an international focus on gender equality more broadly, including through diplomatic initiatives with other countries and partnerships and enhanced coordination with international and nongovernmental organizations and the private sector. To this end, the Ambassador at Large shall also, to the extent the Secretary may direct, assist in:

(i) implementing existing and developing new policies, strategies, and action plans for the promotion of gender equality and advancement of the status of women and girls internationally, and coordinating such actions with USAID and other agencies carrying out related international activities, as appropriate; and

(ii) coordinating such initiatives with other countries and international organizations, as well as with nongovernmental organizations.

(c) Recognizing the vital link between diplomacy and development, and the importance of gender equality as both a goal in itself and as a vital means to achieving the broader aims of U.S. development assistance, the Senior Coordinator for Gender Equality and Women's Empowerment at USAID shall provide guidance to the USAID Administrator in identifying, developing, and advancing key priorities for U.S. development assistance, coordinating, as appropriate, with other agencies.

(d) The Assistant to the President for National Security Affairs (or designee), in close collaboration with the Chair of the White House Council on Women and Girls (or designee) and the Ambassador at Large (or designee), shall chair an interagency working group to develop and coordinate Government-wide implementation of policies to promote gender equality and advance the status of women and girls internationally. The Working Group shall consist of senior representatives from the Departments of State, the Treasury, Defense, Justice, Agriculture,

Commerce, Labor, Health and Human Services, Education, and Homeland Security; the Intelligence Community, as determined by the Director of National Intelligence; the United States Agency for International Development; the Millennium Challenge Corporation; the Peace Corps; the U.S. Mission to the United Nations; the Office of the United States Trade Representative; the Office of Management and Budget; the Office of the Vice President; the National Economic Council; and such other agencies and offices as the President may designate.

Sec. 2. General Provisions.

(a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law or Executive Order to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) Upon designation as such by the Secretary, the Coordinator shall exercise the functions of the Ambassador at Large set forth in this memorandum.

(d) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(e) The Secretary of State is hereby authorized and directed to publish this memorandum in the Federal Register.

* * * *

3. Sexual Orientation

In 2013, the United States joined in joint statements on discrimination based on sexual orientation and gender identity in both the HRC and the UN, which are discussed in this section.

a. Human Rights Council

At the 23rd session of the HRC, the United States and 32 other countries supported a statement on human rights, sexual orientation, and gender identity. The statement, available at *http://geneva.usmission.gov/2013/06/10/joint-statement-by-33-nations-on-human-rights-sexual-orientation-and-gender-identity,* appears below.

_____

* * * *

On this 20th anniversary of the Vienna Declaration and Programme of Action, we recall that while 'various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.' The VDPA declares that 'human rights and fundamental freedoms are the birthright of all human beings.'

We recall Human Rights Council resolution 17/19, the report of the High Commissioner and the panel discussion last year. This has provided a solid foundation on which to build a framework for addressing discrimination and violence based on sexual orientation and gender identity.

Mr. President,

The International Conference on Human Rights, Sexual Orientation and Gender Identity held in Oslo, 15-16 April of this year, co-chaired by South-Africa and Norway, gathered more than 200 participants from 84 countries of all regions of the world.

The Conference was the result of a cross regional process, initiated by South Africa and supported by Norway, Brazil and other friends of the resolution 17/19.

In all countries of the world, individuals are subjected to discrimination and violence based on sexual orientation and gender identity. We would like to thank partner countries for the good collaboration in conducting the consultative regional seminars in Kathmandu, Paris and Brasilia early this year leading up to the concluding international conference in Oslo in April. We would also like to thank civil society for the invaluable contributions to this process. We also extend a special recognition to ARC and ILGA for organizing the side event here in Geneva on 5 June (cosponsored by Brazil, France, Norway, Poland and South-Africa), an event which gave an overview of the process undertaken on the basis of the plan presented by South Africa to the Group of Friends in 2012.

In this regard, we draw attention to the report distributed on 5 June, entitled SOGI Conference Summary and Toolkit. [*] This contains the Co-Chair's Summary and Conclusions; Report from the Oslo Conference (15-16 April); Report from Paris (26 March); Report from Kathmandu (22-23 March); Report from Brasilia (4-5 April); input from Africa; statements by Secretary General Ban Ki-Moon, High Commissioner Pillay, ASG Simonovic; as well as key reference documents in the UN context (resolution 17/19 and the High Commissioner's report on the issue).

Mr. President,

In Oslo, the Co-Chairs together with the regional organizers drew up and issued a set of agreed conclusions. These are contained in the Co-Chairs' Summary and Conclusions. Of particular relevance for the work on the global level, we reaffirmed the responsibility of the Human Rights Council to address human rights violations against all persons, including on the basis of sexual orientation and gender identity. We recognized the ongoing work of treaty bodies, special procedures and under the Universal Periodic Review, and encouraged continued and strengthened efforts in this area. Together we found that the identified gaps and challenges are pervasive in all regions and require systemic solutions.

Against this background, we concluded that there is a need to integrate the issues systematically in the work of the United Nations, through the establishment of a relevant mechanism, at the appropriate time. The Co-Chairs' Summary and Conclusions specifies the objectives of such a mechanism, in essence the need to study and document the situation; recommend concrete steps and encourage good practices; work collaboratively with other UN bodies; present reports to the Human Rights Council and engage its members in inter-active dialogue; and offer technical assistance to states.

Mr. President,

[*] Editor's note: The Conference Summary and Toolkit are available at *http://geneva.usmission.gov/wp-content/uploads/2013/06/SOGI-conference-summary-and-toolkit.pdf*.

Let me conclude by stating that the countries behind this statement remain committed to working with all partners in keeping the issue of human rights, sexual orientation and gender identity on the agenda of the United Nations through an appropriate decision of the Human Rights Council, in accordance with the spirit of resolution 17/19 and drawing upon the outcome of the process as outlined in the report just described.

Moving forward we support further efforts and dialogue among all parties, on the national, regional and global levels. We believe that the United Nations and the Human Rights Council provide a useful framework for such a dialogue on the global level.

* * * *

b. UN

On September 26, 2013, following a meeting of the members of the LGBT Core Group at the UN (which includes the United States), the members issued a declaration on ending violence and discrimination against individuals based on their sexual orientation and gender identity. The declaration appears below and is available at *www.state.gov/r/pa/prs/ps/2013/09/214803.htm*.

* * * *

1. We, ministers of Argentina, Brazil, Croatia, El Salvador, France, Israel, Japan, The Netherlands, New Zealand, Norway and United States, and the High Representative of the European Union for Foreign Affairs and Security Policy—members of the LGBT Core Group at the United Nations—hereby declare our strong and determined commitment to eliminating violence and discrimination against individuals based on their sexual orientation and gender identity.

2. In so doing, we reaffirm our conviction that human rights are the birthright of every human being. Those who are lesbian, gay, bisexual and transgender (LGBT) must enjoy the same human rights as everyone else.

3. We welcome the many positive steps taken in recent decades to protect LGBT individuals from human rights violations and abuses. Since 1990, some 40 countries have abolished discriminatory criminal sanctions used to punish individuals for consensual, adult same-sex conduct. In many countries, hate crime laws and other measures have been introduced to combat homophobic violence, and anti-discrimination laws have been strengthened to provide effective legal protection against discrimination on the basis of sexual orientation and gender identity in the workplace and other spheres, both public and private.

4. We also recognize that countering discrimination involves challenging popular prejudices, and we welcome efforts by Governments, national human rights institutions and civil society to counter homophobic and transphobic attitudes in society at large, including through concerted public education campaigns.

5. We assert our support for, and pay tribute to, LGBT human rights defenders and others advocating for the human rights of LGBT persons. Their work, often carried out at considerable

personal risk, plays a critical role in documenting human rights violations, providing support to victims, and sensitizing Governments and public opinion.

6. We commend the adoption by the United Nations Human Rights Council of resolution 17/19 on human rights, sexual orientation and gender identity, and we welcome the efforts of the Secretary-General and the High Commissioner for Human Rights to raise global awareness of human rights challenges facing LGBT individuals, and to mobilize support for measures to counter violence and discrimination based on sexual orientation and gender identity.

7. Nevertheless, we remain gravely concerned that LGBT persons in all regions of the world continue to be victims of serious and widespread human rights violations and abuses.

8. A landmark 2011 study by the High Commissioner for Human Rights, which drew on almost two decades worth of work by United Nations human rights mechanisms, found a deeply disturbing pattern of violence and discriminatory laws and practices affecting individuals on the basis of their sexual orientation and gender identity.

9. It is a tragedy that, in this second decade of the 21st century, consensual, adult, same-sex relations remain criminalized in far too many countries—exposing millions of people to the risk of arrest and imprisonment and, in some countries, the death penalty. These laws are inconsistent with States' human rights obligations and commitments, including with respect to privacy and freedom from discrimination. In addition, they may lead to violations of the prohibitions against arbitrary arrest or detention and torture, and in some cases the right to life.

10. In all parts of the world—including in our own—LGBT individuals are subjected to intimidation, physical assault, and sexual violence, and even murder. Discriminatory treatment is also widely reported, inhibiting the enjoyment of a range of human rights—including the rights to freedom of expression, association and peaceful assembly, and work, education and enjoyment of the highest attainable standard of health.

11. We are fully committed to tackling these violations and abuses—both at the domestic level, including through continued attention to the impact of current policies, and at the global level, including through concerted action at the United Nations.

12. We recognize the importance of continued dialogue between and within countries concerning how best to protect the human rights of LGBT persons, taking into account regional initiatives. In this context, we welcome the outcome of a series of recent regional consultations on the topic of human rights, sexual orientation and gender identity that took place in March and April 2013, and encourage the holding of further such meetings at regional and national levels.

13. Key to protecting the human rights of LGBT individuals is the full and effective implementation of applicable international human rights law. Existing international human rights treaties provide legally binding guarantees of human rights for all—LGBT people included. But for these guarantees to have meaning they must be respected by Governments, with whom legal responsibility for the protection of human rights lies.

14. Cognizant of the urgent need to take action, we therefore call on all United Nations Member States to repeal discriminatory laws, improve responses to hate-motivated violence, and ensure adequate and appropriate legal protection from discrimination on the basis of sexual orientation and gender identity.

15. We strongly encourage the Office of the High Commissioner for Human Rights to continue its efforts to increase understanding of the human rights challenges facing LGBT people, advocate for legal and policy measures to meet these challenges, and assist the United Nations human rights mechanisms in this regard.

16. We agree with the United Nations Secretary-General's assessment that combating violence and discrimination based on sexual orientation and gender identity constitutes "one of the great, neglected human rights challenges of our time". We hereby commit ourselves to working together with other States and civil society to make the world safer, freer and fairer for LGBT people everywhere.

* * * *

On December 18, 2013, the UN General Assembly adopted a resolution on Preparations for and observance of the twentieth anniversary of the International Year of the Family. U.N. Doc. A/RES/68/136. The United States joined consensus on the resolution, providing a statement underscoring the need to value all types of families, including those headed by same-sex couples. The U.S. explanation of position on the resolution follows.

_____

* * * *

The United States is pleased to join consensus on the resolution before us today to further discussions at the United Nations about the human rights enjoyed by all individuals within a family, including through marking the twentieth anniversary of the International Year of the Family. The family clearly plays an important role within society, and we have come to observe that the nature and role of the family adapt over time while the family retains its fundamental value.

We agree with the sentiment in the resolution that recognizes how important families are to the development of children. "An atmosphere of happiness, love, and understanding," as the resolution notes, is central to our understanding of the family in today's world. The United States thus looks forward to discussions at the United Nations that consider all types of loving families that exist today, be those families headed by one mother and father, a single parent, a same-sex couple, grandparents, or the myriad other family structures which provide essential support for raising children. It is essential that UN recognize these various forms of the family as we further address human rights and the family throughout various UN fora.

* * * *

On November 6, 2013, U.S. Representative to ECOSOC Elizabeth Cousins remarked on the resolution the U.S. co-sponsored entitled "Building a peaceful and better world through sport and the Olympic ideal." Ambassador Cousens' remarks are excerpted below and available in full at *http://usun.state.gov/briefing/statements/217266.htm*.

_____

* * * *

… We especially want to draw attention to the language in the resolution "calling upon host countries to promote social inclusion without discrimination of any kind." This is the first time that language of this kind appears in a resolution on the Olympic Truce, and it sends a powerful message highlighting the role that sport plays for all people. This phrase emphasizes the importance of inclusion and participation of all people in sporting activity, regardless of identity, including persons of different sexual orientations and gender identities.

In its recitation of the fundamental principles of Olympism, the Olympic Charter states "Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play."

Many of the most inspirational moments in the Olympics have come through the ever-broadening participation of persons of various backgrounds in the Games, including: Native-American Jim Thorpe's decathlon and pentathlon gold medals in the 1912 Olympics; the four gold medals African-American Jesse Owens won at the 1936 Berlin Olympics; the three 1960 gold medals of Wilma Rudolph, an African-American woman stricken with polio at age four whose childhood doctors feared she may never walk without wearing a leg brace; and the recent inspirational performance of South African Caster Semenya, who faced unprecedented challenges and unfair gender testing in 2009 only to return proudly and medal in the London Games, where her teammates selected her for the honor of serving as her nation's flag bearer during the opening ceremony.

Part of what makes sport so important is that it promotes inclusion, bringing together people of different ages, races, religions, social status, disabilities, sexual orientation, and gender identity. Sport embraces all segments of society and is instrumental in empowering people of diverse backgrounds, while fostering tolerance and respect for all people, no matter what they look like, where they come from, where they worship, or whom they love.

* * * *

4. Age

a. U.S. view on possible draft convention

The United States has participated in fora to address the rights of older persons, including the Open-Ended Working Group on Ageing (discussed in Section B.4.b., below). The United States has advocated consistently for better implementation of existing instruments rather than the development of a new legal instrument. In response to a request from the UN Department of Economic and Social Affairs in March 2013, the United States submitted the following response.

* * * *

In its March 28, 2013 letter, the Department of Economic and Social Affairs invited member states to submit elements for an international legal instrument to promote and protect the rights of older persons by May 1. UNGA Resolution 67/139—entitled "Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older

persons" and adopted on December 20, 2012—gave the Open-Ended Working Group on Ageing a mandate to consider proposals for a new international legal instrument on the rights of older persons.

The United States thinks a new legal instrument on the rights of older persons is not needed. Many other countries share this view. The positions expressed during the three Open-Ended Working Group sessions held so far clearly demonstrate that UN member states disagree on whether a new instrument is the best way to protect older persons and advance their well-being. The large number of abstentions during the Third Committee and UNGA votes on Resolution 67/139 underscores that most nations are not ready to endorse the resolution's main objective of negotiating a new instrument.

Older persons face critical challenges involving violence and abuse, economic security, and health and nutrition needs. Older persons, however, already have the same human rights as everyone else under existing human rights law. A new international instrument such as a convention would not necessarily provide additional protections, and even after a convention came into force, it would not be binding upon member states that do not ratify it.

There are actions that can be taken in the short term that should be considered before prioritizing a treaty negotiation process. Provisions in existing treaties applicable to older persons should be fully 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 member states and non-governmental organizations can continue to discuss and disseminate best practices concerning the rights of older persons.

Moreover, negotiating a legal instrument would require new human and monetary resources. Member states would need to provide expert teams for a labor-intensive and expensive multi-year negotiating process, in order to arrive at a document that would enjoy broad support. Considering the budget constraints that the UN, member states, and civil society organizations currently face, embarking upon this course of action would inevitably divert resources from addressing the more immediate and concrete needs of older persons. Rather than financing a negotiating process, scarce resources should be devoted to implementing the Madrid Plan of Action on Ageing, which offers a balanced, pragmatic approach to improving the situations and circumstances of older persons. The Open-Ended Working Group on Ageing provides a forum for this approach.

* * * *

b. UN working group

On August 12, 2013, Laurie Phipps, U.S. Adviser for Economic and Social Affairs, addressed a session of the UN's Open-Ended Working Group on Aging. Her statement is excerpted below and available at *http://usun.state.gov/briefing/statements/213121.htm*

* * * *

Over the past three Open-Ended Working Group sessions, participants have shared best practices and discussed possible actions that the UN, member states, and non-governmental organizations

can take to protect the rights of older persons. Yet more needs to be done. We would like to propose some concrete action for the future work of the Working Group, consistent with its role in mainstreaming ageing issues throughout the UN's policies and programs.

At the spring 2013 Commission on Social Development session, the ten-year review of the Madrid International Plan of Action on Ageing was completed and a report was presented to the Commission. The Madrid Plan encapsulates a balanced and pragmatic approach to the various difficulties facing older persons, and provides a comprehensive agenda for dealing with ageing issues. It addresses how to include older persons in the benefits of development; advance health and well-being throughout the life cycle; and build enabling and supportive environments for older persons. And it suggests how governments, NGOs, and other actors can reorient how their societies perceive, interact with, and care for their older citizens. For these reasons, we urge the Open-Ended Working Group on Ageing to continue facilitating implementation of the Madrid Plan. The U.S. delegation looks forward to hearing this afternoon's interactive panel discussion on the Madrid Plan.

Older persons often face concerns that need to be addressed immediately, including food, health care, economic security, protection from violence and neglect, and services to allow for independent living. Because of the time-sensitive nature of these needs, the UN system should direct its efforts to suggesting practical measures, consistent with the Madrid Plan of Action, which member states, the UN, and civil society can take to improve the situation of older persons. Reference to these actions should be included in relevant resolutions, including General Assembly and Second and Third Committee resolutions. Next, reports and side events can focus on topics of particular importance, with a view to raising awareness and arriving at courses of actions. Lastly, language on older persons can be included in the Strategic Plans of the UN Funds and Programmes and other relevant UN organizations, including ILO and UN Women. Doing so would inform the Funds and Programmes in their efforts to develop policies and programs and allow for monitoring and evaluation of progress made. The Open-Ended Working Group should encourage and facilitate these efforts of the UN system, which a range of actors would undertake.

Mr. Chair, elder abuse is a topic of particular importance to the United States. At this year's World Elder Abuse Awareness Day, we and our UN partners, the Canadian government, and non-governmental organizations hosted panel discussions on concrete measures to combat elder abuse. At the 2012 World Elder Abuse Awareness Day, the White House brought national attention to the issue by holding an event that brought together a broad range of actors within the U.S. government. Last April the National Academy of Sciences Institute on Medicine held a two-day public workshop on global elder abuse and its prevention. The workshop explored the negative impacts of elder abuse on individuals, families, communities, and societies.

In the United States, the Elder Justice Act of 2009, as part of the Affordable Care Act, established the Elder Justice Coordinating Council to coordinate across the U.S. government activities related to elder abuse, neglect, and exploitation. The Council is a permanent body, with the goal of better coordinating the Federal response to elder abuse. And the United States has long been engaged in efforts to protect older individuals from elder abuse, such as financial exploitation; physical, psychological, and sexual abuse; and neglect. Through the Older Americans Act, the United States aims to provide services to older persons and protect those who may not be able to protect themselves.

* * * *

Ms. Phipps also delivered a closing statement to the working group on August 15, 2013, excerpted below and available at http://usun.state.gov/briefing/statements/213180.htm

* * * *

We have had three days of interesting and thoughtful discussion on the existing international framework on the human rights of older persons. It is incontrovertible that, as the Universal Declaration of Human Rights declares in the first Article, "all human beings are born free and equal in dignity and rights." This is true throughout life—every older person holds the same human rights as everyone else. Nevertheless, the sad fact remains that not all older persons are treated with dignity and respect for their rights; their needs and interests are too often ignored by their societies, their communities, their families and sometimes, their governments.

The question remains: what can the international community, and more specifically the member states of the United Nations, do to help improve the situations of older persons?

Some have said, during the last few days, that current international human rights law is insufficient for providing protection for older persons. They argue that only a specific instrument that focuses on older persons and their distinctive needs will serve to protect their rights. However, most speakers over the past days have acknowledged that universal human rights apply to older persons, but note that they are not systematically or adequately adhered to. The problem, then, is one of implementation. Ways to promote and protect the rights of older persons, and create accountability for violations and abuses of those rights, have been discussed and should be the topic for further exploration.

It is clear that older persons in many countries face neglect, challenges, and even abuse. What is not yet clear, however, is the best way to address the difficulties and inequalities older persons face. Whether a new convention on the rights of older persons would be the most effective way to close the implementation gap is still in question. We will continue to examine the analyses of the Open-Ended Working Group, the Office of the High Commissioner for Human Rights, the reports of the Secretary-General to the Commission on Social Development and the Third Committee, and input from civil society.

In the meantime, governments need to implement their existing human rights obligations. They also need to take into consideration the Madrid International Plan of Action and other guidelines and implement policies to the benefit of their older persons.

Turning briefly to the OAS draft Convention that has been mentioned repeatedly in this forum, we would like to point out that the United States appended a footnote to the OAS resolution concerning the negotiation of the draft Convention, noting that the U.S. does not endorse the text of the draft Inter-American Convention.

Mr. Chairman,

The contributions older persons can and do make to their communities are a benefit to us all. This should be recognized by their families and communities, but sometimes is not. The process of ageing is often difficult and lonely. The rights of older persons need to be protected and promoted. Much more can be done, and should be done now. While we deliberate over the best way forward, the lack of a Convention should not be an excuse for the lack of protection for the rights and interests of older persons.

* * * *

c. Human Rights Council

On September 26, 2013, at the 24th session of the HRC, the U.S. delegation provided the following explanation of the U.S. position on a resolution on the human rights of older persons. The statement is available at *http://geneva.usmission.gov/2013/09/27/eop-on-the-human-rights-of-older-persons.*

* * * *

All delegations here share the objective of improving the well-being of older persons. As reflected in discussions in the Open-Ended Working Group on Ageing over the past three years, where we differ is in our views on how best to achieve that goal.

Ageing issues are considered throughout the UN, not only in the General Assembly and Commission on Social Development, but in other mechanisms as well. We stress that the new HRC Independent Expert on the human rights of older persons must focus his or her activities on working with states to enable them to implement existing laws and policies and to protect the rights of older persons. The Independent Expert must not duplicate the activities of the Open-Ended Working Group on Ageing, a mechanism that has overlapping elements in its mandate. We believe the best way to avoid duplication is for the Open-Ended Working Group to suspend its operations during the Independent Expert's mandate.

We also note that member states have limited ability to provide additional resources to enable OHCHR to perform the substantial new work mandated by the Human Rights Council. This resolution will trigger costs of over half a million dollars each year, a significant sum. Avoiding duplication among the various entities addressing ageing concerns is essential to reduce costs and ensure efficiency.

* * * *

d. UN General Assembly Third Committee

On December 18, 2013, the UN General Assembly adopted without a vote a resolution on "Follow-up to the Second World Assembly on Ageing." U.N. Doc. A/RES/68/134. The United States joined consensus in adopting the resolution when it was discussed in the Third Committee in November, providing the following statement explaining its support for the resolution's emphasis on coordinating efforts to address the human rights of older persons:

> While we are joining consensus, we would like to reiterate our view that avoiding duplication among the various UN entities and mandate holders addressing ageing is essential to reduce costs and ensure efficiency. For that reason, we are pleased this resolution stresses the importance of coordination

between the Independent Expert on the human rights of older persons and the Open-Ended Working Group to avoid unnecessary duplication with each other's mandates, among others. We continue to believe the best way to avoid duplication would have been for the General Assembly to suspend the operations of the Open-Ended Working Group during the Independent Expert's mandate. We stress that the new HRC Independent Expert on the human rights of older persons must focus his or her activities on working with states to enable them to implement existing laws and policies and to protect the rights of older persons.

5. Persons with Disabilities

On November 21, 2013, Secretary Kerry testified before the Senate Foreign Relations Committee again urging its advice and consent to ratification of the Convention on the Rights of Persons with Disabilities. In 2012, the Senate vote on the resolution for advice and consent to ratification of the Convention was 61 to 38, shy of the required two-thirds majority. See *Digest 2012* at 168-81. Senator Kerry's November 21 statement to the Foreign Relations Committee is excerpted below and available in full at *www.state.gov/secretary/remarks/2013/11/217894.htm*.

_____

* * * *

…I'd just start off by saying we are 100 percent prepared, as we have been, to work through what are known as RUDs—the Reservations, Understandings, and Declarations—in order to pass this treaty. That's our goal. And as—we begin with a place that makes it clear that we don't believe this has impact, but we're happy to restate and reassert the law in ways that makes senators feel comfortable, obviously. We want to pass this.

It's not lost on any of us that only 11 months ago the Senate fell just five votes short of approving this treaty. So more than 60 senators have already resolved in their minds many of the questions that are re-raised again and again. And we can go into them today, as I'm sure we will.

* * * *

In the after-action conversations that I had with many senators, both Republicans and Democrats alike, including a number who had voted against the treaty—yourself, Senator Corker, and others—I even heard some real regret about what had transpired and the unintended message that the outcome sent to Americans with disabilities as well as to other people around the world. And I heard from many not just a willingness but a hope that they would have the chance in a new congress to take up the treaty again and to demonstrate the important truth that senators from both sides of the aisle care deeply about the rights of people with disabilities.

* * * *

Now, I still believe what I believed the first time we tried to do this when I was Chair, that the ratification of the Disabilities Treaty will advance core American values, it will expand opportunities for our citizens and our businesses, and it will strengthen American leadership. And I am still convinced that we give up nothing but we get everything in return. …Our ratification does not require a single change to American law, and it isn't going to add a penny to our budget. But it will provide the leverage, the hook, that we need in order to push other countries to pass laws or improve their laws or raise their standards for the protection of people with disabilities up to the standard that we have already adopted in the United States of America, up to the standard that prompted President George H.W. Bush and Republican Leader Dole to pass the Americans with Disabilities Act, and indeed to negotiate the treaty.

Now, I'm especially engaged now, obviously, as Secretary of State, because having traveled to a great number of countries these last nine months since you confirmed me, I have seen firsthand the need for this treaty in ways that I never had before. It's not an abstract concept. This is not just a nice thing to do. It's not something that's sort of for the few. It really raises standards for the many. And there are countries where children with disabilities are warehoused from birth, denied even a birth certificate, not a real person, and treated as second-class citizens every single days of their life. The United States has the ability to impact that by the passage of this treaty. One hundred and thirty-eight countries have already signed up to this. In too many countries, what we did here at home with the Americans with Disabilities Act hasn't even been remotely realized overseas. And in too many places, what we take for granted here hasn't been granted at all.

Now, I'll never forget my visit recently to a sport rehabilitation center for disabled veterans in Bogota a little while ago, a center that we support with funding from USAID. And I met police officers who were injured by grenades, soldiers wounded by IEDs, volunteers caught in the tragic shootouts that take place over their efforts to help us together to enforce global international narcotics objectives. These brave men and women have risked life and limb and they've lost friends in battle, and yet there's a whole world that they are unable to access today because of their disabilities which they received as they undertook duties shared by our hopes and aspirations with respect to the enforcement of law.

Moments like this really clarify for me the work that we have to do to export our gold standard. The Americans with Disabilities Act is the global gold standard. We should be extraordinarily proud of it. We are. But I would hate to see us squander our credibility on this issue around the world because we're unwilling to embrace what we actually began—this initiative. When I tell other countries that they ought to do what we've done, I'm often reminded that we haven't done what we said we were going to do, we haven't joined the treaty ourselves. It's pretty hard to leverage people when you're on the outside.

So those 138 parties to the treaty, when they convene, we miss out on the opportunity to use our expertise to leverage what we've done in America and put it on the table. We lose out on that. We're not at the table. We can't share our experience and use our experience to broaden theirs. When other countries come together to discuss issues like education, accessibility, and employment standards for people with disabilities, areas where the United States has developed the greatest expertise, we've been excluded because we're not a party to the treaty. And the bottom line is that when we're not there, other countries with a different and unfortunately often a lower standard, a lower threshold, wind up filling the void, and that's the best that people get.

I don't want to see us continue to take ourselves out of the game. No member of the Senate should want us to voluntarily take ourselves out of this. And remaining on the sidelines

jeopardizes our role in shaping the future of disability rights in other countries, and we need to help push the door open for other countries to benefit, not just from our example but from our guidance and our expertise, our experience.

Joining the treaty is the most powerful step that we can take to gain all of those upsides. And don't take my word for it. In a letter to this committee last month, former Secretary of State Colin Powell said it best. He wrote, "If the Senate does not approve this treaty, the United States will continue to be excluded from the most important global platform for the implementation of best practices in disability rights abroad."

So this is about something very real. Look at the numbers of people who were here today and the numbers of groups represented behind me here today. Every one of them represents thousands more people for whom this is very real. It's about things that you can see and you can touch and that make a difference to people's lives. I'm talking about sidewalks without curb cuts—try managing that; public buildings with no accessible bathrooms; restaurants, stores, hotels, and universities without ramps or elevator access; buses without lifts, train platforms with tactile strips that keep you from going over onto the tracks. We can't afford to ignore these barriers as problems that somehow affect other countries but don't affect us. They're present all over the world, including some of the top destinations for Americans traveling abroad for work or for study or for pleasure. And we're not using all of our power and influence to change things for the better if we don't join this treaty.

Now, I'd ask you just to think about what this treaty could mean. It means something for everybody with disabilities. But I do particularly want to ask you to think about what it means to our veterans with disabilities.

* * * *

Joining the Disabilities Treaty will also expand opportunities for American students with disabilities, who need to be able to study abroad to prepare themselves to compete in the global economy. …

* * * *

I just ask you—very quickly, and then I'll wrap up—consider just a few concrete examples. We're talking about joining a treaty that will strengthen our hand as we push for fire alarms with flashing lights so people who are deaf or hard of hearing will know when there's emergency or when they need to evacuate. We're talking about joining a treaty that gives us leverage to push for other countries to have sidewalks with those curb cuts so people who use wheelchairs can safely cross the street, or the tactile strip at the train platform so people who are blind don't fall into danger. Our joining the treaty means that we will lead the way for other countries to raise their standards, and it means that we will lead the way for other countries to adopt our standards for all of these things—accessible bathrooms, tactile strips, fire alarms, flashing lights, all of the advancements that have made an enormous difference in the lives of Americans with disabilities.

Now, I will admit to you change is not going to just happen with the passage of the treaty. It's not going to happen overnight. When we passed the ADA, sidewalks with these curb cuts and bathrooms that were accessible didn't appear the next day, nor did all of the businesses that

make accessible products that serve people with disabilities. But the Disabilities Treaty, just like the ADA, is a process. And our joining the treaty, followed by a very important ingredient—we pass this treaty, I will send a message to every embassy in the world, and we will begin to engage a protocol that will have our people reaching out to every country and every government, and we will use our presence in this treaty to leverage these changes in these other countries, to encourage these changes, to use the voice that you will give us by actually joining it, a voice that we're not able to exercise today for our absence as a member.

* * * *

… I ask you to think about this—why is the American Chamber of Commerce supporting this? Why are so many businesses—Coca-Cola, which is, I think, in something like 198, 200 countries plus—why do they support it? Because this will open new markets. It'll level the playing field for our businesses, who already meet accessibility standards. As other countries rise to meet our standards and need our expertise, guess what? They're going to look to American companies that already produce these goods, and we'll be able to help them fill the needs, and this means jobs here at home. And that's why IBM and the Consumer Electronics Association and many other businesses support ratification.

So I think this is the single most important step that we can take today to expand opportunities abroad for the more than 50 million Americans with disabilities. This treaty is not about changing America. This treaty is about America changing the world.

* * * *

Ambassador Power also urged Senate ratification of the Convention in a statement delivered at the UN on December 3, 2013 in recognition of International Day of Persons with Disabilities. Her statement appears below and is available at *http://usun.state.gov/briefing/statements/218256.htm*.

* * * *

Twenty-three years ago, the United States became the first country in the world to adopt legislation banning discrimination against people with disabilities by passing the Americans with Disabilities Act (ADA). The ADA has since become the international gold standard for the fair and equal treatment of persons with disabilities. Today, on International Day of Persons with Disabilities, we commit to expanding the reach of disability rights by ratifying the Convention on the Rights of Persons with Disabilities (CRPD).

The CRPD matters. It matters because 50 million disabled Americans, including 5.5 million veterans, deserve the same rights abroad that they enjoy at home. It matters because blind veterans traveling abroad have had their guide sticks taken away in airports and amputees have been told to store their artificial limbs in overhead bins. It matters because of Dan Berschinski, an Afghanistan war veteran who lost both of his legs when he stepped on an IED, who explains that, "the advantages that we take for granted here at home that allow people like to me to live fulfilling, independent lives don't exist in much of the rest of the world." It matters because there are countries where disabled children are treated like second-class citizens from the moment they

are born. This disabilities treaty matters because it will have a real impact, not only for disabled Americans traveling and living overseas, but also for the millions of people across the world who aren't afforded the rights and protections we give our citizens.

By ratifying the disabilities treaty, we gain so much and lose nothing—it has no effect on U.S. law and doesn't add a penny to our budget. At the same time, it gives us leverage to push other nations to adopt standards equal to our own. This treaty is about taking what America has done so well for 23 years and getting other nations to follow our lead.

Last year, the U.S. Senate fell six votes short of ratifying this treaty. Six votes short of helping the millions of disabled Americans who receive second-rate rights when abroad. Six votes short of helping hundreds of millions of people across the world who have been written-off as imperfect and unequal. Today, on this International Day of Persons with Disabilities, let's resolve that we will ratify the CRPD in this Congress.

* * * *

C. CHILDREN

1. Committee on the Rights of the Child

On January 16, 2013, the United States appeared before the Committee on the Rights of the Child for the Committee's review of the second periodic reports of the United States on its implementation of provisions in two Optional Protocols to the Convention on the Rights of the Child (on children in armed conflict and on the sale of children, child prostitution, and child pornography). The U.S. delegation included State Department Legal Adviser Harold Koh, as well as Luis CdeBaca, Ambassador-at-Large for the State Department's Office to Monitor and Combat Trafficking in Persons, and representatives from other U.S. government agencies. For background on the written submissions made to the Committee in December 2012, see *Digest 2012* at 183. The Committee's review of the United States presentation is available at *www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12934&LangID=E.* Excerpted below are opening remarks by Harold Koh. Opening remarks by the members of the U.S. delegation are available at *www.state.gov/s/l/c8183.htm*.

* * * *

I am Harold Hongju Koh, Legal Adviser of the U.S. Department of State. On behalf of the United States and outgoing Secretary of State Hillary Rodham Clinton, it is my honor and privilege to address the Committee on the Rights of the Child and to have this chance to present the first human rights periodic treaty reports of the Obama Administration.

As Ambassador King stated, the United States strives for a "more perfect union" to help promote a "more perfect world." The United States is very proud of its human rights record but at the same time recognizes that we have more to do. I served as Assistant Secretary of State for Democracy, Human Rights and Labor when the United States participated in negotiations of the Optional Protocols over twelve years ago and was pleased to see the U.S. ratify them in 2002. As our detailed reports and presentation testify, the United States takes its human rights obligations, commitments, and dialogue with this Committee extremely seriously.

We have found the process of review and reflection with respect to the Optional Protocols very helpful as we consider how to redouble our efforts to protect children in the United States. We appreciate this opportunity for dialogue with your Committee to hear your views on how we are implementing our treaty obligations, as well as related policy recommendations for strengthening our protection of children.

The United States government has also valued the opportunity for an ongoing and robust dialogue with members of U.S. civil society. Before I became Legal Adviser four years ago, I worked as a human rights lawyer. I expect soon to return to civil society to continue that work. Our country believes that bringing civil society members into government positions helps to enrich the dynamic and dialogue between government and civil society.

For the United States, our obligations under these Optional Protocols are not just paper commitments. Both President Obama and Secretary Clinton have repeatedly stated their unequivocal dedication to the protection of innocent children in every setting. Secretary Clinton in particular has worked on these issues her entire career, which started with her work as a young lawyer at the Children's Defense Fund in the United States.[2] The President and Secretary are represented here by the senior-level expert U.S. national delegation that appears before you today. Appearing with me are representatives of the four federal agencies that are most actively involved in implementing the U.S. laws and programs that give life and effect to our obligations under the Optional Protocols. Many other U.S. government agencies also actively participated in drafting our reports and responding to the Committee's questions. Because the protection of children must be pursued at the state and local level, we are honored for the first time to bring to a U.S. Government human rights treaty presentation not one, but two Attorneys General from our fifty States to discuss their states' efforts to combat child exploitation.

The United States is a government of laws and not individuals. So we take pride that our numerous protections for children are not just personal commitments, but ones enshrined in U.S. laws and policies. In the United States, an extensive network of Constitutional, federal, state, and local laws create a framework to protect children from the types of exploitation the Optional Protocols are designed to stop. Federal, state, and local programs and policies work together to create a nurturing environment where children can grow and develop.

The broad and comprehensive legal framework within the United States to implement the Optional Protocols described in the U.S. Initial Reports, presented five years ago, remains in place. These Second Periodic reports update our Initial Reports on major relevant developments, including new laws, judicial decisions, policies, and programs that expand protections in various areas.

Let me address "the elephant in the room:" that we have signed but are not yet party to the Convention on the Rights of the Child. In my personal capacity, I have been on the record for two decades as saying that I deeply regret our remaining outside this important treaty and that

[2] *See* Hillary Rodham, *Children Under the Law*, 43 Harv. Educ. Rev. 487 (1973).

I hope my country will soon correct this omission. As we have noted in response to relevant UPR recommendations, this Administration supports the treaty's goals and intends to review how we can finally move it towards ratification.

At the same time, this Committee should not confuse our non-ratification with any lack of commitment to protecting children. While we have not yet ratified the CRC, few other countries have adopted as many laws, policies, and programs designed to protect the rights of the child. During the negotiation of the Optional Protocols in the late 1990s, some colleagues here in Geneva asked whether the United States should be able to ratify these Optional Protocols without having already ratified the Convention itself. We answered that some nations take an attitude of "ratification before compliance" with regard to international treaties. But the United States tends toward "compliance before ratification." By ratifying these specialized protocols first and engaging with this Committee with respect to these important issues over time, we have greatly increased our country's familiarity with this treaty and Committee and have brought closer the day when the United States could ratify the Convention itself.

Throughout today, you will hear from members of our team confirming our dedicated efforts related to both Protocols. This morning, my colleague, Ambassador Luis CdeBaca, Director of the Department of State's Office to Monitor and Combat Trafficking in Persons, will address U.S. efforts related to the Optional Protocol on the sale of children, child prostitution, and child pornography. Our approach to combating trafficking focuses on three P's, prosecution, protection, and prevention: punishing perpetrators, protecting victims, and preventing patterns of trafficking. There is a fourth P: partnership with state and local government and Indian tribes as well as civil society.

This afternoon, we will describe three themes that drive our work regarding the Optional Protocol on the involvement of children in armed conflict. First, the United States does not send children to fight. We are proud to have an all-volunteer force in the United States—no one of any age can be forcibly recruited into the U.S. Armed Forces—and no individual under the age of 18 can take a direct part in hostilities. Moreover, we respect our obligation not to recruit, in any event, those under the age of 17. We go to great lengths to ensure compliance with all of our obligations under the Protocol, and we exceed its requirements in many respects. Second, we are great supporters of the Protocols and this process of treaty review. We became party to these Protocols in 2002 with bipartisan support, and we have actively sought to participate in this process in a frequent and timely manner. Third, in our efforts abroad, we again take a three-part approach: prevention, mitigation, and rehabilitation. Around the world, the United States seeks to prevent and mitigate the harms resulting from the involvement of children in armed conflict and to support rehabilitation programs.

Let no one doubt: the United States abhors the unlawful use of children in armed conflict and supports the prosecution of ruthless war criminals, like Joseph Kony, who engage in such grotesque practices. Such brutal practices steal from children their youth and show them horrific violence that no child should experience. All too often, children who have been so tragically abused become adults who replicate these abuses without mercy.

We deeply appreciate the efforts this Committee has made to advance the international community's response in combating the exploitation of children, through trafficking and in armed conflict. On behalf of my country and my delegation, I look forward to our discussions with you. …

* * * *

2. Rights of the Child

a. Human Rights Council

On March 22, 2013, Ambassador Donahoe delivered the U.S. general comment on the resolution on "the rights of the child to the enjoyment of the highest attainable standard of health," adopted by the HRC at its 22nd session. U.N. Doc. A/HRC/RES/22/32. The United States co-sponsored the resolution. Ambassador Donahoe's statement follows, and is available at *http://geneva.usmission.gov/2013/03/22/u-s-pleased-to-co-sponsor-hrc-resolution-on-rights-of-the-child/*.

_____

* * * *

The United States is extremely pleased to co-sponsor the "Rights of the Child resolution: the right of the child to the enjoyment of the highest attainable standard of health," and thanks the co-sponsors for their collaboration during the negotiations. We are glad to see the resolution calls upon States to increase their efforts to address child and maternal mortality and apply a human rights-based approach in this regard, which we understand to mean an approach anchored in a system of rights and corresponding obligations established by international human rights law.

The United States remains deeply engaged in promoting healthy children both domestically and internationally. We look forward to continuing to work with other nations and international partners to ensure that all children live a healthy life, that their human rights are respected, and that they grow up in a world that they deserve. In September 2010, the UN launched the Secretary General's Global Strategy for Women's and Children's Health in order to accelerate progress towards the advancement of the fourth and fifth Millennium Development Goals. Supporting the strategy, the United States, Ethiopia, and India, in collaboration with UNICEF, convened the Child Survival Call to Action last June that urged countries to embrace the goal of ultimately ending all preventable child deaths. To date, more than 160 governments have signed this pledge, and we are continuing to work with our partners to see the progress continue. In April 2012, the United States launched the "Every Child Deserves a 5th Birthday" awareness raising campaign. The United States also remains the largest government donor to UNICEF, focusing largely on vaccination campaigns and work on child survival. Over the past year, we have contributed more than $345 million to UNICEF, including large contributions to emergency appeals and to support worldwide immunization efforts.

Today we co-sponsor this resolution 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. Furthermore, to the extent that it is implied in this resolution, the United States does not recognize the creation of any rights or principles that we have not previously recognized, the expansion of the content or coverage of existing rights or principles, or any other 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. We read this resolution's references to the right to safe drinking water and sanitation in accordance with our September 27, 2012

statement in Geneva on this topic and our July 27, 2011 statement in New York at the UNGA plenary meeting.

The resolution also recognizes the harmful effects of armed conflict on children, and we emphasize that all parties to armed conflict must comply strictly with their obligations under international law, in particular international humanitarian law. In accordance with those obligations, parties to armed conflict must refrain from making protected civilians and civilian objects, including children and schools, the target of attack.

Finally, we wish to underscore that we have agreed to this resolution's invitation to the World Health Organization to prepare a study concerning children's mortality and human rights on the express understanding that this invitation does not represent a precedent. In this instance, we have agreed to this invitation on the understanding that WHO is ready and prepared to accept it, and has sufficient resources to do so. While the topic of child mortality is an important topic and we welcome WHO's collaboration with the Office of the High Commissioner for Human Rights on matters of human rights and health, we underscore that OHCHR has the primary mandate for the promotion and protection of human rights and is the appropriate body for this Council to invite to prepare reports. OHCHR must remain in the lead on human-rights reporting.

* * * *

b. UN General Assembly

On December 18, 2013, the United States joined consensus in adopting the annual UN General Assembly resolution on the rights of the child. U.N. Doc. A/RES/68/147. The U.S. explanation of its position on the resolution follows.

* * * *

The United States is very pleased to join consensus on the Rights of the Child resolution today, which focuses on children head of households. We welcomed working with the sponsors and other partners throughout the lengthy negotiation process.

While we support the resolution's theme and goals in regard to protecting the rights of children, including those heading households due to unfortunate circumstances, there were some areas of the resolution that would have benefited from more precision and nuance.

For example, while we understand the importance of family unity and working to avoid situations where children are left as heads of households or in contact with only one parent, there are several factors to consider when families are separated by national borders, including immigration restrictions. We also appreciate the critical role of governments in supporting and protecting children, but at the same time are mindful of the primary role of families, and of respecting an appropriate balance in that regard.

Today's young people are maturing earlier, both physiologically and socially, and too many adolescents, either because of country policies or the attitudes of health providers, lack access to sexual and reproductive health services. Many lack access to comprehensive sexuality education which helps young people, including those 18 years and younger, build the skills they will need to successfully negotiate relationships, and can help promote gender equality and

human rights. We believe in the affirmative goals set forth in The Program of Action that was adopted by 179 governments at the 1994 International Conference on Population and Development (ICPD) in Cairo, and reaffirmed in many international documents since then, which recognize that for women and young people to realize their full potential, they must be able to attain the highest standard of sexual and reproductive health. We must do much more to make available comprehensive reproductive health services as well as accurate information and education on sexuality for not only women and men, but also girls and boys as they age and as their needs evolve. We must foster equal partnerships and sharing of responsibilities by all family members in all areas of family life, including in sexual and reproductive life, and promote frank discourse in relation to sexual health and reproduction. New thinking and renewed vigor in our approach and partnerships can bring us closer to attaining ICPD goals for the current and future generations of young people.

This resolution 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 would also like to note 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 parties. Furthermore, to the extent that it is implied in this resolution, the United States does not recognize creation of any new rights which we have not previously recognized, the expansion of the content or coverage of existing rights, or any other change in the current state of treaty or customary international law. In particular, the United States would like to recall its previous positions on economic, social, and cultural rights. Further we understand the resolution's reaffirmation of prior documents to apply to those who affirmed them initially.

While we recognize the ambition to create a comprehensive resolution on all children's issues, we would urge the main sponsors to aim for a more streamlined text next year. We look forward to working with the co-sponsors and other delegations on this important resolution. Thank you.

* * * *

3. Children and Armed Conflict

a. United Nations

On June 17, 2013, U.S. Alternate Representative to the UN for Special Political Affairs Jeffrey DeLaurentis delivered remarks at the UN at a Security Council open debate on Children and Armed Conflict. Ambassador DeLaurentis mentioned Syria, the Democratic Republic of Congo, and Burma as examples of countries where the situation of children in armed conflict is particularly dire. He went on to call for greater and more cross-cutting efforts to address the problem of children and armed conflict ("CAAC"):

> Indeed, the Security Council requires more effective ways to deal with the growing number of persistent perpetrators, especially among armed groups. In this regard, we appreciate the Working Group's focus on this issue, its efforts to develop appropriate tools, and commend the Secretary-General's proposals, which deserve this Council's serious consideration.
>
> The question of persistent perpetrators, however, raises a larger issue about the UN CAAC process itself. We can be proud of what it has accomplished, and we must strive to make it as effective as it can be. But it is only one tool among the many we should be using to protect children. Rather than attempting to make the Action Plan process a one-size-fits-all mechanism, we should promote CAAC Action Plans in tandem with other tools to comprehensively address the various contexts in which children are subjected to abuse.
>
> A wider range of efforts is needed, from holding perpetrators accountable and preventing them from committing abuses to resolving situations of conflict that enable such heinous crimes. For example, the conviction of Thomas Lubanga for unlawful child soldiering by the International Criminal Court sends an important message that these crimes will not be tolerated. Furthermore, several African countries are cooperating, with the support of the African Union, the United Nations, the United States, and others, to end once and for all the threat posed by the Lord's Resistance Army (LRA), one of the world's worst perpetrators of crimes against children. As noted in the Council's discussion on May 29, this effort has resulted in a substantial drop in LRA attacks, the removal of two top LRA commanders from the battlefield, and the defection of scores of LRA fighters. And finally, peacemaking efforts work to safeguard endangered children by ending the armed conflict itself. Connecting these efforts into a comprehensive approach will strengthen the ultimate goals of the CAAC Action Plan process and concretely advance the plight of children caught in harm's way.

Ambassador DeLaurentis's remarks are available in full at *http://usun.state.gov/briefing/statements/210722.htm*.

b. 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 2013 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 2013 report are the governments of Burma, Central African Republic, Chad, Democratic Republic of the Congo, Rwanda, Somalia, South Sudan, Sudan, Syria, and Yemen. The full text of the TIP report is

available at *www.state.gov/j/tip/rls/tiprpt/2013/index.htm*. 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 30, 2013, 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 Chad, South Sudan, and Yemen," and that, with respect to the Democratic Republic of the Congo and Somalia it is in the national interest that the prohibition should be waived in part. 78 Fed. Reg. 63,367 (Oct. 23, 2013).

D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. Education

Ambassador Donahoe delivered remarks at the 23rd session of the HRC explaining the U.S. position on, and vote in favor of, the resolution on the right to education adopted by the HRC. U.N. Doc. A/HRC/RES/23/4. Her June 13, 2013 statement is available at *http://geneva.usmission.gov/2013/06/13/the-u-s-firmly-committed-to-the-right-to-education/* and appears below.

* * * *

The United States strongly supports the right to education, and this resolution's focus on it. We firmly believe in the importance of this human right.

The United States is firmly committed to providing equal access to education, and our history provides clear and powerful examples of the important role courts can play in promoting that right. We profoundly understand the important role that relevant adjudicatory mechanisms can play in promoting the implementation of the right to education, and we interpret the provisions of this resolution in that light. We further note that our judicial framework provides robust opportunities for redress but is appropriately limited to parties who have suffered harm. On the legislative side, we have a strong statutory commitment to ensuring non-discriminatory access to education which we hope may serve as example of legislative initiatives as recommended in this resolution. As is well known, the United States notes that it is not a party to the International Covenant on Economic, Social, and Cultural Rights, nor to the associated Optional Protocol. Further, in joining consensus on this resolution, the United States notes that it does not recognize any change in the current state of conventional or customary international law.

We also firmly believe in the importance of quality in education, and of increased attention to it, but note concern with any attempts to add to the right to education vague components that are difficult to define and quantify.

With respect to this resolution's references to private providers, we support encouraging private providers to deliver education consistent with its importance as a public good, and we further take very seriously the responsibility of the state to intervene in litigation as appropriate.

Additionally, we are concerned that the resolution includes declarative language on the priorities and structure of the post-2015 development agenda. While we are strong supporters of international education efforts, we believe that language is out of step with the early stage of the post-2015 development agenda discussions and the emphasis on broad consultation and inclusivity in crafting the agenda which member states and the Secretary General have called for. The U.S. does not regard the language in this resolution as assigning primacy to any one issue or in any other way pre-judging the outcome of full intergovernmental negotiations on the post-2015 development agenda.

Despite these concerns and because this resolution is generally consistent with our strong support for education, we join consensus on this resolution and the sponsors of this resolution for their focus on an important human right, the right to education.

* * * *

2. Food

On March 21, 2013, the United States joined consensus on a resolution adopted by at the 22nd session of the HRC on the right to food. U.N. Doc. A/HRC/RES/22/9. Attorney Adviser Julianna Bentes delivered the statement on behalf of the U.S. delegation, excerpted below, and available at *http://geneva.usmission.gov/2013/03/22/u-s-explanation-of-position-right-to-food/*.

* * * *

The United States joins consensus on this annual resolution on the right to food in recognition of our ongoing support for and leading role in the broader goal of worldwide food and nutrition security. We recognize the importance of maintaining a focus on global food security in order to realize our vision of a world free from hunger. However, we are disappointed that this resolution continues to employ language that distracts from the larger issues at play. For instance, statements on trade and trade negotiations are inappropriate for the Human Rights Council to address, as they are both beyond the subject-matter and the expertise of this Council. We also wish to clarify that this resolution today 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 ongoing trade negotiations.

Nonetheless, we are pleased that both this resolution and the Special Rapporteur's report emphasize the important link between the empowerment of women and the progressive realization of the right to food in the context of national food security. Empowering women and improving global food security are key foreign policy objectives of the United States. Whether it be through our Feed the Future Initiative, programs to support women entrepreneurs in Africa and in the Americas, or our programs that seek to help achieve the hunger and poverty-related MDGs, the United States is committed to incorporating a gender equality perspective in our

efforts to address the root causes of hunger and poverty and to forge long-term solutions to chronic food insecurity and undernutrition.

For more than a decade the United States has been the world's largest food aid donor. We do not concur with any reading of this resolution or related documents that would suggest that states have particular extraterritorial obligations arising from a right to food. Rather we pursue such a role because we understand that in order to advance global stability and prosperity we must all work together to improve the most basic of human conditions: the need that families and individuals have for a reliable source of quality food and sufficient resources to purchase it.

The United States asserts that this resolution over-emphasizes the term "global food crisis," when in fact we are not in one globally, thereby detracting from arguably more important and relevant challenges. Factors such as long-term conflicts, lack of strong governing institutions, and systems that deter investment plague many regions and contribute significantly to the recurring state of regional food insecurity. Similarly, the current high and volatile food prices we see in some parts of the world are another significant contributor to food insecurity. Yet these issues are not even mentioned in the resolution.

We would also like to take the opportunity to note that the text contains many references to obligations on the part of donor nations and investors. We believe that a well-balanced text would also include references to obligations of nations receiving assistance—specifically regarding transparency, accountability, and good governance, as well as the obligation to create an environment conducive to investment in agriculture.

As we have stated here in previous years, as well as in a wide variety of fora, we support the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights.

However, we must take this opportunity to reiterate that 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. Overall, we view the right to food as a desirable policy goal; it is our objective to achieve a world where everyone has adequate access to food. We do not, however, 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). 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.

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 statements.

Finally, we interpret this resolution's reaffirmation of previous documents, resolutions, and related human rights mechanisms as applicable to the extent countries affirmed them in the first place.

By robbing people of a healthy and productive life and stunting the development of the next generation, hunger leads to devastating consequences for individuals, families,

communities, and nations. Therefore, despite the many concerns that we have, the United States will not block consensus on this sprawling resolution. We are committed to investing in a wide variety of approaches to sustainably reducing hunger and poverty around the world.

* * * *

3. Water and Sanitation

On September 27, 2013, the U.S. delegation provided an explanation of its position, joining consensus on the resolution at the 24th session of the HRC on "the human right to safe drinking water and sanitation." U.N. Doc. A/HRC/RES/24/18. The United States made clear, however, that it did not join consensus on the paragraph in the preamble to the resolution that contains an overly expansive definition of the right to water, one that does not appear in an international agreement. The U.S. explanation of position appears below and is available at *http://geneva.usmission.gov/2013/09/27/eop-the-human-right-to-safe-drinking-water-and-sanitation/*.

* * * *

We are pleased to join consensus on this resolution and thank the cosponsors for their efforts in finding consensus on this important topic. The United States recognizes the importance and challenges of meeting basic needs for water and sanitation to support health, economic development, peace and security. There is no question of the increasing importance of water as an issue. A 2012 report by the U.S. National Intelligence Council titled "Global Water Security" found that many countries will experience water problems risking instability and state failure, increasing regional tensions, and hindering countries' abilities to address their needs relating to food, energy and health.

For these reasons, the United States remains deeply committed to addressing the global challenges relating to water and sanitation. The United States is working to improve water resources management and promote cooperation on transboundary water. We encourage countries to prioritize access to safe drinking water and sanitation, on a non-discriminatory basis, in national development plans and strategies. We have made access to safe drinking water and sanitation a priority in our own development assistance efforts. The United States is one of the largest bilateral donors to water supply and sanitation programs, as well as one of the largest donors to several development banks treating this problem, including the World Bank, the African Development Bank, and the Inter-American Development Bank.

In 2010, 2011, and 2012, the United States joined consensus on three resolutions of this Council affirming that the human right to safe drinking water and sanitation is derived from the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights. As such, we support States Parties to that Covenant as they undertake steps to achieve progressively its full realization.

We also stress that we read preambular paragraph 14 of this year's resolution to be consistent with those previous resolutions, which noted that transboundary water issues fall outside the scope of this right.

In addition, while the United States agrees that safe water and sanitation are critically important issues, we do not accept all of the analyses and conclusions in the Special Rapporteur's most recent report. The United States appreciates this resolution's recognition that sustainability represents an important policy objective. At the same time, it is important to keep in mind that States must balance it with other goals relating to progressively realizing the right to safe water and sanitation.

The United States also believes the post-2015 development agenda should be consistent with States' human rights obligations. We also underscore that the discussions among the broader UN membership to develop this new framework are still in an early stage and that, as a result, this resolution does not prejudge those discussions. In that regard, the United States notes that we do not read this resolution as calling for the post-2015 agenda to address water specifically. Nor do we read it as calling for states, when they elaborate that agenda through discussions among the broader UN membership, to assign primacy to water over other considerations. As these discussions progress, we believe the international community should focus concretely on issues of access, inclusion, and governance, as well as good policies and practical implementation.

In conclusion, while we are pleased to join consensus on this year's resolution, the United States unfortunately must disassociate from consensus on preambular paragraph 15. The language used to define the right to water in that paragraph is based on the views of the Committee on Economic, Social, and Cultural Rights, but this Council has never previously adopted it, nor does it appear in an international agreement. The United States does not agree with this definition due to the expansive way this right has been articulated. This language does not represent a consensus position.

* * * *

The United States co-sponsored the resolution on "the human right to safe drinking water and sanitation," adopted by the UN General Assembly at its 68th session on December 18, 2013. A/RES/68/157.

4. Health

The HRC adopted a resolution at its 23rd session on "Access to medicines in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." U.N. Doc. A/HRC/RES/23/14. On June 13, 2013, the U.S. provided the following explanation of its decision to call a vote and abstain on the resolution. The U.S. explanation of vote is excerpted below and available in full at *http://geneva.usmission.gov/2013/06/13/eov-on-the-resolution-on-access-to-medecines/*.

* * * *

The United States thanks Brazil for its continued dedication to an issue of tremendous importance to all countries. Regarding this resolution, however, my country has decided to call a vote and abstain. Some of our reasons follow.

For many years now the United States has joined other countries in supporting the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. While we recognize the importance of access to medicine, we note that countries have a wide array of policies and actions that may be appropriate in promoting the progressive realization of the right to the enjoyment of the highest available standard of physical and mental health. Therefore, we think that this resolution should not try to define the content of the right.

Furthermore, to the extent that it is implied in this resolution, the United States does not recognize creation of any new right which we have not previously recognized, the expansion of the content or coverage of existing rights, or any other change in the current state of treaty or customary international law.

The United States commitment in the arena of global health is unsurpassed. Through programs such as the Global Health Initiative, PEPFAR, and the President's Malaria Initiative, as well as through investments in medicines research led by our National Institutes of Health, and extensive technical engagement and financial contributions to multilateral health institutions, the United States plays an important, catalyzing role encouraging innovation and voluntary mechanisms that increase access to affordable health products and technologies to people around the world.

At the same time, the United States has strong concerns about a number of the provisions of the resolution. The goal of greater access to medicines, and particularly to essential medicines, is, for each country, a multi-faceted and complex issue. States have to prioritize the access goal and promote public health policies in a manner best suited for their circumstances and consistent with their human rights and other international obligations.

We regret that the resolution, in the context of human rights, has a select emphasis on issues of intellectual property and trade. There often exist multiple reasons why essential medicines are less widely available than they should be in some countries. Inappropriate tax and tariff policies, insufficient health systems, inadequate access to financing, or lack of essential medicines procurement systems in place to support health delivery, services, and access, can all serve as internal barriers. Many of these are best addressed by taking domestic action.

In addition, the United States does not agree with the resolution's assertion that local production actually increases access or affordability. While it may have potential economic benefits unrelated to health, we would urge States only to undertake the promotion of local production when local circumstances and economic analysis make clear that doing so is likely to result in lower prices, comparable quality, and increased access.

The United States reiterates its support for the Doha Declaration on TRIPS and Public Health and wishes to emphasize that nothing in this resolution is intended to or should be interpreted as altering the scope or meaning of that Declaration or any other part of the TRIPS Agreement.

We would also like to encourage the Human Rights Council and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to consider and focus on other aspects of this issue, especially those that have been more neglected.

Every government can and in fact should work to provide access to affordable, safe, efficacious and quality essential medicines for all. We look forward to continue working with our partners to address this and other critical issues facing our countries.

* * * *

On September 26, 2013, the 24th session of the HRC adopted, without a vote, a resolution on "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." U.N. Doc. A/HRC/RES/24/6. The general statement of the U.S. delegation on the resolution is excerpted below and available at *http://geneva.usmission.gov/2013/09/26/the-right-of-everyone-to-the-enjoyment-of-the-highest-attainable-standard-of-physical-and-mental-health*/.

* * * *

For many years now the United States has joined other countries in supporting resolutions on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. We are pleased to cosponsor today this resolution renewing the mandate of the Special Rapporteur. With this mandate renewal, we look forward to a renewed focus on pressing human rights concerns, especially those of the most needy.

The United States believes access to health coverage is a necessary element in the full realization of one's health potential. The expansion of health care coverage has been at the forefront of our domestic agenda and we commend the leadership of other countries who have made it a priority. The United States also believes that health coverage is a national-level concern and responsibility. For progress and sustainability, national governments must take on the fundamental challenges to move toward more inclusive access.

At the same time, the United States has had strong concerns about a number of the provisions in previous resolutions adopted by this body and included in reports of the Special Rapporteur, including a selective emphasis on issues of intellectual property and trade as well as access to medicines. The Special Rapporteur will have the greatest impact if he or she uses the position to help States prioritize goals of access and promote public health policies relevant to their national circumstances, consistent with their human rights and other international obligations. On this note, the position of the United States with regard to economic, social and cultural rights is well known. We cosponsor this resolution in that light, and with the goal of furthering access to healthcare around the world.

Every government can and in fact should work to provide access to affordable, safe, efficacious and quality health care for all. We urge continued attention to the important wider range of human rights issues related to health, especially one relating to those most in need.

* * * *

E. HUMAN RIGHTS AND THE ENVIRONMENT

On March 6, 2013, the U.S. delegation to the 22nd session of the HRC delivered a statement at the interactive dialogue following the preliminary report of the independent expert on human rights and the environment. That statement is excerpted below and available at *http://geneva.usmission.gov/2013/03/07/u-s-intervention-on-human-rights-and-the-environment/*.

_____

* * * *

The United States thanks Professor Knox for preparing a comprehensive and thoughtful report that looks at the broad range of issues we encounter when we talk about the relationship between human rights and the environment. We appreciate the detail and thoroughness of this preliminary report and believe it provides an excellent basis for continuing our discussion of these issues. Countries around the world face many of the challenges the report describes. International cooperation can play a key role in our meeting such challenges.

In particular, we support the report's focus on procedural rights and the identification of "human rights vital to environmental policymaking" as especially promising avenues for the Independent Expert to explore in more depth. In this regard, the United States notes that it strongly supports the right of all individuals to express themselves freely, including environmental activists as the Independent Expert describes.

We also applaud his attention to best practices, which have proven to be useful tools as they provide valuable information and insight into the cause and effect of policies. At times, specific case studies may not be directly relevant to a country's particular circumstances. However, best practices can provide the foundation for aspirational goals, increase understanding through lessons learned, or allow countries to accelerate progress in a related area.

The United States appreciates the Independent Expert's empirical approach, and we would welcome his clarification of the meaning of "evidence-based approaches" with respect to obligations.

We would also like to request greater clarification about how the Independent Expert intends to address Millennium Development Goal Number 7. We anticipate that maintaining a broad view of the concept of the goal (ensuring environmental sustainability), rather than delving into the elements that comprise it (for example, exploring the human rights aspects of the fact that the 2010 biodiversity targets were not met), will make for a more productive and more broadly applicable outcome.

We also note that a number of aspects of the relationship between human rights law and the environment, particularly with respect to substantive obligations, are neither well understood nor established. While an examination of human rights obligations relating to transboundary and global environmental harm — for example with regard to climate change — falls within the mandate of the Independent Expert, these are particularly complex and novel issues. We would urge the Independent Expert to take a measured approach that focuses on describing the international law as it stands rather than seeking to develop or create new norms.

We take a different view from that presented by the Independent Expert on certain other aspects of the report as well, such as in the discussion of third-party harms and in some of the nuances of the discussion of various vulnerable groups.

The discussion of the relevance of human rights to the protection of non-human rights aspects of the environment is also worth reconsideration. We caution that pursuing this line of inquiry could be a distracting and inconclusive exercise.

* * * *

F. BUSINESS AND HUMAN RIGHTS

1. Implementation of Guiding Principles

In 2013, the United States continued to promote implementation of the Guiding Principles on Business and Human Rights, which were endorsed by the Human Rights Council in 2011 in resolution 17/4. On May 1, 2013, the U.S. Department of State released "The U.S. Government Approach on Business and Human Rights," available at *www.humanrights.gov/2013/05/01/u-s-government-approach-on-business-and-human-rights/*. The statement of the U.S. delegation at a clustered interactive dialogue during the 23rd session of the HRC on May 30, 2013 highlights U.S. implementation actions. That statement is excerpted below and available at *http://geneva.usmission.gov/2013/05/31/human-rights-transnational-corporation/*. For background on the Dodd-Frank Act, mentioned in the U.S. statement, see *Digest 2012* at 410-12. See also Chapter 11.D.2.a. on the efforts by the United States to work with the government of Bangladesh to ameliorate working conditions in that country.

_____

* * * *

The United States Government thanks the UN Working Group on the issue of human rights and transnational corporations and other business enterprises for its report. We support the work of the Working Group in promoting the dissemination and implementation of the UN Guiding Principles. We were pleased to participate in the State survey summarized in the Working Group's report and encourage other States to provide information to the Working Group on measures they have taken to implement the Guiding Principles. Such information could then be the basis for a fruitful exchange on best practices.

One set of practices we would like to highlight is that of due diligence reporting in national laws and regulations, which can increase transparency. For example, Section 1502 of the Dodd Frank Wall Street Reform and Consumer Protection Act encourages responsible sourcing of certain "conflict minerals" from the African Great Lakes Region. In a similar vein, upon easing sanctions in Burma, we instituted a set of Reporting Requirements on Responsible Investment, calling on U.S. persons that invest more than an aggregate $500,000 in Burma to report annually on human rights policies and procedures, among other key areas for due diligence. Section 1502 and the Burma Reporting Requirements both encourage companies to

uphold high standards in new and/or challenging investment climates. Increasing transparency leads to increased corporate accountability and can minimize adverse impact by businesses on human rights.

We also support the call for states to consult with external stakeholders, and for the financial sector to contribute to efforts and initiatives aimed at clarifying the operational implications of the Guiding Principles across different segments of the financial sector. Over the past year, the United States has held two workshops with investors to discuss strategies for investment firms to incorporate the UN Guiding Principles into their regular business practices, including the use of non-financial factors in decision-making. We have also hosted workshops focused on the Guiding Principles. These conversations are an important first step to human rights challenges in a complex global economy. We will continue to make consultations with external stakeholders a priority, in line with the Working Group's recommendation, and encourage other states to do the same.

For more information on how business and human rights are integrated into U.S. foreign policy, we would refer you to a summary we have just issued, which can be found on *humanrights.gov*.

* * * *

2. Extractive industries

On June 19, 2013 at a Security Council debate on conflict prevention and natural resources, U.S. Ambassador to the UN Susan E. Rice elaborated on the connection between the extractive industries and armed conflicts. Her remarks are available at *http://usun.state.gov/briefing/statements/210932.htm* and are excerpted below.

* * * *

Since 1990, at least 18 armed conflicts have been fueled by the exploitation of natural resources. At least 40% of all intrastate conflicts over the last 60 years have a link to natural resources. The Security Council is currently dealing with several conflict countries in which natural resources have played a central role. From diamonds in West Africa to coltan in the Great Lakes region, the irresponsible exploitation and illicit trade in natural resources have financed conflict, motivated antagonists, and increased susceptibility to conflict by fomenting corruption and competition for wealth. For evidence, we need look no farther than the horrors perpetrated in Sierra Leone in the 1990s or the current conflicts in the DRC and CAR.

Moreover, the illegal exploitation of extractive resources often contributes to the unraveling of post-conflict peacebuilding processes. Conflicts associated with natural resources are twice as likely to relapse in the first five years. Societies that cannot responsibly manage the wealth of their extractive industries are at higher risk of instability and violence. In short, the illegal extraction and trade of natural resources are directly related to international peace and security and to this Council's business.

National governments must lead in responsibly managing the natural resources of their countries for the benefit of their peoples. But the international community must support them in doing so by reducing the space for corruption and helping to strengthen national governance. The United States actively promotes the responsible behavior of American companies in line with the UN Guiding Principles on Business and Human Rights. In July 2010, the U.S. Congress enacted legislation to diminish the potential for mineral supply chains to contribute to violence. Companies listed on the U.S. stock exchanges must now submit annual descriptions of their due diligence on the sourcing and chain of custody of conflict minerals from the African Great Lakes region. This legislation also elevated transparency standards in the extractive industries by requiring the disclosure of payments to governments for the commercial development of oil, gas, and mineral resources by certain companies. We welcome last week's vote by the European Parliament to adopt a similar rule.

The United States also supports several related global initiatives. The Kimberley Process, which the United States chaired last year, strengthens governance in international trade in mineral commodities. Since its inception, the Kimberley Process has reduced the trade in conflict diamonds to less than 1% of the world's total rough diamond trade from an estimated 15% in the 1990s. Multiple-stakeholder partnerships among governments, the private sector and civil society—such as the EITI—are making significant progress in addressing the link between extractive resources and conflict. The United States urges all states to embrace EITI principles of revenue transparency and to support the Voluntary Principles on Security and Human Rights Initiative, which promote the adoption of oil, and gas and mining companies of operational security measures that respect human rights.

Yet, intergovernmental regimes and multi-stakeholder partnerships are necessary but not sufficient. The Security Council must act as well. Since this Council last addressed natural resources and conflict in 2007, the Council has reinforced the Kimberley Process' actions on diamonds in the Cote d'Ivoire and Liberia sanctions regimes and endorsed due diligence guidelines on conflict minerals in the DRC. We've also imposed and lifted a timber ban in Liberia and imposed a ban on charcoal exports from Somalia. In addition, last April, under the U.S. presidency, this Council called upon the UN system to strengthen member states' capacity to secure their borders to combat the transnational flow of illicit goods that can fuel conflict and breed insecurity. Whether imposing sanctions, authorizing field missions, or supporting mediation efforts, the Council's attention to these threats must continue.

Natural resources remain indispensable to many countries' economies. When managed and traded responsibly, these resources can accelerate development and improve living standards for millions. But when exploited for the benefit of the few or co-opted for nefarious purposes, they can fuel corruption, violence and conflict. States fortunate enough to be endowed with such wealth owe at least this to their people. And, we who sit on this Council owe it to them not just to discuss this challenge but to act in the numerous real-world cases where the illicit extraction and trade of natural resources threatens international peace and security.

* * * *

G. INDIGENOUS ISSUES

On May 21, 2013, Terri Robl, Deputy U.S. Representative to ECOSOC, delivered a statement at the discussion on indigenous youth in the Permanent Forum on Indigenous Issues ("PFII"). That statement is excerpted below and available at *http://usun.state.gov/briefing/statements/209773.htm*.

* * * *

…[T]he United States appreciates very much the opportunity to address this forum and to highlight actions taken in 2012 and 2013 in favor of indigenous peoples and their communities, which also benefit indigenous youth.

At the 2012 White House Tribal Nations Conference, high-level U.S. consultations with indigenous tribal leaders that were started in 2009, President Obama addressed attendees and Cabinet Secretaries participated in breakout sessions with conference participants. The breakout sessions allowed for frank discussion on areas that indigenous peoples identified as important, including economic development, housing, energy, law enforcement, disaster relief, education, and strengthening the government-to-government relationship. We invite you to review the report released in connection with the conference, entitled "Continuing the Progress in Tribal Communities", for details about U.S. government policies and actions in favor of indigenous peoples and indigenous youth in the United States. I will highlight just a few initiatives here.

First, in the area of education, the U.S. Government supports science, technology, engineering, and mathematics (STEM) education in tribal colleges and universities, as well as the preservation of Native languages in schools while advancing proficiency in English. For health, U.S. government-funded community health centers provide services to hundreds of thousands of American Indians and Alaskan Natives. We fund numerous substance abuse and mental health programs, including some devoted to suicide prevention. On improving living conditions in communities, the President's fiscal year 2013 budget request includes $650 million for the Indian Housing Block Grant. The Safe Indian Communities Initiative aims to support the prevention of violent crime in tribal communities. And in favor of environmental and cultural preservation, we support programs to introduce Native American students to career opportunities in the field of conservation.

The Obama Administration has worked to resolve longstanding Native American legal trust claims against the United States and private entities related to land, water, natural resources, and other issues. Between January and November 2012, the Administration settled the trust accounting and management claims of 59 individual tribes. Since taking office in 2009, the Obama Administration has processed successfully over 1,100 tribal applications for taking lands

into trust on behalf of tribes. The tribal lands in the United States have grown by more than 200,000 acres in this timeframe.

In July 2012, President Obama signed the Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH Act) into law. Under the HEARTH Act, tribal governments have the ability to enact regulations to govern the leasing of tribal lands, which enhances tribal control over these lands. The Act also reduces the time it takes to get a lease of tribal lands approved, thereby promoting economic development of Indian lands.

We are now past the two-year anniversary of the 2010 Tribal Law and Order Act (TLOA), which has steadily improved the federal government's ability to work with Indian tribes in investigating and prosecuting crimes affecting indigenous communities. The TLOA gives tribes greater sentencing authority; strengthens defendants' rights; helps at-risk youth; establishes new guidelines and training for officers handling domestic violence and sex crimes; improves services to victims; helps combat alcohol and drug abuse; expands recruitment and retention of Bureau of Indian Affairs and tribal officers; and gives officers better access to criminal databases.

The U.S. Congress passed a third extension of the Violence Against Women Act (VAWA) in February 2013, and President Obama signed the extension into law on March 7. This latest reauthorization contains an important new provision that allows indigenous tribes to prosecute non-Native perpetrators of violence against indigenous women for acts that occur on tribal lands. This is particularly important, given that indigenous women in the United States, including adolescent girls, face disproportionately high rates of domestic violence. The Act also continues effective programs and expands the protections and services available to survivors of violence.

Also, the Departments of the Interior, Energy, Agriculture, and Defense have recently entered into a Memorandum of Understanding on Sacred Sites, and developed an Implementation Plan to continue to work toward appropriate access to, and protection of, these significant places.

Finally, in 2012 the Department of the Interior's National Park Service, Bureau of Indian Affairs, Fish and Wildlife Service worked with the State of Montana and the Assiniboine and Sioux Tribes to successfully return genetically pure bison to their historic rangelands on the Fort Peck Indian Reservation.

* * * *

The United States delivered a statement at a panel discussion on indigenous peoples at the 24th session of the HRC in September in which it expressed support for the World Conference on Indigenous Peoples planned for 2014. See *Digest 2012* at 200-02 for a discussion of previous U.S. statements on the World Conference on Indigenous Peoples. The U.S. statement delivered September 17, 2013 follows and is available at *https://geneva.usmission.gov/2013/10/02/item-3-half-day-panel-discussion-indigenous-peoples/*.

* * * *

The U.S. government places importance on the high-level UNGA meeting known as the World Conference on Indigenous Peoples, consistent with our policy to strengthen our relationship with Indian tribes and include indigenous peoples' concerns in our broader policy objectives.

We support an inclusive preparatory process for the World Conference. The United States will hold a listening session with U.S. indigenous representatives on October 11 in Washington, so that we can hear their suggestions and expectations for the Conference.

As the World Conference would be enhanced by consideration of a wide range of views, broad indigenous input is essential. In consultations prior to the high-level meeting, the concerns of all indigenous peoples must be heard, with no groups being marginalized. Throughout the world, including in my own region of North America, indigenous peoples have leaders who are either elected through a democratic process or appointed through traditional processes to represent their peoples. The preparatory process would benefit from the observations of these leaders along with other persons.

Concerning the outcome document from the June 2013 preparatory meeting in Alta, the United States does not think that text should be the starting point for negotiations on an outcome document for the World Conference on Indigenous Peoples. Rather, the recommendations contained in the Alta document should be considered during negotiations on the high-level meeting outcome document.

The participants to the World Conference should include representatives designated by indigenous peoples, including representatives of tribal governments. Civil society partners—including non-governmental organizations that represent indigenous women and youth and indigenous persons with disabilities—should also have the opportunity to participate in the Conference. All processes for selecting credible representatives of indigenous governments must be completely transparent. The PFII Secretariat, working with the seven indigenous regional caucuses and the two thematic caucuses on youth and women, are involved in identifying the indigenous representatives who will participate in the World Conference. We appreciate the briefing the Secretariat provided to member states several months ago, and we welcome continued dialogue on this issue.

The World Conference's roundtables, with their interactive format, will allow for indigenous peoples' meaningful participation. The roundtable themes do not need to refer only to individual Declaration articles, but can also focus on current best practices for issues that cut across multiple Declaration articles. Possible topics could include "Lands, resources, the environment, and economic development;" "Cultures of indigenous peoples, including information about Indian cultures in their educational curricula and teaching Native languages;" and "Business and its impacts on indigenous peoples."

The General Assembly resolution on the World Conference calls for a concise, action-oriented outcome document. Such a political statement with recommended actions to improve the status of indigenous peoples is an appropriate product of the high-level meeting. It would also be useful to have a longer Chair's text, which would give a thorough account of the substantive roundtable and panel discussions. We also recommend that arrangements be made to receive input—including in written, electronic, pre-recorded, or telephonic format—from indigenous peoples and others who are unable to attend the World Conference in person.

We welcome the panelists' views on appropriate topics for the World Conference's roundtable discussions, as well as their suggestions on what the outcome document could contain.

* * * *

The United States co-sponsored a resolution on human rights and indigenous peoples at the 24th session of the HRC. U.N. Doc. A/HRC/RES/24/10. The U.S. statement on the resolution, delivered on September 26, 2013, appears below and is available at *http://geneva.usmission.gov/2013/09/26/general-statement-on-human-rights-and-indigenous-peoples/*. The HRC adopted an additional resolution on indigenous peoples on the same day, which extends the mandate of the special rapporteur. U.N. Doc. A/HRC/RES/24/9.

* * * *

The United States is pleased to co-sponsor the resolution on "Human Rights and Indigenous Peoples." Indigenous peoples throughout the world face grave challenges, and the United States is committed to addressing these challenges both at home and abroad.

The United States 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.

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 that the resolution covers both these topics in various ways. For example, operative paragraph 12 highlights the role of treaty bodies in promoting human rights, and we commend other sections of the resolution that highlight the importance of protecting the human rights of indigenous women and children and indigenous persons with disabilities.

* * * *

H. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

Report to the UN Committee Against Torture

On August 12, 2013, the United States submitted its third, fourth, and fifth periodic reports to the United Nations Committee Against Torture (as one document), in keeping with the requirement for periodic reports in Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1465 U.N.T.S. 85 (1984). See *Digest 2005* at 341-71 regarding the second period report of the United States to the Committee, submitted on May 6, 2005. See also *Digest 2006* at 403-21, summarizing U.S. interactions with the Committee in response to the second periodic report, and *Digest 2007* at 375-77, excerpting the U.S. response to specific recommendations by the Committee in relation to the second periodic report. Excerpted below is the Introduction to the 2013 submission. The full text of the report is

available at *www.state.gov/j/drl/rls/213055.htm*. The report is also excerpted in Chapter 18.

---

* * * *

1. It is with great pleasure that the Government of the United States of America presents its Periodic Report to the United Nations Committee Against Torture concerning the implementation of its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "Convention" or "CAT"), pursuant to Article 19 of the Convention. This document constitutes the third, fourth, and fifth periodic reports of the United States.

2. The absolute prohibition of torture is of fundamental importance to the United States. As President Obama stated in his address to the nation on national security, delivered at the National Archives on May 21, 2009: "I can stand here today, as President of the United States, and say without exception or equivocation that we do not torture, and that we will vigorously protect our people while forging a strong and durable framework that allows us to fight terrorism while abiding by the rule of law." Most recently, in his May 23, 2013 speech at the National Defense University, the President reiterated that the United States has "unequivocally banned torture."

3. Marking the anniversary of the CAT's adoption on June 24, 2011, President Obama noted that, more than two decades ago, President Reagan signed and a bipartisan coalition provided Senate advice and consent to ratification of the Convention, "which affirms the essential principle that under no circumstances is torture ever justified." President Obama continued:

> . . . Torture and abusive treatment violate our most deeply held values, and they do not enhance our national security – they undermine it by serving as a recruiting tool for terrorists and further endangering the lives of American personnel. Furthermore, torture and other forms of cruel, inhuman or degrading treatment are ineffective at developing useful, accurate information. As President, I have therefore made it clear that the United States will prohibit torture without exception or equivocation, and I reaffirmed our commitment to the Convention's tenets and our domestic laws.
>
> As a nation that played a leading role in the effort to bring this treaty into force, the United States will remain a leader in the effort to end torture around the world and to address the needs of torture victims. We continue to support the United Nations Voluntary Fund for Victims of Torture, and to provide funding for domestic and international programs that provide assistance and counseling for torture victims. We also remain dedicated to supporting the efforts of other nations, as well as international and nongovernmental organizations, to eradicate torture through human rights training for security forces, improving prison and detention conditions, and encouraging the development and enforcement of strong laws that outlaw this abhorrent practice.

The full text of the President's statement is available at *www.whitehouse.gov/the-press-office/2011/06/24/statement-president-international-day-support-victims-torture*.

4. Treaty reporting is a way in which the Government of the United States can inform its citizens and the international community of its efforts to ensure the implementation of those obligations it has assumed, while at the same time holding itself up to the public scrutiny of the international community and civil society. In preparing this report, the United States has taken the opportunity to engage in a process of stock-taking and self-examination. Representatives of U.S. government agencies involved in implementation of the Convention met with representatives of non-governmental organizations as part of outreach efforts to civil society in this process. The United States has instituted this process as part of its efforts to improve its communication and consultation on human rights obligations and policies. Thus, this report is not an end in itself, but an important tool in the development of practical and effective human rights strategies by the U.S. government.

5. This report was prepared by the U.S. Department of State (DOS) with extensive assistance from the U.S. Department of Justice (DOJ), the U.S. Department of Defense (DoD), the U.S. Department of Homeland Security (DHS), the U.S. Department of Education (ED) and other relevant components of the U.S. government. It responds to the 55 questions prepared by the Committee and transmitted to the United States on January 10, 2010 (CAT/C/USA/Q/5) pursuant to the new optional reporting procedure adopted by the Committee in May 2007 at its 38th Session (A/62/44). The information included in the responses supplements information included in the U.S. Initial Report (CAT/C/28/Add.5, February 9, 2000, hereinafter referred to as "Initial Report") and its Second Periodic Report (CAT/C/48/Add.3, June 29, 2005, hereinafter referred to as "2005 CAT Report"), and information provided by the United States in connection with Committee meetings considering the reports, including its 2006 Response to List of Issues (April 28, 2006, hereinafter referred to as "Response to List of Issues") and 2007 Follow-up (July 25, 2007). It also takes into account the Concluding Observations of the Committee Against Torture (CAT/C/USA/CO/2, July 25, 2006), as referenced in the questions provided by the Committee. Throughout the report, the United States has considered carefully views expressed by the Committee in its prior written communications and in its public sessions with the United States. A list of acronyms used in the report, and the full name of each, is attached as Annex B.

6. In the spirit of cooperation, the United States has provided detailed and thorough answers to the questions posed by the Committee, whether or not the questions or information provided in response to them bear directly on obligations arising under the Convention. It should be noted that the report does not address the geographic scope of the Convention as a legal matter, although it does respond to related questions from the Committee in factual terms.

7. The United States also directs the Committee's attention to the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights filed in December 2011 (hereinafter referred to as "2011 ICCPR Report," available at *www.state.gov/j/drl/rls/179781.htm*) and the U.S. Periodic Report Concerning the International Convention on the Elimination of All Forms of Racial Discrimination filed in June 2013 (hereinafter referred to as "2013 CERD Report," available at). Although the United States has endeavored to fully answer each of the Committee's 55 questions in the text of this report, in a number of places the report also incorporates by reference sections of the 2011 ICCPR Report, the 2013 CERD Report, and the Common Core Document of the United States filed in December 2011 (hereinafter referred to as "CCD") in the interest of full and robust reporting.

* * * *

I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

1. Death Penalty

The United States provided an explanation of vote on the resolution on Belarus at the 23rd session of the Human Rights council, available at *https://geneva.usmission.gov/2013/06/13/u-s-supports-hrc-resolution-on-the-situation-of-human-rights-in-belarus*/. The U.S. explanation of vote includes the following statement on the death penalty:

> [W]e do not share the view that the death penalty equals inhumane treatment. We emphasize that the death penalty is not prohibited by international law, including the International Covenant on Civil and Political Rights, to which Belarus is a party, and that any decision to establish a moratorium or abolish the death penalty must be left to the people of Belarus to decide through domestic democratic processes.

The United States also provided an explanation of vote at the 22nd session of the Human Rights Council to accompany its vote in favor of a HRC decision on the high-level panel discussion on the question of the death penalty. That explanation of vote includes the following:

> The United States is pleased to vote in support of his decision. International law does not prohibit capital punishment when imposed in accordance with a state's international obligations. Rather, it leaves the ultimate decision regarding its use or abolition to be addressed through the domestic democratic processes of individual Member States. We thank the sponsors of this resolution for producing a text that is carefully drafted and consistent with international law and practice. It is our hope that the high-level panel to be convened on the question of the death penalty will address all aspects of the argument about the death penalty, given the wide divergence of views regarding its abolition or continued use both within and among nations. We also urge all governments that employ the death penalty to do so in conformity with their international human rights obligations.

2. Arbitrary Detentions

On March 5, 2013, the U.S. delegation provided a statement at the 22nd Session of the HRC regarding the working group on arbitrary detentions. The U.S. statement is excerpted below and available at *http://geneva.usmission.gov/2013/03/06/u-s-*

statement-on-the-protection-of-human-rights-while-countering-terrorism-and-on-arbitrary-detentions/.

_____

* * * *

Regarding the Working Group's "Deliberation No. 9," the United States reserves on such questions as to whether and under what circumstances prolonged arbitrary detention may violate customary international law or whether there is a preemptory or *jus cogens* norm against it. However, we agree with the emphasis of the Working Group's report on the need for all States to enforce protections against arbitrary or unlawful detention and to provide means for a detained person to challenge the lawfulness of detention in accordance with applicable international obligations, paying due respect to the principle of *lex specialis* in situations of armed conflict, and the limits on the Working Group's mandate in that regard.

However, we see no need to rewrite or reinterpret treaty text, such as Articles 4 and 9 of the International Covenant on Civil and Political Rights, in order to underscore the importance of continued protection from unlawful or arbitrary detention. We would also emphasize the importance of the Universal Declaration of Human Rights in providing a yardstick by which the conduct of all States may be judged with respect to arbitrary arrest or detention, particularly those States that are not party to the International Covenant on Civil and Political Rights or other relevant international or regional conventions. Finally, as stated in our intervention on the Working Group's last report, 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.

As for the Working Group's ongoing efforts to prepare draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty, the United States notes that Resolution 20/16 requested that the Working Group seek the views of States and others, and inquires as to how the Working Group intends to proceed in seeking such views and what its timeframe for collecting such responses might be.

* * * *

J. FREEDOM OF ASSEMBLY AND ASSOCIATION

1. Human Rights Defenders

On March 8, 2013, Ambassador Donahoe delivered the statement for the United States at a general debate at the 22nd session of the HRC on resolutions concerning both human rights defenders and peaceful protests. Resolution 22/6 on protecting human rights defenders was adopted on March 21, 2013. U.N. Doc. A/HRC/RES/22/6. Resolution 22/10 on the promotion and protection of human rights in the context of peaceful protests was also adopted on March 21. U.N. doc. A/HRC/RES/22/10. Ambassador Donahoe's statement is excerpted below and available at

http://geneva.usmission.gov/2013/03/08/too-many-governments-continue-to-restrict-freedoms-of-expression-and-association/.

Ambassador Donahoe delivered a statement on human rights defenders at the 23rd session of the HRC as well. That statement is available at http://geneva.usmission.gov/2013/06/10/item8-4/.

In November, the UN General Assembly's Third Committee passed a resolution on protecting women human rights defenders. The resolution was adopted by the General Assembly on December 18, 2013. U.N. Doc. A/RES/68/181.

---

* * * *

As we gather here, seized with a full agenda to promote and protect universal human rights, there are individuals in each of our countries who are working tirelessly to fight against human rights violations and degradation. Human rights defenders, who often work at great risk, threatened with reprisal, fight to ensure that the obligations and commitments of governments are implemented in the real world in their own communities. Whether through global movements, such as One Billion Rising, which struggles to bring an end to the cowardly scourge of violence against women, or through the courageous actions of individuals like Malala Yousafzai, who was almost assassinated for simply wanting to be educated, there is little doubt that human rights defenders are facing increasingly grave challenges to their lives and work. Too many governments continue to restrict rights such as freedom of peaceful assembly and association, and freedom of expression; and too many governments continue to threaten and harass both human rights defenders, and the lawyers and legal professionals who bravely represent them when a government clamps down. We must all work together to support Human Rights Defenders and ensure that governments uphold their freedom and human rights. We must also protect the lawyers and legal professionals who face threats and arbitrary restrictions on their ability to carry out their professional duties.

Human Rights Defenders, and civil society more broadly, are also vital in advancing the human rights of the most vulnerable. During this session we will be considering resolutions on the Rights of the Child, the Right of Persons Belonging to Minorities, and the Rights of Persons with Disabilities. In many cases, members of these vulnerable groups are discriminated against and do not have the ability to speak for themselves, so it is often through the tireless advocacy work of human rights defenders that their rights are protected. Nelson Mandela once said that "we owe our children—the most vulnerable citizens in any society—a life free from violence and fear." Our children and other vulnerable members of our societies all deserve our utmost attention and protection. We look forward to working with our partners at the Council to ensure the rights of every person.

* * * *

2. Freedom of Assembly and Association Generally

On September 13, 2013, Ambassador Donahoe delivered the statement on behalf of the U.S. delegation at the general debate on promotion and protection of all human rights

at the 24th session of the HRC. Her statement is excerpted below and available in full at *http://geneva.usmission.gov/2013/09/13/freedom-of-assembly-and-association-is-inextricably-linked-to-other-fundamental-freedoms/*.

* * * *

It is with great pride that the United States once again lends its support to the resolution on the freedoms of peaceful assembly and of association, and we are pleased to join our cross-regional partners, including the Czech Republic, Indonesia, Lithuania, the Maldives, Mexico, and Nigeria, in introducing this resolution. The special rapporteur Maina Kiai has proved to be a strong, independent, and credible voice highlighting the need to protect these freedoms, while also promoting best practices and providing technical assistance to governments. Adopting another resolution on this topic is important so the Council can maintain the important work of the special rapporteur and reaffirm a basic truth: civil society plays a pivotal role in promoting and protecting human rights, but can only do so when the universal rights of freedom of peaceful assembly and of association are protected. Democratic progress demands political participation through the exercise of the freedoms of peaceful assembly and association. We have seen time and time again the benefits that a vibrant civil society can inspire, including greater economic prosperity, societal innovation, and ethnic and religious harmony. Governments that violate freedoms of peaceful assembly and association put their societies at risk of economic stagnation, poverty, inflamed ethnic, racial, or religious tensions, broad unrest and violence, and other serious problems.

Furthermore, the freedoms of peaceful assembly and of association are inextricably linked to other fundamental freedoms, including freedom of expression and freedom of religion or belief. Citizens must be free to come together to advocate for change, express support, address community needs, and, most importantly, remind governments that they derive their authority from the will of the governed. Strong civil society also fosters transparent and accountable government.

Finally, we have witnessed continued violations of freedoms of peaceful assembly and of association. We have seen governments restrict civil activism and attack civil society organizations with impunity. These assaults frequently accompany periods of political turmoil or changes in power. The voice of civil society, as a reflection of the will of the people, should be heard most clearly during these transition periods. Unfortunately, it is during these times that freedoms of peaceful assembly and of association are most threatened.

* * * *

On September 26, 2013, Ambassador Donahoe again addressed the 24th session of the HRC to introduce a resolution on the rights to peaceful assembly and association. The resolution on freedom of assembly and association was adopted without a vote on September 26, 2013. U.N. Doc. A/HRC/RES/24/5. Ambassador Donahoe's statement is excerpted below and available at *http://geneva.usmission.gov/2013/09/26/u-s-introduces-resolution-on-rights-to-freedom-of-peaceful-assembly-and-association/*.

_____

* * * *

Civil society organizations and related associations are facing an ongoing assault around the world. On the margins of the UN General Assembly earlier this week, President Obama and numerous like-minded government leaders, as well as the UN, foundations, and civil society organizations met to voice their concern about the global deterioration in the environment for civil society and agreed to take additional steps to address it. To that end, they noted in particular the importance of the mandate to be extended by the resolution we would like to introduce today, resolution A/HRC/24/L.7 "The rights to freedom of peaceful assembly and of association."

We direct you to the oral revision that has been circulated.

We present this resolution for adoption along with the Czech Republic, Indonesia, Lithuania, the Maldives, Mexico, and Nigeria, and 60 co-sponsors including Angola, Botswana, Brasil, Egypt, Guatemala, Libya, Macedonia, Moldova, New Zealand, Panama, Republic of Korea, San Marino, Senegal, Serbia, Togo, and Uruguay. The resolution's purpose is to support the work of the Special Rapporteur on these rights.

This resolution extends his mandate and marks the third specific resolution on this issue. We want to thank our core-group for their hard work on this text and for continuing to emphasize the importance of this issue in the Human Rights Council.

Three years ago, we joined Council colleagues in supporting the creation of a new special rapporteur on these rights. Now we present an extension of his mandate in order to continue the vital work he has undertaken on this issue. In May of this year we welcomed the Special Rapporteur's annual report, which focused particularly on the undue restrictions relating to funding of associations and holding peaceful assemblies. We also look forward to the presentation of his report before the UN General Assembly on October 29, which will focus on elections, and highlight the importance of protecting the rights of freedom of peaceful assembly and of association, particularly during the time before, during, and after an election.

We bring this resolution before the council to reaffirm the necessity of the protection of such rights and to encourage countries around the world to engage with the Special Rapporteur. The resolution, among other provisions, calls upon states to cooperate fully with the Special Rapporteur in the performance of his mandate, to respond promptly to his urgent appeals and other communications, and to consider favorably his requests for visits.

Finally, we would like to re-affirm that the strength and vibrancy of nations depend on an active civil society and robust engagement between governments and civil society to advance shared goals of peace, prosperity, and the well-being of all. We note our deep concern that many governments are restricting civil society and the rights of freedom of association and expression, both online and offline.

We look forward to working with other Council members in the upcoming year on the rights to freedom of peaceful assembly and of association and we urge the Council to adopt this resolution by consensus.

* * * *

K. FREEDOM OF EXPRESSION

1. General

a. Protection of Journalists

On July 17, 2013, Acting U.S. Permanent Representative to the UN, Rosemary DiCarlo, delivered remarks at a Security Council open debate on protecting journalists, convened by the United States. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/212072.htm*.

_____

* * * *

Thank you, Deputy Secretary-General Eliasson, for your briefing and for your support to this issue. We also greatly appreciate the remarks of our four briefers, who have made a compelling case for the challenges and risks journalists face, and their experiences demonstrate the indispensable role that journalists play in focusing the world's attention on conflict. This is why the United States has convened today's open debate on protecting journalists.

Journalists are literally our eyes and ears in every corner of the world. They sound the warning when local tensions threaten to erupt into war. They document the suffering of civilians in conflict areas. And they expose human rights violations and war crimes. Journalists are critical to this Council's ability to remain well informed so that it may fulfill its mandate to maintain international peace and security.

Reporting from the former Yugoslavia in the 1990s brought attention to mass atrocities there and helped mobilize the international community's response, including support for a war crimes tribunal. More recently, this Council relied on videos, photos, and the reported accounts of citizens to understand the events taking place in Libya in 2011. This real-time reporting gave us the information necessary to act quickly to prevent even more horrific violence by the Qadhafi regime.

Tragically, this work is not without sacrifice, as the case of journalist Mohammed "Mo" Nabbous and his wife Samra Naas demonstrated. When a sniper killed Mo while he was broadcasting live during Qadhafi's assault on Benghazi, Samra, pregnant with their first child, took his place, declaring, "What he has started has got to go on, no matter what happens."

In Syria, the Assad regime continues to kill, imprison, and torture journalists. Mazen Darwish, head of the Syrian Center for Media and Freedom of Expression—the only Syrian-based non-governmental organization accredited to the United Nations—has been held incommunicado since February 2012 and was reportedly tortured by the Assad regime. His so-called crime, like so many of his colleagues, was exercising his universal right to freedom of expression to show the world the regime's atrocities.

As others have noted, Resolution 1738 reminds us that journalists operating in armed conflict are protected under international humanitarian law. Given the invaluable contribution of journalists to our work, this Council must do all it can to ensure their protection. Therefore, we ask the Secretary-General to increase his focus on the safety and security of journalists, media professionals, and associated personnel in his reports on the protection of civilians and in his

reports on peacekeeping missions whose mandates include civilian protection. Furthermore, we urge Member States-especially those who contribute troops and police to UN peacekeeping missions-to ensure that their judicial officials, law enforcement officers, and military personnel know their obligations under international human rights law and international humanitarian law regarding the safety of journalists.

Impunity for violence against journalists must end. The United States endorses fully the 2012 UN Plan of Action on the Safety of Journalists and the Issue of Impunity. We encourage Member States to enact its provisions and put in place voluntary protection programs for journalists operating in conflict areas. We also underscore the specific risks faced by women journalists, including sexual and gender-based violence. A gender-sensitive approach is needed when considering measures to address the safety of journalists.

New and emerging forms of 21st century communication technology, including various Internet fora, blogging, texting, and other social media platforms have transformed the way journalists, including citizen journalists, work. These new forms of communication have allowed wider and more rapid dissemination of information from conflicts across the globe. We call on all Member States to maintain and safeguard the infrastructure that enables the work of journalists in situations of conflict.

In conclusion, recognizing the value of the work of journalists reporting on conflict, this Council has an obligation to help protect those who provide us with so much vital information. We thank journalists around the world who risk their lives to seek the truth and shine light on the darkness for the entire world to see. The Security Council could not do its job without you. We thank you.

* * * *

b. Freedom of expression and women's empowerment

On June 4, 2013, at the 23rd session of the HRC, the U.S. delegation delivered a statement introducing a resolution on the importance of freedom of expression to women's empowerment. The resolution was adopted by consensus on June 13, 2013. U.N. Doc. A/HRC/RES/23/2. The U.S. statement appears below and is available at *http://geneva.usmission.gov/2013/06/04/26051/*. For further discussion of issues relating to discrimination on the basis of gender, see section B.2., *supra*.

* * * *

At this session, the United States, as part of a broad cross-regional group, is proposing a resolution that stresses the importance of freedom of expression, especially as it relates to women's empowerment.

Respect for freedom of opinion and expression plays a fundamental role in the ability of women to interact with society at large, in particular in the realms of economic and political participation.

We have seen, time and again, that when citizens are able to express themselves freely and without fear of reprisal or retribution, societies reap the benefits, including greater economic prosperity, societal innovation, and ethnic and religious harmony. Governments that violate

freedom of expression impede societal progress, producing consequences that include poverty, economic stagnation, inflamed ethnic or religious tensions, and unrest among citizens who are prevented from fully participating in their societies or governments.

Women's participation in the political, economic, and social spheres is often particularly limited by undue restrictions on their right to freedom of expression. Discrimination, intimidation, harassment and violence often prevent women and girls from fully enjoying their human rights and fundamental freedoms, including their right to freedom of opinion and expression. We recognize the critical importance of women's participation in all contexts, and their essential contributions to the achievement of peace and development.

Freedom of expression is inextricably linked to other freedoms we consider essential, including the freedom of religion and belief. Freedom of expression allows us to engage in informed discourse on important issues before us in our own nations, and also allows us to work together to solve global challenges.

Freedom of expression is crucial for reaping the benefits of the Internet, which has fast become a space for innovative collaboration.

To ensure that we properly harness the transformative power of the Internet, we must ensure that the universal human rights that governments are obligated to respect in the offline world are equally protected online. We have seen that threats to Internet freedom are growing in number and complexity. Governments that block websites, censor search results, imprison journalists and activists, and impose laws that unduly restrict online discourse and the ability to seek information rob their citizens of their fundamental freedom of expression. We encourage these states to reverse these measures and respect their human rights obligations, in order to prevent the societal ills we have seen accompany the suppression of freedom of expression.

In this regard, we reiterate our support for HRC Resolution 20/8 and join the statement by Sweden on this topic.

* * * *

2. Internet Freedom and Privacy

At the clustered interactive dialogue on freedom of expression and violence against women, held at the 23rd session of the HRC on June 3, 2013, the United States delegation delivered a statement commenting on a report of the special rapporteur on the relationship between the right to freedom of expression and privacy rights. That portion of the statement appears below and focuses on the limits of online privacy. The portion of the U.S. statement addressing violence against women appears in Section B.2.b., above. The statement in its entirety is available at *http://geneva.usmission.gov/2013/06/03/clustered-interactive-dialogue-on-freedom-of-expression-and-violence-against-women/*.

_____

* * * *

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights state that no one shall be subjected to arbitrary or unlawful interference with his or her privacy. The central idea of Internet freedom is that human rights apply with the same force online as offline. This is true for privacy rights, which enable people to make the most of modern communication technologies.

But some governments see modern communications technologies as threatening, and have sought to use surveillance to attempt to control discourse and eliminate dissent. If governments are conducting surveillance of private communications for illegitimate purposes—for instance, to persecute dissidents—or if governments are conducting arbitrary surveillance or surveillance outside the rule of law, then that surveillance may constitute an arbitrary interference with privacy or an improper restriction on the rights to freedom of expression, association or assembly.

In contrast, to protect their citizens, governments must sometimes investigate criminal activity by lawfully obtaining online communications. Like other rights-respecting governments, the United States conducts surveillance for lawful purposes, pursuant to laws that are transparent, adopted pursuant to democratic processes, and subject to oversight by all three branches of government. In fact, the Foreign Intelligence Surveillance Act and its recent amendments, which the report mischaracterizes as providing a "blanket exception to the requirement for judicial authorization," are expressly designed to bring certain privacy-impacting activities under judicial and congressional supervision. Such surveillance, used appropriately, supports human rights.

While the United States cannot endorse all of the conclusions of the report, including those related to the nature of privacy rights and the test for permissible infringements on privacy, we commend the Special Rapporteur for taking up this difficult issue, and we encourage other States, businesses, and civil society groups to take seriously the human rights concerns raised by the report.

* * * *

On June 10, 2013, at the 23rd session of the HRC, a statement on freedom of expression on the internet was read by Tunisia, on behalf of 70 countries, including the United States. Excerpts from the statement appear below; the full text is available at *http://geneva.usmission.gov/2013/06/10/internet-freedom-5/*.

* * * *

The Vienna Declaration and Program of Action asserted that all human rights are universal, indivisible, interdependent and interrelated. This was also at the core of the resolution 20/8"The promotion, protection and enjoyment of human rights on the Internet" adopted by consensus in this Council a year ago. Our conviction that freedom of expression and access to information promotes development in all spheres of society stands firm. With the remarkable spread, use and potential of modern communication technologies, the importance of this link cannot be overestimated. Internet, social media, and mobile phone technology have played, and should continue to play, a crucial role as instruments for participation, transparency and engagement in socio-economic, cultural and political development.

We also reiterate what was stated in the important resolution 20/8; that the same rights that people have offline such as freedom of expression, including the freedom to seek, receive and impart information must also be protected online.

To enjoy and ensure the potential that the internet offers, we believe that there should be as little restriction as possible to the flow of information on the Internet and we repeat our call on all states to ensure strong protection of freedom of expression, privacy and other human rights online in accordance with international human rights law.

As the Internet continues to spread and its impact grows, the handling of security concerns are moving into the realm of the Internet as well. However, the state's efforts to manage security concerns may pose a challenge when it relates to the Internet.

It is of paramount importance to recall that the state has an obligation to respect, protect and promote individuals' human rights and fundamental freedoms. This applies, as laid out before, both in the physical world as well as on the Internet. We therefore wish to emphasize that when addressing any security concerns on the Internet, this must be done in a manner consistent with states' obligations under international human rights law and full respect for human rights must be maintained.

Recognizing the complexity and the diversity of the Internet, it is our belief that governments should promote and protect human rights online at the same time as taking responsibility for security concerns. We are convinced that governments can achieve this through the establishment of democratic and transparent institutions, based on the rule of law. This is not only possible, but necessary to ensure that the Internet can continue being the vibrant force which generates economic, social and cultural development.

* * * *

On November 26, 2013, U. S. Representative to the UN Economic and Social Council, Elizabeth Cousens delivered the U.S. explanation of position on the Third Committee resolution on "The Right To Privacy in the Digital Age." The resolution was adopted by consensus on December 18, 2013. U.N. Doc. A/RES/68/167. Ambassador Cousens's statement is excerpted below and available at *http://usun.state.gov/briefing/statements/218078.htm*.

* * * *

The United States appreciates the efforts of Germany and Brazil, and we are pleased to have joined consensus on today's resolution because the human rights it reaffirms—privacy rights and the right to freedom of expression as set forth in the International Covenant on Civil and Political Rights (the ICCPR) and protected under the U.S. Constitution and U.S. laws—are pillars of our democracy.

We take this opportunity to reaffirm those human rights instruments that we have long affirmed, in particular the ICCPR, understanding this resolution to be focused on State action and consistent with longstanding U.S. views regarding the ICCPR, including Articles 2, 17, and 19. The United States has long championed these rights domestically and internationally, and as we have said before, we firmly believe that privacy rights and the right to freedom of expression

must be respected both online and offline, as demonstrated by our cosponsorship of a resolution on this topic at the Human Rights Council.

In some cases, conduct that violates privacy rights may also seriously impede or even prevent the exercise of freedom of expression, but conduct that violates privacy rights does not violate the right to freedom of expression in every case. The United States remains firmly committed to working with all States to promote freedom of expression and privacy online. And we applaud this resolution's recognition that full respect for the right to freedom of expression requires respect for the freedom to seek, receive, and impart information.

Mr. Chairman, human rights defenders, civil society activists, and ordinary citizens the world over are using the Internet and online resources in new and innovative ways, to protect human dignity, fight against repression, and hold governments—including mine—accountable. It is imperative that they can use these tools freely without inappropriate censorship and fear of reprisals, to continue their vital work to protect and promote human rights worldwide. Thank you.

* * * *

L. FREEDOM OF RELIGION

1. U.S. Domestic Developments

a. Launch of the Office of Faith-Based Community Initiatives

On August 7, 2013, Secretary Kerry announced the creation of the Department of State Office of Faith-Based Community Initiatives, established to engage more closely with faith communities around the world. The Secretary's remarks on the launch of the Office of Faith-Based Community Initiatives are available at *www.state.gov/secretary/remarks/2013/08/212781.htm*. The website of the office, *www.state.gov/s/fbci/*, features a statement of the U.S. Strategy on Religious Leader and Faith Community Engagement and includes this overview of the Office of Faith-Based Community Initiatives:

> The Office of Faith-Based Community Initiatives is the State Department's portal for engagement with religious leaders and organizations around the world. Headed by Special Advisor Shaun Casey, the office reaches out to faith-based communities to ensure that their voices are heard in the policy process, and it works with those communities to advance U.S. diplomacy and development objectives. In accordance with the U.S. Strategy on Religious Leader and Faith Community Engagement, the office guarantees that engagement with faith-based communities is a priority for Department bureaus and for posts abroad, and helps equip our foreign and civil service officers with the skills necessary to engage faith-communities effectively and respectfully. The office collaborates regularly with other government officials and offices focused on religious issues,

including the Ambassador-at-Large for International Religious Freedom, the Department's Office of International Religious Freedom, and the White House Office of Faith-Based and Neighborhood Partnerships.

b. U.S. annual report on international religious freedom

On May 20, 2013, the Department of State released the 2012 International Religious Freedom Report, and transmitted the report to Congress 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/#wrapper*. Remarks by Ambassador-at-Large for International Religious Freedom Suzan Johnson Cook on the release of the report are available at *www.state.gov/j/drl/rls/rm/2013/209699.htm*. Secretary Kerry's statement on the release of the report is available at *www.state.gov/secretary/remarks/2013/05/209678.htm*.

2. Human Rights Council

a. Resolutions at the 22nd session

At its 22nd session, the HRC adopted two resolutions related to freedom of religion or belief. Resolution 22/20 was co-sponsored by the United States and the European Union and affirms that respect for religious diversity is an essential element of a peaceful society. Ambassador Donahoe delivered a statement on behalf of the U.S. delegation in support of the resolution on March 21, 2013. Resolution 22/20 was adopted without a vote on March 22, 2013. U.N. Doc. A/HRC/RES/22/20. Ambassador Donahoe's statement is excerpted below and available in full at *http://geneva.usmission.gov/2013/03/22/respect-for-religious-diversity-is-an-essential-element-of-any-peaceful-society/*.

* * * *

The United States is pleased to co-sponsor the EU-sponsored resolution on the freedom of religion or belief. The United States strongly supports freedom of religion for all people around the world. Unfortunately, in too many countries, governments fail to protect, or actively deny, their peoples' fundamental right to believe according to their conscience and to manifest those beliefs, and subject their citizens to violence, severe discrimination, or arrest on account of those beliefs. Too many people around the world face the threat of prosecution from blasphemy and apostasy laws, which governments frequently use to shield themselves from legitimate criticism, and fellow citizens use as weapons in private disputes. Too many governments routinely fail to investigate and prosecute perpetrators of sectarian crimes, leading to a climate of impunity that

may breed violent extremism. These trends must be reversed if we are to realize sustainable peace in this world.

We note with particular concern the worsening plight of religious minority communities in Iran, including Christians, Sunnis, Sufis, Jews, and Baha'i. Iranian officials continue to restrict these communities' freedom to practice their religious beliefs free from harassment, threat, or intimidation. Christian pastor Saeed Abedini's continuing harsh treatment at the hands of Iranian authorities exemplifies this trend. We repeat our call for the Government of Iran to release Mr. Abedini, and others who are unjustly imprisoned, and to cease immediately its persecution of all religious minority communities. The United States also repeats its call for the Government of Iran to provide without delay the urgent medical attention Mr. Abedini needs.

Respect for religious diversity is an essential element of any peaceful society, and religious freedom is a universal human right that all states have a responsibility to uphold. We implore all states to live up to their obligations and to hold accountable those who seek to restrict the freedom of religion.

* * * *

Another resolution was adopted on March 22, 2013 that follows up on resolution 16/18 on combating religious intolerance, adopted in 2011. U.N. Doc. A/HRC/RES/22/31; see *Digest 2011* at 236-37 on the adoption of resolution 16/18. Assistant Secretary Brimmer's remarks at the opening of the 22nd session of the HRC, excerpted in Section A.1.a, *supra*, also discuss resolution 16/18. Ambassador Donahoe delivered the comment of the U.S. delegation in support of resolution 22/31 on "combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief." Her statement is excerpted below and available in full at *http://geneva.usmission.gov/2013/03/22/16-18/*.

* * * *

For the third year in a row, this Council has affirmed the Resolution 16/18 consensus on a range of positive steps that states should take to address the glaring challenges of intolerance, discrimination, and violence on the basis of religion or belief without infringing on the fundamental freedoms of expression and religion. All too often today we hear of places of worship being attacked, of individuals belonging to minority religious communities facing violence and discrimination because of their beliefs, and of repressive laws infringing on the freedoms of religion and expression.

The steps called for in this resolution—such as protecting places of worship, enforcing anti-discrimination laws, and speaking out against intolerance—are critical in addressing these pressing concerns in a manner that protects universal human rights. This consensus has moved this Council away from the divisive and unacceptable approach of encouraging restrictions on speech as a way to address intolerance, to an approach that recognizes that protection of human rights for all individuals is essential to promote tolerance and understanding. We have worked with many partners to promote implementation of the specific actions called for in this

resolution. And we continue to promote such action through assistance and training programs, and through participation in the Istanbul process of experts meetings to identify best practices.

* * * *

On March 25, 2013, the U.S. delegation to the HRC made a statement in an interactive dialogue that included the Special Rapporteur on Freedom of Religion and Belief, Heiner Bielfeldt. The statement is excerpted below and available in full at *https://geneva.usmission.gov/2013/03/06/u-s-statement-on-freedom-of-religion-or-belief-item-3/*.

* * * *

The United States also thanks Special Rapporteur Bielfeldt. We appreciate his focus on the need to respect and protect freedom of religion or belief of persons belonging to religious minorities.

Many of the Special Rapporteur's documented violations are confirmed through our own Annual Report on International Religious Freedom. Despite some progress, the overall status of religious freedom in the world is sliding backward, especially for religious minorities. We stand by those reaching for greater dignity and freedom and demanding that their governments institutionalize democratic reform. We are concerned by governments that fail to protect religious minorities, reform discriminatory laws, or speak out against hate on the basis of religion or belief. Many countries restrict religious freedom supposedly to ensure public safety, even though studies have shown that suppression of religious freedom is directly correlated with instability and violence. Some states use the pretext of countering violent extremism to suppress religious freedom and other human rights, even though such suppression itself can lead to radicalization. Those arrested on charges of extremism are often subject to torture, beatings, and harsh prison conditions.

We also note the Special Rapporteur's recommendations for promoting religious freedom and tolerance, many of which have been outlined in Human Rights Council Resolution 16/18. We continue to urge implementation of the constructive measures laid out in that resolution, including the development of outreach programs to religious minorities, training for government officials on religious and cultural needs and sensitivities, promoting understanding through education and the media, and interfaith dialogue.

Finally, we would like to underscore the important role of civil society, religious communities, and national human rights institutions to promote religious freedom along with governments, and to speak out against intolerance. The United States continues to establish partnerships with groups and individuals around the globe and we are using our convening power to bring together various groups to advance religious freedom around the world.

* * * *

b. Istanbul Process

On June 19, 2013, Acting Principal Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor Michael G. Kozak delivered the U.S. statement at the 3rd International Expert Meeting on the Follow-up of Implementation of HRC Resolution 16/18, held in Geneva. For background on Resolution 16/18 and previous follow-up (the "Istanbul Process"), see *Digest 2012* at 220-22 and *Digest 2011* at 235-44. The June 2013 meeting of the Istanbul Process was hosted by the Organisation for Islamic Cooperation ("OIC"). Ambassador Kozak's statement at the June meeting of the Istanbul Process is excerpted below and available at *http://geneva.usmission.gov/2013/07/09/the-u-s-on-review-of-the-istanbul-process-progress/*.

* * * *

The United States is pleased to participate in the third meeting to promote implementation of HRC Resolution 16/18. We thank OIC Secretary General Ihsanoglu for his leadership in inspiring Resolution 16/18. And we thank him for working to promote its implementation through the process he, Lady Ashton and former Secretary Clinton began in Istanbul. He is a valued partner and we commend his efforts on advancing its implementation.

In reviewing these efforts, we assess that there has been significant progress. We also believe there is a strong need to continue our joint efforts to promote implementation of 16/18. We have had successes multilaterally in organizing a series of highly substantive meetings of which today's is the latest. And we have some positive examples of implementation of the steps called for in the resolution within member States. Unfortunately, however, there are many examples of States taking a conflicting approach on religious intolerance, including through passage or enforcement of blasphemy laws. Enforcement of such laws not only infringes on the freedoms of religion and expression; they also exacerbate underlying tensions that may exist between religious communities. And they are often enforced in ways that target members of religious minorities and political opponents.

In the U.S. we learned these lessons the hard way.

There has been a narrative that the U.S. is clinging to its "quaint" 18th Century First Amendment while the rest of the world has progressed. But the reality is the opposite. While the text of the First Amendment has remained the same, its interpretation has changed radically over time.

When the First Amendment was first enacted, we maintained in place blasphemy laws we inherited from our colonial experience. Initially the authors of our Constitution passed the Alien and Sedition Act which criminalized "false, malicious and scandalous" publications about the government. We criminalized criticisms of slavery on the grounds that such criticism could incite violence. We suppressed labor union activity and civil rights advocacy.

We learned a hard lesson. All of these efforts to prevent violence by banning speech ended in violence. Because when you close off peaceful dissent and debate, violence becomes the only alternative.

About sixty years ago, our national consensus changed. Our courts severely limited how speech could be restricted. And we set up the machinery to protect minority views. The result has been greater harmony and peace. Our application of these lessons learned occurred in the same time frame as the development of international human rights law as reflected in the Universal Declaration and in the International Covenant on Civil and Political Rights.

* * * *

So when we speak about freedom of expression, we speak from principle but mostly from experience. We urge the governments that are working to implement the principles in 16/18 to examine the U.S. experience. We believe they would find that a reform of their current laws to a less restrictive approach might well engender greater harmony, as it did in the U.S.

At the experts meeting the United States held in December 2011, we invited practitioners from foreign government ministries of justice and ministries of interior. They discussed two recommended actions from 16/18: First, they discussed effective government strategies to engage members of religious minorities, and training of government officials on religious and cultural awareness. Second, they examined enforcing laws that protect against discrimination on the basis of religion or belief. This conference focused on concrete measures States can take, and we found a number of best practices derived from the experience of a large number of countries. Our report of the meeting, which includes a list of best practices discussed by the participants, is available online. We can also provide you with a copy.

As the result of requests made at that conference, the United States has initiated a foreign assistance program run by our Departments of Justice and of Homeland Security. They provide interested foreign governments help to establish training programs on the two topics that were discussed: government engagement with members of religious communities and enforcement of anti-discrimination laws. The first such training was held last week in Bosnia. We had excellent discussions and participation from officials in Bosnia, including Bosniaks, Serbs, and Croats living in Bosnia- Herzegovina. We have two more trainings planned as well, one in the North Africa region and one in the Southeast Asia region.

The United Kingdom, in association with Canada, hosted the second implementation meeting in December 2012. This implementation meeting focused on best practices for fostering religious freedom and pluralism. These included promoting the ability of members of religious communities to manifest their religion and building networks with civil society and other partners to promote freedom of religion or belief. A summary of that meeting, which includes a list of ideas made by panelists, is also available online.

Now we are here for this meeting being hosted by the OIC in Geneva. Thus far 16/18 implementation meetings have been held in States rather than at UN facilities so that the message of implementation gets carried directly to domestic audiences and experts. It also allows us to hear from domestic experts who work daily on how to best combat religious intolerance. But this meeting in Geneva provides us with an opportunity to reflect on the progress made thus far, to inform delegations here in Geneva of that progress, and to continue to work together towards future implementation efforts. We are aware that Qatar, for example, has declared its intention to host a 16/18 meeting, perhaps later this year, and other countries are considering hosting next year. We look forward to working with them on those plans.

Through these meetings, we are able to discuss best practices of the specific policies outlined in 16/18. In documenting the reports of those meetings, we are creating a record of best

practices that states can use to improve their policies at home. But the key is to turn these compilations of best practices into concrete reforms.

We are pleased with the progress so far and plan to continue to work directly with interested parties. We will continue to provide technical expertise and training, to promote implementation of the steps called for in 16/18. And we welcome any states with interest in receiving such assistance to be in contact with us.

In addition to this progress in supporting the efforts of others, domestically the United States has continued its efforts to practice what 16/18 preaches. We have made strong efforts vigorously to enforce anti-discrimination laws, to speak out against intolerance, to encourage interfaith dialogue, to protect the freedoms of religion and expression, and to engage robustly with members of religious communities. These policies, which are part of 16/18 and which we will discuss further today, are policies that have proven successful in the United States over the past several decades. It is because of our experience on these issues that we are so committed to promoting implementation of 16/18.

* * * *

M. RULE OF LAW AND DEMOCRACY PROMOTION

1. United States Joins Venice Commission

On April 15, 2013, the United States became the 59th member of the Council of Europe's European Commission for Democracy through Law, or Venice Commission. For more information on the Venice Commission, see its website, *venice.coe.int*. The United States had been an observer at the Venice Commission since 1991. Sarah Cleveland, a law professor at Colombia Law School who has represented the United States as an observer since 2010, is serving as the first U.S. member on the Commission, with Evelyn Aswad, a law professor at the University of Oklahoma College of Law, as substitute member. In a post available at *http://cyberambassadorsblog.wordpress.com/2013/04/15/u-s-joins-venice-commission-today/*, Evan G. Reade, U.S. Deputy Permanent Observer at the Council of Europe, wrote of the U.S. joining the Venice Commission:

> The decision of the United States to seek full membership after many years participating as an observer represents a commitment to the use of rule of law to address all range of constitutional issues, and we look forward to making a positive contribution based on our own legal scholarship, experience, and expertise. The U.S. respects and appreciates the influential work the Commission has accomplished in Europe since its creation in 1990 and notes with satisfaction that in addition to its continued relevance in advancing democracy in Europe, its expertise is now being recognized and sought by countries outside Europe seeking to strengthen the rule of law in their systems of government.

2. UN Third Committee Resolution

On November 7, 2013, the United States introduced a resolution on "Strengthening the role of the UN in enhancing periodic and genuine elections and the promotion of democratization." Ambassador Elizabeth M. Cousens, U.S. Representative to the UN Economic and Social Council, delivered the statement for the United States. Her remarks, excerpted below, are available at *http://usun.state.gov/briefing/statements/217350.htm*.

_____

* * * *

On behalf of the United States as the main sponsor of this resolution and the over 50 member states who have already cosponsored this text, it is my pleasure to introduce the Third Committee resolution entitled "Strengthening the Role of the United Nations in Enhancing Periodic and Genuine Elections and the Promotion of Democratization," Document L. 41.

In line with previous resolutions, this year's text reaffirms that democracy is a universal value 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. As President Obama recently said at the General Assembly, "Strong nations recognize the values of active citizens. They support and empower their citizens rather than stand in their way, even when it's inconvenient—or perhaps especially when it's inconvenient—for government leaders."

This text also includes elements incorporated in the General Assembly's previous resolutions on elections, recognizing the importance of free, fair, periodic and genuine elections, including in new democracies and countries undergoing democratization in order to empower citizens to express their will and to promote successful transitions to long-term sustainable democracies.

Two crucial elements in this text ensure the realization of democratization and free, fair, periodic and genuine elections. Consistent with the recent Secretary General's report, the resolution highlights the participation of women in the political and electoral process. The resolution calls upon States to enhance the political participation of women, on equal terms with men, at all levels of decision-making. The resolution this year also includes a new element relevant to persons with disabilities, reflecting the unique challenges they face in participating in electoral processes, including physical barriers to participation. States have an obligation to ensure that persons with disabilities can participate in the electoral process. This includes measures such as having tactile ballots for the visually impaired and ramps for persons with physical disabilities to access polling stations.

The text also reiterates the role of civil society and the importance of its active engagement in the promotion of democratization and invites Member States to facilitate the full participation of civil society in the electoral processes. As President Obama said, "Strong civil societies help uphold universal human rights. The human progress has always been propelled at some level by what happens in civil society—citizens coming together to insist that a better life is possible, pushing their leaders to protect the rights and the dignities of all people."

Finally, Mr. Chair, we appreciate the active support of delegations for this text and the contributions made to the text by Member States through the open negotiations we have conducted. We encourage those who have not yet done so to cosponsor the resolution and we hope it will again be adopted by consensus as it has been in the past.

* * * *

3. Civil Society

On September 23, 2013, on the margins of the UN General Assembly in New York, governments of 24 countries, including the United States, agreed on a joint statement "On the Promotion and Protection of Civil Society." Daily Comp. Pres. Docs. 2013 DCPD Doc. No. 00654, p. 1. President Obama and leaders of several other governments that met and agreed to the joint statement also delivered remarks at their meeting. Daily Comp. Pres. Docs. 2013 DCPD Doc. No. 00653, pp. 1-6. The joint statement follows.

_____

* * * *

We, the governments of the United States, Australia, Canada, Chile, Croatia, Czech Republic, Denmark, Estonia, Georgia, Ireland, Japan, Libya, Lithuania, Mexico, Mongolia, the Netherlands, Norway, Poland, Slovakia, South Korea, Sweden, Switzerland, Tunisia, and the United Kingdom, taking note of the important work of the Community of Democracies, the Open Government Partnership, and the Lifeline Fund, met on September 23 along with representatives of civil society, the philanthropic community, the private sector, and the United Nations on the margins of the United Nations General Assembly in New York. Our purpose was to reinforce the central role of civil society in working with governments to address common challenges and to coordinate action to promote and protect civil society in the face of ongoing assault around the world. We affirmed that the strength and vibrancy of nations depend on an active civil society and robust engagement between governments and civil society to advance shared goals of peace, prosperity, and the well-being of all people. We noted our deep concern that many governments are restricting civil society and the rights of freedom of association and expression, both online and offline.

To combat this alarming trend, our governments committed to work together to respond to growing restrictions on civil society that undermine its ability to perform its crucial role. We will ensure effective coordination of the multiple efforts already underway toward this end, including through the U.N. system, the Community of Democracies, the Open Government Partnership, and Lifeline, and commit to strengthen our support for these existing mechanisms. We will enhance our support for the work of the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association. We will lead by example to promote laws, policy decisions, and practices that foster a positive space for civil society in accordance with international law, and oppose legislation and administrative measures that impede efforts of civil society. We will undertake joint diplomatic action whenever necessary to support civil society in

countries where it is under threat, and to defend the fundamental freedoms of association and peaceful assembly.

We will also work to develop new and innovative ways of providing technical, financial, and logistical support to promote and protect the right of citizens and civil society to freely associate, meaningfully engage with government, and constructively participate in processes to improve the well-being of their countries. Throughout all of these efforts, our nations will continue to engage with representatives of civil society to help us understand and respond to the challenges they confront.

We commit to gather again at the opening of the 69th United Nations General Assembly to review our progress toward these objectives. We will work in concert over the coming year to ensure a robust, effective international response to the proliferation of restrictions being placed on civil society. We call on representatives of civil society, the philanthropic community, the private sector, and other governments to partner with us in supporting and defending civil society.

* * * *

On September 27, at the 24th session of the HRC, Ambassador Donahoe delivered a general statement for the United States in support of a resolution on civil society space. The resolution was adopted by consensus on September 27, 2013. U.N. Doc. A/HRC/RES/24/21.

* * * *

The United States is proud to co-sponsor the Human Rights Council's first resolution on creating and maintaining, in law and in practice, a safe and enabling environment for civil society. We thank Ireland for this leadership. This timely resolution underscores the important role civil society plays both in the promotion and protection of human rights, democracy, and the rule of law, and in providing expertise and advocacy within the UN system. We recognize the importance of states' commitment to creating an enabling environment for civil society and encourage all states to work together and with relevant regional, UN, and civil society mechanisms in this effort. Just this past week, heads of state, civil society, multilateral organizations, and private foundations gathered in New York at an event President Obama hosted on the margins of UNGA to consider ways to improve the policy environment for civil society. Participants discussed strengthening adherence to international norms and promoting best practices for government and civil society engagement and ways to resist the increasing restrictions being placed on civil society.

The text we are adopting today includes a reference to "realizing the right to development" in a long list of challenges with respect to which civil society plays a role. While development is a goal we all aim to achieve, important work is needed to build consensus on the relationship between development and human rights.

The United States thanks Ireland and the other core group members—Tunisia, Sierra Leone, Japan, and Chile—for the open and transparent negotiations they facilitated, and notes the spirit of flexibility and compromise that characterized those negotiations. In that context, we regret the decision of certain states—at the last hour—to table numerous amendments

introducing new elements that are not central to the subject of creating and maintaining civil society space. In light of the extensive consultations that took place after these states proposed the amendments, we are particularly disappointed that these states chose to call votes today on these amendments.

This is not how the Council should operate. We join the core group in calling on member states to vote "no" on these hostile amendments, and to support the text as proposed.

* * * *

4. Equal Political Participation

On September 26, 2013, the HRC adopted resolution 24/8 on equal political participation. U.N. Doc. A/HRC/RES/24/8. The resolution was the culmination of an initiative led by the Czech government. In June, at the 23rd session of the HRC, the Czech delegation delivered a joint statement on equal political participation on behalf of numerous countries, including the United States. The June 10, 2013 joint statement on equal political participation follows.

* * * *

Every healthy society makes sure that all its members have equal access to the political process. Political participation is the basis of democracy, a driving force towards social cohesion and economic development as well as a vital part of the enjoyment of all human rights and fundamental freedoms.

The right to express one's political will through suffrage in periodic and genuine elections and the right to be elected are crucial forms of such political participation. In this regard, we also wish to recall the importance for everyone to be able to exercise their rights to freedom of expression, peaceful assembly and association.

For political participation to be meaningful, it has to be fully inclusive. Only then it can channel competing interests into spaces of dialogue, leading to compromises that can be respected by all, and thus avoiding the possibility of tensions and resort to violence. This is also key in post-conflict situations and times of transition.

For this to happen, States should ensure that every citizen has an effective opportunity to participate in public affairs without discrimination of any kind. States should eliminate laws, regulations and practices that, in a discriminatory manner, prevent or restrict participation in the political process.

Despite recent progress, many continue to face countless challenges to exercise their right to participation in the political life of their countries on equal basis.

Women's full and equal participation in the political process and decision-making is essential to the achievement of equality, sustainable development, peace and democracy.

Persons living in poverty and other vulnerable situation or belonging to national or ethnic, religious and linguistic minorities are among the most affected by social exclusion and are subject to discrimination in the exercise of their political participation.

With this statement we would like to encourage states not only to respect and protect political rights of their citizens but to make a further step and take positive action to facilitate, promote and create conditions for them to fully exercise such rights.

States should actively aim to identify barriers, in law and in practice, as well as those individuals and groups that face the most obstacles, and to take adequate measures towards the full realization of their political rights on equal basis with other citizens towards the development of more inclusive and plural societies.

Some of the measures recommended by various international human rights mechanisms that, though quite simple, have major impact on effective participation free from discrimination, include:

Making polling stations accessible or allowing assistance in voting to facilitate the participation of persons with disabilities; Abrogating laws that discriminate against or are discriminatory to women in all fields of life; Removing discriminatory requirements such as language, ethnicity or religion that exclude persons belonging to minorities from the right to vote or to stand for elected office; Ensuring freedom of opinion and expression, access to public information and media, and freedom of peaceful assembly; Guaranteeing accessible and non-discriminatory voters' registration, where established; Facilitating access to legal identity and to documentation necessary to register as a voter or a candidate that affects for instance socially excluded persons, such as persons living in poverty and also persons in post-conflict situation. Meaningful participation of all segments of society in public affairs ensures that decision-making includes a broad range of opinions, perspectives and interests, leading to policies that foster stability, development and respect for human rights of all. And that should be our common aim.

* * * *

N. PUTATIVE RIGHTS

1. Right to Development Resolution at the Human Rights Council

On September 26, 2013, the UN Human Rights Council adopted a resolution entitled "The right to development." U.N. Doc. A/HRC/RES/24/4. The United States voted against the resolution. The U.S. explanation of vote follows.

* * * *

The United States' commitment to international development as a critical element of our foreign policy is clear. Nevertheless, we continue to have concerns about the so-called right to development. The United States is pleased to actively participate in the Working Group on the Right to Development 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 upset the careful balance resulting from those discussions by calling for an additional two-day informal meeting, without any effort to reach agreement on how to make progress in those discussions. We therefore request a vote on this resolution and will vote NO.

We would also highlight these additional points.

First, the United States remains convinced that any discussion of the right to development must involve expert guidance from civil society and the private sector. We hope that this year, we will be able to ensure better expert and civil society participation.

Second, it is important to consider not only the criteria and sub-criteria, but also the indicators elaborated by the High Level Task Force. It is the more specific indicators that are essential to analysis, measurement, and evaluation. These operational elements—which, together with the sub-criteria themselves, constitute "operational sub-criteria"—are important not so that we can rank or criticize particular States, but rather so that we can see how to improve the lives of the greatest number of individuals. Therefore, it is essential that the Working Group's future sessions take up the issue of indicators. We see this as squarely within the Working Group's mandate. We are disappointed that the proponents of this resolution have consistently refused to consider proposals to incorporate discussion of these operational elements.

Third, 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 rights include civil and political rights as well as economic, social, and cultural rights. The focus should be on the obligations States owe to their citizens in this regard, not the asserted obligations of institutions. Regrettably, this resolution continues to focus on institutions. In addition, the resolution dictates how the UN's specialized agencies should incorporate the topic of the right to development in their activities and inappropriately singles out the World Trade Organization for negative treatment.

Fourth, as previously noted, we are not prepared to join consensus on the possibility of negotiating a binding international agreement on this topic.

Nevertheless, we hope that at its 15th session, the Working Group can continue to operate constructively and on the basis of consensus, with further consideration of the sub-criteria and their operational elements and indicators.

* * * *

2. Putative Right to Peace

a. Working Group on a Draft UN Declaration on the Right to Peace

As discussed in *Digest 2012* at 238-42, the United States has participated in the inter-governmental working group on a draft UN declaration on the right to peace, despite U.S. opposition to the creation of the group. The United States continued to attend the working group's sessions in 2013. Excerpted below is the U.S. opening statement at the working group's session that began on February 18, 2013. The U.S. opening statement reiterates the basis for U.S. opposition to the elaboration of a declaration on the "right" to peace. The full text of the U.S. opening statement delivered on February 18 is available at *http://geneva.usmission.gov/2013/03/04/working-group-on-a-draft-un-declaration-on-the-right-to-peace-opening-statement*.

_____

* * * *

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. That said, we would offer the following brief preview of positions that we may take later this week:

As noted above, there are a number of issues addressed by the draft Declaration that are properly addressed in other forums. These issues include disarmament and peacekeeping and refugees and migration. There are also a number of issues addressed by the draft that are already under discussion in the Human Rights Council—and indeed in many cases are due for further discussion either in the coming weeks at HRC22 or later this year. Included in that category are the right to development and the environment. Finally, there are also issues where certain aspects of the issue are under discussion at the international level, including at the HRC, while other aspects are more appropriate for domestic regulation. And I would put PMSCs in that category. None of these are suitable for discussion in this Working Group.

On the other hand, we 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.

* * * *

As previewed in the U.S. opening statement above, the United States participated in the session of the working group on a draft declaration on the right to peace despite the group's work on several subject areas that are already covered by other UN bodies and groups. For example, on February 20, 2013, the United States responded to the issue paper on refugees and migrants, identifying other for a in which these concerns are being addressed. The U.S. statement, excerpted below, is available at *http://geneva.usmission.gov/2013/03/04/declaration-on-the-right-to-peace-issue-paper-on-refugees-and-migrants/*.

* * * *

We would like to take this opportunity to offer some general views on the inclusion in the Advisory Committee's draft Declaration of provisions related to refugees and migrants.

As we have said with respect to a number of other subjects in the Declaration, we do agree that refugee and migrant issues are extremely important, and we do think there is a human rights dimension to this issue. The United States strongly supports the human rights of all migrants, regardless of their immigration status.

However, refugee and migrant issues are both handled in other fora, namely the United Nations High Commissioner for Refugee's (UNHCR) Executive Committee, the Inter-Agency Standing Committee, and the United Nations General Assembly. They are also handled at the Global Forum on Migration and Development and some fourteen "Regional Consultative Processes" in every part of the world. There are already international conventions on refugee issues. UNHCR also regularly adopts Executive Committee Conclusions on International Protection and other human rights related issues. These Conclusions constitute expressions of opinion which are broadly representative of the policy views of the international community.

In terms of Article 12's paragraph two, the right to return to one's country, as enshrined in Article 13 of the Universal Declaration of Human Rights, is a right that belongs to all persons, not a right particular to refugees. Nonetheless, the international community should endeavor to find durable solutions for refugees, including where appropriate, voluntary return in safety and with dignity. We also have concerns with the proposed language, in paragraph 2, that special consideration be given to the situation of persons displaced by war and hunger. The status of "refugee" has a precise legal definition; whether or not they are legally "refugees," people who have been displaced by war and who suffer from hunger are vulnerable, and thus still merit the international community's concern. Nevertheless, these issues are separate from refugee issues and should be addressed differently.

In sum, we believe the Human Rights Council's time is better spent urging states to respect all human rights so that situations leading to involuntary displacement can be avoided more often, and so that migrants can have their human rights respected no matter what their legal status might be. Respecting the rights of migrants and refugees would help in creating the right conditions for a more peaceful society.

* * * *

Similarly, on February 20, the United States provided the following response to the issue paper on development, poverty, and the environment, identifying ways in which the HRC is already addressing these topics. The U.S. statement on provisions in the draft declaration relating to 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*/.

* * * *

We would like to take this opportunity to offer some general views on the inclusion in the Advisory Committee's draft declaration of provisions related to several points. In addition to

development, addressed in Article 9 which we are discussing now, I will touch on the draft's provisions regarding poverty (which is in Article 2(7)), and the environment (Article 10).

These three topics (and several other topics the Declaration seeks to address) are each inappropriate for discussion in this Working Group—first, because these topics are appropriately and principally addressed in other forums; and second, while each does have a human rights dimension, those human rights dimensions are already under discussion in the Human Rights Council. We see no benefit to duplicating those other discussions or, even worse, interfering with them.

Let me first outline the ways in which the Human Rights Council is already seized with the human rights dimensions of these issues.

With respect to development, as we have repeatedly said, we remain prepared to discuss development at the Council, but any such discussion needs to focus on aspects of development that relate to human rights, i.e. those of individuals, including civil and political as well as economic, social, and cultural rights. Further, with respect specifically to the right to development, much theoretical work remains to be done to explain how the right to development is a human right—i.e., a universal right that every individual possesses and may demand from his or her government. But again, these issues are under active discussion in another forum—namely, the Working Group on the Right to Development, which will hold its fourteenth session in the next few months. And while there may remain differences of views on the substance, the issue of mechanisms for incorporating aid recipients' voices in aid programming and evaluation is one of the sub-criteria that may be discussed at the next session of that Working Group.

Furthermore, we note that draft Article 9 reiterates a number of economic, social and cultural rights. These appear to be derived from the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights and, as such, States Parties to that Covenant undertake to take steps with a view to achieving progressively its full realization. The United States is not a party to the International Covenant on Economic, Social and Cultural Rights, but we are pleased to address these human rights issues in other fora where they are already discussed, and we see no benefit, and in fact potential for harm, in reopening the same issues here.

With regard to poverty, the draft Declaration states that "mechanisms should be developed and strengthened to eliminate . . . poverty." But just a few months ago, the Human Rights Council adopted the Guiding Principles on extreme poverty and human rights as a useful tool for States in the formulation and implementation of poverty reduction and eradication programs, as appropriate. While there were characterizations of human rights law within the report of the Special Rapporteur with which we disagreed, discussions under those auspices were and are robust and detailed. We fail to see why the same set of issues needs to be discussed here as well.

Finally, with regard to the environment, we note that the broad issue of the relationship between human rights obligations and the enjoyment of a safe, clean, healthy, and sustainable environment is squarely within the purview of the new Independent Expert created by the Human Rights Council to address, and in fact the issue will be discussed at the next session of the Human Rights Council in connection with the presentation of the IE's first report.

But while each of these three issues has a relationship with human rights, they are principally not human rights issues, and they are being primarily addressed outside of human rights bodies. For instance, poverty is a focus of the MDGs. And we all know about the discussions surrounding the post-2015 development agenda.

And, finally, many of the issues that draft Article 10 purports to address with regard to the environment are not the purview of the Council to address. They are being actively negotiated in other UN bodies of jurisdiction. The language here on this topic is incorrect in many respects, including in article 10(2) the misrepresentation that a State's responsibility is derived from its historical contribution to climate change, that its responsibility is subject to "the principle of common but differentiated responsibilities" (article 10(1) and 10(2)), and a mischaracterization of a States' responsibility for providing assistance to the common challenge of adapting to climate change. We also object to importing the phrase "common but differentiated responsibility" into a process that deals with human rights — an issue that is common across States, but is not differentiated. It does not contribute to our common work to craft an ambitious and effective climate change agreement to re-characterize the same issues in this forum, particularly when countries in the UNFCCC are currently in the process of negotiating a new agreement for the post-2020 world that will be applicable to all Parties.

To sum up, Mr. Chairperson, we are very concerned that the draft Declaration (1) risks serious interference with work already underway in the Council and (2) confuses issues, by conflating those aspects of certain topics that are appropriate for discussion at the HRC with those that are not. We see this as a fundamental flaw in the draft Declaration.

* * * *

The United States delivered a closing statement at the session of the working group on February 20, 2013, available at *http://geneva.usmission.gov/2013/02/21/declaration-on-the-right-to-peace-closing-statement*, and excerpted below.

* * * *

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.

* * * *

b. HRC resolution on the UN declaration on the right to peace

On June 13, 2013, Stephen Townley delivered the explanation of vote for the U.S. delegation on the resolution entitled "United Nations Declaration on the Right to Peace." The United States called for a vote and voted against the resolution, which calls for a further session in 2014 of the working group drafting a UN declaration on the right to peace. The resolution was adopted by a vote of 30 in favor, nine against, with eight abstentions. U.N. Doc. A/HRC/RES/23/16. Mr. Townley's statement, excerpted below, is available at *http://geneva.usmission.gov/2013/06/13/eov-on-the-right-to-peace/*.

_____

* * * *

As we have stated many times in our discussions of this resolution throughout the years, the United States believes that respect for human rights is fundamental to ensuring peace in any society. We 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.

International human rights bodies can and do make crucial contributions to advancing the important cause of international peace. Consistent with the framework set forth in the UN Charter and the covenants, we believe that the most appropriate and effective way for them to do so is through increased attention to implementation of existing human rights obligations.
But the United States continues to question the value of working toward a declaration on the so-called "right" to peace. This proposed right is neither recognized nor defined in any universal, binding instrument, and its parameters are entirely unclear. Nor is there any consensus, in theory or in state practice, as to what such a right would entail. Regardless of how it has been promoted, studied or framed, past efforts to move forward with the '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 circumvent ongoing dialogue in the Council by using broad support for the cause of peace to advance other agendas.

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.

Therefore, as we said during the first session of the Working Group explaining the basis for our participation, we are not prepared to negotiate a draft Declaration on the 'right to peace.' We do, however, remain open to the possibility of discussing, for instance, the relationship between human rights and peace or how respect for human rights contributes to a culture of peace, including in this Working Group. But if the focus is on negotiating a Declaration on the 'right to peace,' the Working Group will surely continue to be divisive.

No country wants to be cast as 'voting against peace.' This resolution, however, and a Working Group with the mandate to negotiate a Declaration on the 'right to peace' will not contribute to the cause of peace or human rights. A vote against this resolution is not a vote against peace, nor is it against efforts to discuss human rights and peace or find a way to reflect on those linkages, but it is rather a vote against continuing an exercise with little relationship to human rights or to peace. We hope that there can still be a constructive path forward on the issues of human rights and peace, which are important to us all, but the text before the Council today does not show us that path and, therefore we must call a vote and vote against this resolution.

* * * *

Cross References

Deprivation of nationality questionnaire from UN High Commissioner for Human Rights, **Chapter 1.A.1.**
Asylum and refugee issues, **Chapter 1.D.**
UN Women, **Chapter 7.A.2.**
International Law Commission's work on crimes against humanity, **Chapter 7.D.1**
Inter-American Commission on Human Rights, **Chapter 7.E.1.**
Voluntary Principles on Security and Human Rights, **Chapter 11.F.4.**
SEC rules implementing Dodd-Frank, **Chapter 11.F.5.**
Extractive Industries Transparency Initiative, **Chapter 11.F.6.**
Sustainable development, **Chapter 13.A.5.**
Magnitsky Act sanctions, **Chapter 16.A.5.**
Other sanctions, including relating to human rights violators, **Chapter 16.A.**
Women, peace, and security, **Chapter 17.C.1.**
CAT report regarding detainees, **Chapter 18.C.1.b.**
International humanitarian law, **Chapter 18.A.4.**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. UN Reform

Adoption of Fifth Committee resolutions on UN reform

On April 12, 2013, the United States welcomed the progress at the Fifth Committee of the UN General Assembly on several reform initiatives it had championed over the years. The State Department issued a fact sheet, excerpted below and available at *http://usun.state.gov/briefing/statements/207456.htm*, summarizing the Fifth Committee resolutions adopted by the General Assembly. Ambassador Joseph M. Torsella, U.S. Representative to the UN for UN Management and Reform, provided a statement on April 12, 2013 on the adoption by the General Assembly of key Fifth Committee resolutions on UN reform. His statement (not excerpted herein) is available at *http://usun.state.gov/briefing/statements/207455.htm.*

_____

* * * *

… The agreement adopted today does the following:

Agrees to make all of the internal audit reports of the UN Office of Internal Oversight Services (OIOS) publicly available online beginning later this year. The United States has been a major advocate for OIOS and has worked for years for the audit reports the UN watchdog produces to be available to the citizens of the countries the member states represent. The decision by member states to authorize public disclosure of OIOS reports, on a trial basis, through December 2014 is a landmark victory for transparency and accountability, and should become a permanent fixture at the United Nations. Taxpayers and citizens around the world are demanding of their governments more transparency and accountability and this decision helps ensure the United Nations itself maintains the standards it helps promote around the world.

Adopts most of the Secretary General's air travel reform proposals and more. Member states acted on the Secretary General's proposals to address the UN's ballooning air travel expenditures, a significant part of the overall UN travel budget that reached three-quarters of a billion dollars last biennium. …

Embraces much needed human resources reform, including advancement of whistleblower protections. Among the critical actions taken today:

• Commissioning a comprehensive review of the UN compensation package and the methodology used to determine it so that the United Nations can continue to attract and retain high-quality staff while at the same making sure that staff-related costs—a major contributing factor in the UN's dramatic budget growth over the last 10 years—are sustainable.

• Authorizing the Secretary-General to continue planning his staff mobility policy, which would give him the flexibility to move staff and to execute important UN mandates.

• Reaffirming the importance of communication between UN management and staff on staff welfare issues while rejecting the need for "consensus" between them, which has negative implications for accountability and sound decision-making at the UN.

• Requesting the Secretary-General to report annually on the impact of increases in UN staff compensation on the financial situation facing UN organizations. These increases are a primary reason budgets across the UN system continue to be squeezed.

• Directing the Secretary-General to expedite the development of stronger whistleblower protections. The United States is committed to ensuring that those who come forward to report misconduct, fraud, and abuse are fully protected from retaliation.

* * * *

2. UN Women

On June 25, 2013, Teri Robl, U.S. Deputy Representative to ECOSOC, addressed the UN Women Executive Board in New York. Ms. Robl's remarks are excerpted below and are available at *http://usun.state.gov/briefing/statements/211161.htm*. For background on UN Women, see *Digest 2010* at 323-24.

* * * *

My delegation would first like to applaud the fact that after just two years of operation, UN Women has become a global leader for gender equality and women's empowerment. Experience and a growing body of research demonstrate that when the rights of women and girls around the world advance, so do global peace and prosperity. Investing in women and girls is one of the most powerful forces for international development. Gains in women's employment, health, and education spur economic growth and social cohesion; integrating women's perspectives into peace and security efforts strengthens conflict prevention and makes peace agreements more durable; and when women and men are equally empowered as political and social actors, governments are more representative and effective.

UN Women's leadership role is vital across the UN system. UN Women's proactive involvement was essential to the successful conclusion of the March 2013 Commission on the Status of Women, where the personal involvement of the Executive Director and her team helped member states reach agreement on Conclusions regarding the prevention and elimination of all forms of violence against women and girls. At the General Assembly last year, UN Women's efforts helped pave the way for gender-related language in key resolutions, and at the Rio+20 Conference, UN Women's advocacy was instrumental in gaining support for an outcome that recognized the importance of gender equality.

The UN does critical work on behalf of women and girls that takes place in the field, and UN Women has made its presence increasingly felt on the ground throughout the world. We are pleased that over the past year UN Women has increased its impact, including through hands-on engagement in over 70 countries. We urge UN Women to continue to expand its work with civil society organizations, including groups advocating for women's rights, men and boys committed to advancing gender equality, religious and community leaders, and the private sector.

We support UN Women's focus on five fundamental priorities outlined in the current Strategic Plan: leadership and political participation, economic empowerment, violence against women and girls, peace and security, and national planning and budgeting. With regard to violence against women and girls, we hope UN Women will continue to lead the UN system in working with member states to implement CSW's Agreed Conclusions. We must work together to stop violence directed at women due to their sexual orientation or gender identity, violence against women and girls in all intimate partner relationships, including outside formal marriage, and the link between violence against women and sexual and reproductive health and reproductive rights. Harmful traditional practices such as female genital mutilation/cutting and early or forced marriage must also continue to be addressed.

The United States applauds the new Strategic Plan's increased focus on gender in the context of humanitarian response, including in post-conflict situations. Humanitarian crises exact a heavy toll on women and girls, and all too often gender is not mainstreamed in humanitarian response. We urge UN Women to continue to work across the UN system to ensure that planning for and responding to humanitarian crises addresses the unique effects on women and girls, and ensures increased female participation in planning and response.

We are pleased that UN Women has finalized its regional architecture and put in place the foundations for a new field structure. We urge UN Women to fill field positions with strong and proven leaders who can ensure that UN Women's support, expertise and services get to those who need them most. This will require dedicated effort to ensure that other UN agencies meaningfully integrate gender equality and women's empowerment into programs and policies across all of their work. Given UN Women's role as the hub of coordination across the UN system and with governments, civil society, and other stakeholders, it will also require field leaders who are committed to and excel at coordination with wider stakeholders.

The United States welcomes UN Women's commitment to accountability and enhanced transparency and, in this regard, welcomes the implementation of its decision to disclose internal audit reports publicly. We note that UN Women has allocated additional resources to its audit work, and we support this continued strengthening of the agency's audit and evaluation capacities.

We are concerned that mandatory and non-discretionary costs are rising at a faster rate than contributions. We look forward to discussing how best to ensure that UN Women's critical programmatic activities continue to receive adequate funding.

We are grateful that UN Women has pledged to share best practices and help build the capacity of the Equal Futures Partnership, a new multilateral initiative that aims to improve gender equality through new national actions to expand women's economic empowerment and political participation. We look forward to working with UN Women to expand and develop this important initiative.

Finally, we are looking forward to the Secretary General's announcement of the next Executive Director. This role is pivotal to the UN system's leadership and advocacy on behalf of women and girls worldwide.

The United States is committed to continuing our strong collaboration with UN Women and the Executive Board to advance gender equality and women's empowerment worldwide. These goals remain among the highest priorities for the United States and we look forward to working together in the months and years to come.

* * * *

B. PALESTINIAN MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS

Loss of U.S. Vote at UNESCO

On November 8, 2013, the United States lost its vote in the UN Educational, Scientific, and Cultural Organization ("UNESCO") General Conference as a result of legislative restrictions on payment of U.S. dues to UNESCO that were triggered after UNESCO's members voted to grant the Palestinians membership as a state in 2011. See *Digest 2011* at 254-56. The State Department issued a press statement, available at *www.state.gov/r/pa/prs/ps/2013/11/217366.htm*, expressing regret at the loss of a vote while also explaining the ongoing role the United States will have at UNESCO. The press statement includes the following:

> We note a loss of vote in the General Conference is not a loss of U.S. membership. The United States intends to continue its engagement with UNESCO in every possible way—we can attend meetings and participate in debate, and we will maintain our seat and vote as an elected member of the Executive Board until 2015.
>
> UNESCO and U.S. leadership at UNESCO matter. UNESCO directly advances U.S. interests in supporting girls' and women's education, facilitating important scientific research, promoting tolerance, protecting and preserving the world's natural and cultural heritage, supporting freedom of the press, and much more. It is in that vein that President Obama has requested legislative authority to allow the United States to continue to pay its dues to UN agencies that admit the Palestinians as a member state when doing so is in the U.S. national interest. Although that proposal has not yet been enacted by Congress, the President remains committed to that goal.

U.S. Ambassador to the UN Samantha Power also delivered a statement on behalf of the United States at the UN on November 8 regarding the loss of a U.S. vote at UNESCO, available at *http://usun.state.gov/briefing/statements/217394.htm*, which follows:

> Today the United States lost its vote in the United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference as a result of legislative restrictions that prohibit the U.S. from paying its dues. While these restrictions are motivated by concerns that we share, the loss of the United States' vote in UNESCO diminishes our influence within an organization that is looked to around the world for leadership on issues of importance to our country, including the rights of women and girls, Internet governance, freedom of the press, and the recognition and protection of cultural heritage. The Obama Administration has called upon Congress to approve legislative changes that would allow needed flexibility in the application of these statutory restrictions.
>
> U.S. leadership in UNESCO matters. As such, the United States will remain engaged with the organization in every possible capacity, including attending meetings, participating in debates, and maintaining our seat as an elected member of the Executive Board until 2015.

U.S. Ambassador to UNESCO David Killion also delivered a statement regarding the loss of a U.S. vote at UNESCO on November 9, 2013 at the 37th UNESCO General Conference. His statement follows and is also available at *http://unesco.usmission.gov/37gc-voteloss.html*.

---

* * * *

I would like to thank you, Director-General Bokova, for your strong, moving and eloquent statement of support for the relationship between the United States and UNESCO. At this important moment in UNESCO's history, I would like to respond briefly on behalf of the United States.

As I noted in my national remarks to the plenary yesterday evening, the deep and continued engagement of the United States in UNESCO will be maintained.

UNESCO matters to the United States. It is at the forefront of facing global challenges and improving the lives of people all around the world. The United States recognizes that UNESCO is a critical partner in creating a better future. We intend to continue our engagement with UNESCO in every possible way. We will actively participate in meetings and debates and we will maintain our seat and vote as an elected member of the Executive Board until 2015. We will also continue to work with the Secretariat and partner delegations on programs of mutual importance, such as girls' and women's education, protection of cultural heritage, leveraging public-private partnerships, and freedom of expression.

The United States is at the table here. Just as we were present for UNESCO's founding 68 years ago, the United States remains as committed to UNESCO's mandate and purpose today.

For this reason, President Obama, Secretary Clinton, Secretary Kerry, myself, and other officials at every level have been working tirelessly to seek a legislative remedy that would allow the United States to resume paying our contributions to UNESCO. Regrettably, that remedy has not yet been achieved. Nonetheless, the administration will continue its efforts to restore our funding for UNESCO.

Madame Director-General, on behalf of the United States, I also want to express my heartfelt thanks to you for your friendship and your steadfast leadership. We have worked together for several years on important issues at UNESCO. Ironically, during the course of this challenging period, your engagement and your leadership have dramatically enhanced the visibility and credibility of UNESCO in the United States as an indispensable agency tackling 21st century global challenges.

* * * *

C. INTERNATIONAL COURT OF JUSTICE

On March 29, 2013, the State Department issued a press statement expressing the United States' strong support for the candidacy of Judge Joan E. Donoghue for re-election to the International Court of Justice in 2014. The statement is available at *www.state.gov/r/pa/prs/ps/2013/03/206812.htm* and includes the following:

> Judge Donoghue has served with distinction as an ICJ judge since her election by the United Nations Security Council and the United Nations General Assembly on September 9, 2010 to complete the term of Judge Thomas Buergenthal. Before joining the Court, Judge Donoghue had a long and distinguished career in the service of international law including serving as the senior career lawyer at the State Department and teaching at several U.S. law schools.
>
> The ICJ is the principal judicial organ of the United Nations and plays a vital role in the development of international law, in dispute resolution and in the promotion of the rule of law. Elections to fill judicial vacancies on the ICJ for a term running from 2015 until 2024 will be held during the UN General Assembly session in 2014.

On October 31, 2013, Ambassador Elizabeth Bagley, Senior Advisor for the U.S. Mission to the UN, delivered remarks on the report of the International Court of Justice at the UN in New York. Ambassador Bagley's remarks are available at *http://usun.state.gov/briefing/statements/216244.htm* and are excerpted below.

_____

* * * *

We would like to thank President Tomka for his leadership as president of the International Court of Justice, and for his recent report regarding the activities of the Court over the past year. We are struck by the continuing forward momentum of the Court reflected in the report. Over the last year, the Court issued two judgments and six orders, and held hearings open to the public in

four complex cases. In addition, the Court has in its pipeline ten more contentious cases spanning the gamut of issues including border disputes, environmental matters, and the interpretation of treaties among multilateral parties, just to reference a few. Five of the pending cases are between Latin American states, two between European states, one between African states, and one between Asian states, while one is intercontinental in character. Truly, the case load of the Court is global and mirrors the work of the General Assembly itself in this regard.

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 the role of the Court. Taking stock today of approximately 70 years of ICJ jurisprudence, it is clear that the Court has made a significant contribution to establishing legal norms and clarifying legal principles in multiple areas of international law.

We see an increased tendency among States—reaffirmed again this past year—to take disputes to the Court and to vigorously advocate on behalf of their interests before the Court. In turn the Court has continued to become more responsive to them in multiple ways, including through measures to enhance its efficiency to cope in a timely way with the increase in its workload, and its commitment to continually review and refine its procedures and working methods to keep pace with the rapidly changing times. By working to resolve some disputes up front, helping to diffuse other disputes before those conflicts escalate, and providing a trusted channel for states to address and resolve disputes about legal issues, the Court is fulfilling its Chapter XIV mandate. We hope the Court will continue to receive appropriate resources for carrying out its important functions.

We also want to commend the Court's continued public outreach to educate key sectors of society—law professors and students; judicial officials and government officials; and the general public—on the work of the Court and to increase understanding of the ICJ's work. From a transparency standpoint, we note, in particular, that the Court's recordings are now available to watch live and on demand on UN Web TV. All these efforts complement and expand the efforts of the United Nations to promote the rule of law globally and promote a better understanding of public international law.

In closing, we want to express our appreciation for the hard work of President Tomka, the other judges who currently serve on the Court and all of the members of the ICJ staff who contribute on a daily basis to the continuing productive work of that institution.

* * * *

D. INTERNATIONAL LAW COMMISSION

1. ILC's Work on Subsequent Agreements and Subsequent Practice in Treaty Interpretation and Immunity of State Officials from Foreign Criminal Jurisdiction

On October 28, 2013, U.S. Department of State Acting Legal Adviser Mary McLeod delivered a statement at a UN General Assembly Sixth Committee session on the report of the International Law Commission ("ILC") on the work of its 63rd and 65th sessions. Ms. McLeod's remarks, excerpted below (with footnotes omitted) and available in full at

http://usun.state.gov/briefing/statements/215964.htm, provide U.S. comments on the topics presented by the ILC's report.

---

* * * *

Mr. Chairman, I appreciate the opportunity to comment on the topics that are currently before the committee and will in these remarks address the issues of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "immunity of state officials from foreign criminal jurisdiction," as well as provide a few comments on chapter 12 of the Commission's report regarding other decisions and conclusions.

On the subject of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties," we would like to thank the Special Rapporteur, Professor Georg Nolte, for his extensive and valuable work in producing his first report as Special Rapporteur for this topic, and to commend the Commission for its rapid consideration of draft conclusions in the drafting committee during its session earlier this year. 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 Special Rapporteur's report and the draft conclusions adopted by the Commission, the United States welcomes in particular the emphasis on preserving and highlighting established methods of treaty interpretation under Article 31 of the Vienna Convention, and situating subsequent agreements and subsequent practice in that framework.

We also welcome the increasing acknowledgment in the draft conclusions and commentary of the limits of subsequent agreement and subsequent practice as interpretive tools vis-à-vis the reasonable scope of the treaty terms being interpreted. For example, subsequent agreements and subsequent practice should not substitute for amending an agreement when appropriate.

In draft conclusion number 3, we note some concern at the term "presumed intent." While discerning the intent of the parties is the broad purpose in treaty interpretation, that purpose is served through the specific means of treaty interpretation set forth in Articles 31-32. In other words, intent is discerned by applying the approach set out in Articles 31-32, not through an independent inquiry into intent and certainly not into presumed intent. The text of conclusion 3 does not seem to capture this important distinction.

Mr. Chairman, turning to the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction," we commend Concepción Escobar Hernández of Spain, the ILC's Special Rapporteur, for the progress she has made on this important and difficult topic. We appreciate the efforts that Professor Escobar Hernández has made to build on the work that Roman Kolodkin, the former Special Rapporteur, had done, and her foresight in planning out the work that remains to be done. We commend also the thoughtful contributions by the members of the ILC.

Under the stewardship of Professor Escobar Hernández, the ILC has produced three draft articles addressing the scope of the topic and immunity *ratione personae*, as well as commentary on those articles. Accordingly, we are pleased that there is now visible progress that has been built on the extensive effort that went into laying a foundation.

One of the challenges of this topic as it relates to immunity *ratione personae* has to do with the small number of criminal cases brought against foreign officials, and particularly against

heads of State, heads of government, and foreign ministers. The federal government of the United States has never brought a criminal case against a sitting foreign head of state, head of government, or foreign minister. Nor are we aware of a state government within the U.S. having brought such a case.

The bulk of U.S. practice on foreign official immunity centers on civil suits. For our purposes, perhaps the most critical difference between civil and criminal jurisdiction in the United States is that civil suits are generally brought by private parties, without any involvement by the executive branch; criminal cases are always brought by the executive branch. We realize that procedures differ in other countries, including those in which criminal investigations are conducted by members of the judicial branch and/or initiated by private party complaints. Of course, it is the sovereign that is concerned with reciprocity, whereas the private parties who bring civil suits are not. When the issue of immunity does arise in the criminal context, and decisions regarding prosecution are made within the executive branch, the application of immunity or of related policy concerns about bringing a prosecution of a sitting head of state may not be publicly apparent because they are considered and resolved within the executive branch as part of the initial decision whether to proceed. Thus, the deferral of prosecution of sitting heads of state may not be a matter of public record, which may make it more difficult to elicit the governing rules.

The United States believes that scope of the topic and immunity *ratione personae* were prudent issues with which to begin, and that the draft articles and commentary may help produce momentum to deal with issues of greater controversy such as immunity *ratione materiae* and exceptions to immunity, as may be appropriate. With respect to scope, because the rules that govern immunity in civil cases differ from those in criminal cases, we suggest that the commentary clarify that the draft articles have no bearing on any immunity that may exist with respect to civil jurisdiction.

The precise definition of the concept of "exercise of criminal jurisdiction" has been left to further commentary. The existing commentary, to Article 1, paragraph 5, explains that the exercise of criminal jurisdiction should be understood to mean "the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons enjoying immunity in this context." It is unclear why the exercise of criminal jurisdiction should be limited to those that are linked to judicial processes. In the US, there are limited instances in which the executive branch can apply the police powers without the prior involvement of the judicial branch, for example, arrest and limited periods of detention that can be lawfully undertaken by police authorities with respect to crimes committed in their presence or when necessitated by public safety. We view such application of the police powers as constituting the exercise of criminal jurisdiction, and believe that the commentary to Article 1 should make this clear. Any immunity that exists from the exercise of criminal jurisdiction should not depend on the branch of government that applies the coercion, or the stage of the process at which that coercion is applied. As stated by the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority." It follows that the types of exercise of criminal jurisdiction as to which a head of state, or other member of the troika, may enjoy immunity are those that are coercive, regardless of the branch of government applying the coercion.

Another issue with respect to immunity *ratione personae* that would benefit from clarification in draft Article 4 is whether members of the troika can be compelled to testify in a criminal case in which they are not the defendants. The citation to *Djibouti v. France* in paragraph 3 of the commentary to draft Article 3 would imply that the answer is no, as the I.C.J. ruled in that case that because France had issued a mere request to the president of Djibouti to testify, it did not violate his immunity. The implication of that ruling is that an order compelling the head of state's testimony would have violated his immunity. The commentary should make it clear that the immunity of the troika from compelled testimony does not arise only in cases in which a member of the troika is a defendant or the target of an investigation.

We look forward to working with Professor Escobar Hernández and with the Commission on this important and complex topic.

Mr. Chairman, with respect to other decisions and conclusions of the Commission, let me make brief remarks about two additional topics. First, Mr. Chairman, we wish to express our disappointment that the topic of "Protection of the Atmosphere" has been moved onto the Commission's active agenda, in light of the concerns we expressed about this topic last year. The Commission's understandings limiting the scope of this topic are very welcome, but even with them, the United States continues to believe that this is not a worthwhile topic for the Commission to address, as various long-standing instruments already provide sufficient general guidance to states in their development, refinement, and implementation of treaty regimes. We do not see value in the Commission pursuing this matter, and we will pay close attention to developments on this topic.

Second, Mr. Chairman, the United States welcomes the Commission's addition of the topic "crimes against humanity" to its long-term work program. As the description of this topic noted, the codification of other serious international crimes in widely adopted multilateral treaties—such as the codification of genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—has been a valuable contribution to international law. Because crimes against humanity have been perpetrated in various places around the world, the United States believes that careful consideration and discussion of draft articles for a convention on the prevention and punishment of crimes against humanity could also be valuable. This topic's importance is matched by the difficulty of some of the legal issues that it implicates, and we expect these issues will be thoroughly discussed and carefully considered in light of states' views as this process moves forward.

* * * *

2. ILC's Work on Reservations to Treaties

On October 30, 2013, Assistant Legal Adviser Todd Buchwald delivered U.S. remarks on the report of the ILC on its work on reservations to treaties. Mr. Buchwald's remarks appear below and are also available at *http://usun.state.gov/briefing/statements/216136.htm*.

* * * *

Mr. Chairman, once again, I would like to thank the Chairman of the Commission, Mr. Bernd Niehaus, for his introduction of the Commission's report and for the Commission's completion in 2011 of the Guide to Practice on Reservations to Treaties and commentaries thereto.

Particular gratitude is due to Professor Pellet, who devoted countless hours and considerable expertise to this project; he is commended for bringing this work to a conclusion after so many years. The Guide provides helpful and detailed pointers for the practice related to treaty reservations and can be a valuable reference for practitioners. We also find Professor Pellet's introduction to the Guide to be particularly helpful in detailing the Guide's intended purpose and relationship to law. In this connection, we note the Commission's longstanding consensus that the Guide is not intended to replace or amend the Vienna Conventions. The Guide is not a legally binding text and does not authoritatively interpret the Vienna Convention. Indeed, some passages are simply recommendations for good practice, which is consistent with the Guide's overarching purpose of providing practical solutions for the sometimes complicated questions that arise in this area.

We also note that though the Guide at times reflects obligations that are otherwise established via treaty or custom as law, it does not always reflect consistent state practice or settled consensus on certain important questions, as we have indicated in our prior statements on this topic. For example, state practice on the consequences of an invalid reservation remains quite varied and, as a result, section 4.5.3—one of the more controversial elements of the Guide—in particular, should not be understood to reflect existing law. Moreover, the approach articulated in that section should not be regarded as a desirable rule, since it cannot be reconciled with the fundamental principle of treaty law that a state should only be bound to the extent it expressly accepts a treaty obligation. If a state objects to another state's reservation as invalid, the objecting state can decide to either accept treaty relations notwithstanding its objection, or it can decide not to accept treaty relations. The reserving state, however, cannot be bound without its consent to a treaty without the benefit of its reservation.

The Commission has recommended the establishment of a "reservations dialogue," and that the General Assembly consider establishing an "observatory" on treaty reservations within the Sixth Committee, as well as a "reservations assistance mechanism."

The United States supports a robust "reservations dialogue" and welcomes the useful practices outlined in the Commission's recommendation, which can help encourage clarity about the meaning and intent behind reservations and objections thereto. We note in particular that the reservations dialogue is not a singular or rigid process, but rather a set of basic recommended practices and principles that can improve reservations practice.

The "observatory" on treaty reservations is an interesting proposal. However, we would need to reflect further on any proposed details before we express a view as to whether it is appropriate to establish such a body within the Sixth Committee.

With regard to the "reservations assistance mechanism," the United States is following this proposal with interest. In general, we question whether an independent mechanism, consisting of a limited number of experts that would meet to consider problems related to reservations, is appropriate to inject into a process that fundamentally is to take place between and among states. Further, we are concerned about any implication that the proposals resulting from the mechanism could be seen as compulsory on the states requesting assistance.

* * * *

3. ILC's Work on Protection of Persons in the Event of Disasters and Other Topics

On November 4, 2013, Mark Simonoff, Minister Counselor for Legal Affairs at the U.S. Mission to the UN, delivered remarks on the work of the ILC at its 63rd and 65th sessions. Mr. Simonoff addressed the work of the ILC on several topics, including "Protection of Persons in the Event of Disaster," "Identification of Customary International Law," "Provisional Application of Treaties," "Protection of the Environment in Relation to Armed Conflicts," "The Obligation to Extradite or Prosecute," and "Most-Favored-Nation Clause." Mr. Simonoff's remarks are excerpted below and are available in full at *http://usun.state.gov/briefing/statements/216241.htm*.

* * * *

We appreciate the Commission's continued work on Draft Article 12, addressing "Offers of Assistance," and in particular the recognition in the commentary that offers of assistance are "essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist." We also value the commentary's affirmation that offers of assistance made in accordance with the present draft articles may not be discriminatory in nature, and that offers of assistance in accordance with the draft articles cannot be regarded as interference in the affected state's internal affairs.

We believe additional consideration is merited, however, of the distinction in this draft article between the relative prerogatives of assisting actors. Draft Article 12 provides that states, the United Nations, and other competent intergovernmental organizations have the "right" to offer assistance, whereas relevant non-governmental organizations "may" also offer assistance. The commentary suggests this different wording was used for reasons of emphasis, in order to stress that states, the United Nations, and intergovernmental organizations are not only entitled but encouraged to make offers of assistance, while non-governmental organizations have a different nature and legal status. We suggest eliminating the distinction and providing instead that states, the United Nations, intergovernmental organizations, and non-governmental organizations "may" offer assistance to the affected State, in accordance with international law and applicable domestic laws. While there is no doubt that states, the United Nations, and intergovernmental organizations have a different nature and legal status than that of non-governmental organizations, that fact does not affect the capacity of non-governmental organizations to offer assistance to an affected state, in accordance with applicable law. The United States also believes that non-governmental organizations should be encouraged—like states, the United Nations, and competent intergovernmental organizations—to make offers of assistance to affected states, in accordance with applicable law.

More generally, we remain concerned with an overall approach to the topic that appears to be based on legal "rights" and "obligations." We would continue to emphasize our view that the Commission could best contribute in this area not by focusing on legal rights and duties, but by providing practical guidance to countries in need of, or providing, disaster relief.

For example, although the United States greatly values individual and multilateral measures by states to reduce the risk of disasters, and we have implemented such measures domestically, we do not accept the assertion in Draft Article 16 that each state has an obligation

under international law to take the necessary and appropriate measures to prevent, mitigate, and prepare for disasters. The voluminous information gathered by the Commission describing national and international efforts to reduce the risk of disasters is impressive and valuable, but we do not believe that such information establishes widespread state practice undertaken out of a sense of legal obligation; rather, national laws are adopted for national reasons and the relevant international instruments typically are not legally binding. As such, there is no basis to conclude that this is a rule of customary international law. To the extent this article reflects progressive development of the law, it ought to be identified as such in the commentary to this article. Moreover, we question the practical impact of such a rule considering that it would be up to each state to determine what risk reduction measures are necessary and appropriate. Finally, the draft article should be re-titled "Reduction of risk of disasters," to align it with similar articles such as draft articles 14 ("Facilitation of external assistance") and 15 ("Termination of external assistance").

We have similar concerns regarding Draft Article 14, though we commend the Commission and the rapporteur for their work on the draft article in other respects, including the emphasis it places on the importance of the affected state taking the necessary measures within its national law to facilitate the prompt and effective provision of external assistance regarding relief personnel, goods, and equipment—in particular, among other things, with respect to customs requirements, taxation and tariffs. Such steps can address a major and avoidable obstacle to effective assistance. Indeed, while we agree with the idea that it is generally beneficial for an affected state to take steps to exempt external disaster-related assistance goods and equipment from tariffs and taxes in order to reduce costs and prevent delay of goods, we would suggest eliminating the notion in the commentary that might encourage states as an alternative to lessen such tariffs and taxes. Along similar lines the draft article contains an illustrative list of measures for facilitating the prompt and effective provision of external assistance; without prejudice to our views about whether the article should be framed as being based on legal rights and obligations, we suggest adding to that list measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon termination of external assistance. States and other assisting actors may be more likely to offer assistance if they are confident that, when the job is done, their personnel, goods and equipment will be able to exit without unnecessary obstacles.

Mr. Chairman, with respect to the topic "Identification of Customary International Law," the United States extends our compliments to Sir Michael Wood for his excellent work on the topic in his first report as special rapporteur. Mr. Wood's initial Note on this topic set forth an excellent road map for how the Commission might tackle this issue and highlights that there are still many unsettled questions in this area that could benefit from the attention of states and the Commission.

Mr. Wood's report this year provides an important review of relevant authority in this area, in particular regarding relevant decisions from international courts and tribunals. This will serve as a valuable foundation as the work on the topic moves ahead. The report also highlights the difficulty of analyzing state practice due to the paucity of publicly available materials. We believe that state practice is a critical ingredient to the Commission's work in this area, and would hope to see it play a larger role as this topic progresses. To that end, as we have stated previously, 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, and we anticipate being able to respond by the requested deadline in January 2014.

The report canvassed a diverse array of views on questions related to the formation and evidence of customary international law. Recognizing that the work is in its early stages and that covering all viewpoints provides an important foundation for the work to progress, we hope that, ultimately, such diversity will not obscure areas that should be clear, such as the importance of both state practice and *opinio juris* in the formation of customary international law.

With respect to the inclusion of *jus cogens*, we agree with the special rapporteur that it is better not to deal with that issue as part of the current topic.

In general, we echo the observation in Mr. Wood's initial report that, as work on this topic proceeds, it is critically important that the results of the Commission's work not be overly prescriptive.

Once again, we commend Mr. Wood for his work on this topic thus far, and welcome its further elaboration according to the plan established in his initial note.

Mr. Chairman, turning to the topic, "Provisional Application of Treaties," the United States thanks Mr. Juan Manuel Gómez-Robledo for his first report.

The work on this topic appears to be at an early stage. As such, we can offer general reactions in anticipation of more detailed interaction as the Commission's work evolves. As we have previously noted in discussing this topic, our approach begins with the basic proposition that 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 is clear on this basic definition.

As we have in the past, the United States urges caution in putting forward any proposal that could create tension with the clear language in Article 25 of the Vienna Convention on the Law of Treaties as it relates to provisional application.

The current report touches on the interaction between domestic law and the international law regarding provisional application. As the special rapporteur notes, domestic law is not, in principle, a bar to provisional application, but it seems equally plain to us that a state's domestic law may indeed determine the circumstances in which provisional application is appropriate for that state. The special rapporteur also alluded to concerns that provisional application may be used to sidestep domestic legal requirements regarding the conclusion of international agreements. The appropriateness of provisional application under a state's domestic law is a question for that state to consider. In this regard, the United States does not agree with the special rapporteur's characterization of the provisional application of a certain maritime boundary treaty mentioned in the report. In our own practice, we examine our ability under domestic law to implement a given provision or agreement pending entry into force before we agree to apply it provisionally, and do so only consistent with our domestic law.

We note the special rapporteur describes the goal of his work on this topic to "encourage" and provide "incentives" for the use of provisional application. This appears to reflect his conclusion that provision application is rarely used, and that this fact suggests that states are "unaware of its potential." In our view, the question of whether states make use of provisional application or not depends on the particular circumstances of a given agreement or situation. For purposes of this report, the frequency of use seems to be a separate and secondary issue compared to clarifying the nature of provisional application and how to make use of it clearly

and effectively. Although bringing additional clarity to this area of the law may indeed result in more frequent use of provisional application, we would urge the special rapporteur to focus on provisional application itself rather than on increasing its use.

The United States congratulates Ms. Marie Jacobsson on her appointment as the special rapporteur for the topic entitled "Protection of the environment in relation to armed conflicts," which has now been included in the ILC's program of work. We recognize the deleterious effects armed conflict has had on the natural environment, and we believe this is an issue of great importance. The U.S. military has long made it a priority to protect the environment not only to ensure the availability of land, water, and airspace needed to sustain military readiness, but also to preserve irreplaceable resources for future generations. Indeed, we reaffirm that protection of the environment during armed conflict is desirable as a matter of policy for a broad range of reasons, including for military, civilian health, and economic welfare-related reasons, in addition to environmental ones as such.

However, we are concerned that this topic encompasses broad and potentially controversial issues that could have ramifications far beyond the topic of environmental protection in relation to armed conflict, such as the issue of concurrent application of bodies of law other than the law of armed conflict during armed conflict. Any effort to come to conclusions about lex specialis in general or the applicability of environmental law in relation to armed conflict in particular—especially in the abstract—is likely to be difficult and controversial among states.

We therefore concur in the special rapporteur's view that this topic is not well-suited to a draft convention and we welcome her decision to focus on identifying existing rules and principles of the law of armed conflict related to the protection of the environment. We anticipate that this review will demonstrate that the law of armed conflict contains a body of rules and principles relevant to environmental protection. For example, under the principle of distinction, parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and parts of the natural environment may not be destroyed unless required by military necessity. However, certain treaty provisions related to the protection of the environment during armed conflict have not gained universal acceptance among states either as a matter of treaty law or customary international law. We also note the suggestion that it is "not the task of the Commission to modify . . . existing legal regimes," in particular the law of war. We urge the ILC to continue to take that consideration into account as it continues its work on this topic.

Mr. Chairman, with respect to the topic entitled "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)," we would like to thank the ILC Working Group for the Report found at Annex A of the ILC 2013 Annual Report for the sixty-fifth session. The report ably recounts the extensive work by the Commission on this topic since its inception in 2006, the diverse array of treaty instruments containing such an obligation, and important developments such as the International Court's 2012 judgment on Questions relating to the Obligation to Prosecute or Extradite. The United States agrees with the working group that "it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute" (Annex A, para. 18).

Further, while we consider extradite or prosecute provisions to be an integral and vital aspect of our collective efforts to deny terrorists a safe haven, and to fight impunity for such crimes as genocide, war crimes and torture, there is no obligation under customary international law to extradite or prosecute individuals for offenses not covered by treaties containing such an

obligation. Rather, as the working group notes, any efforts in this area should focus on specific "gaps in the present conventional regime" rather than a broad-based approach (*ibid*., para. 20). Accordingly, we commend the working group for its report, which we think allows the Commission to bring to closure its work on this topic.

As regards the Most-Favored-Nation Clause topic, we appreciate the extensive research and analysis undertaken by the study group, and wish to recognize Donald McRae in particular for his stewardship of this project as chair of the study group, Mathias Forteau for his service as chairman in Professor McRae's absence, as well as the other members of the Commission who have made important contributions in helping to illuminate the underlying issues.

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 believe that including guidelines and model clauses in the final report risks an overly prescriptive outcome and therefore would not be appropriate. 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.

* * * *

E. OTHER ORGANIZATIONS

1. Organization of American States

a. Election of U.S. Candidate to the Inter-American Commission on Human Rights

On February 21, 2013, the State Department announced the candidacy of Professor James L. Cavallaro of Stanford Law School to serve as a member of the Inter-American Commission on Human Rights ("IACHR") for elections to be held during the June 2013 General Assembly of the Organization of American States (OAS) in Antigua, Guatemala. The media note making the announcement is available at *www.state.gov/r/pa/prs/ps/2013/02/205055.htm* and explains the importance of the IACHR:

> The independent and autonomous IACHR promotes and defends human rights in all member states of the OAS. It impacts thousands of lives in the hemisphere through the issuance of reports on petitions and cases, as well as recommendations, to OAS member states to improve the human rights' conditions in their countries.
>
> Over the last half century, the IACHR has played a critical role in monitoring and supporting OAS member state adherence to human rights commitments. Its seven Commission members are recognized experts in human

> rights elected in their own right as individuals, not as representatives of governments. Their members' political autonomy and objectivity distinguish the IACHR as a leading human rights body.
>
> The promotion of human rights and fundamental freedoms, as embodied in the American Declaration on the Rights and Duties of Man and the Inter-American Democratic Charter, is a cornerstone of U.S. foreign policy. The United States is pleased to be a strong supporter of the IACHR, and is committed to continuing support for the Commission's work and its independence. Preserving the IACHR's autonomy is a pillar of our human rights policy in the region.

Professor Cavallaro was elected to the Commission at the regular session of the General Assembly of the OAS in June. See State Department press statement, available at *www.state.gov/r/pa/prs/ps/2013/06/210403.htm*.

b. Resolution on Strengthening the Inter-American Human Rights System

At its 44th special session in March 2013, the OAS General Assembly adopted a resolution on strengthening the Inter-American Human Rights System. OEA/Ser.P AG/RES.1 (XLIV-E/13) (Mar.22, 2013). The United States welcomed the resolution in a March 23, 2013 press statement, available at *www.state.gov/r/pa/prs/ps/2013/03/206581.htm*. The press statement explains:

> The independent and respected Inter-American Commission on Human Rights—a founding pillar of the Western Hemisphere's human rights architecture—is stronger and more capable as a result of the decision of all OAS member states to seek full financing for its operations and to strengthen its rapporteurships. As a reflection of our strong support for the Commission's efforts, the United States also announced yesterday a $1 million contribution to support its operational costs, and we encourage other member states to do the same.

For U.S. input on the efforts to strengthen the Inter-American Human Rights System, see *Digest 2012* at 264-67.

2. Organization for Economic Cooperation and Development

On May 30, 2013, the Organization for Economic Cooperation and Development ("OECD") announced that it would be entering into accession discussions with Colombia and Latvia. The U.S. Department of State issued a media note conveying the announcement, available at www.state.gov/r/pa/prs/ps/2013/05/210106.htm. The media note explains:

> The OECD is a multilateral organization that brings together 34 democracies with market economies from the Americas, Europe and the Pacific Rim. Countries

seeking OECD membership must demonstrate like-mindedness, or compatibility, with OECD principles, as well as complete technical reviews of various aspects of their economies.

As new members, Colombia and Latvia would contribute unique perspectives and insight to OECD discussions and policy recommendations.

3. Puerto Rico's Participation in International Organizations

a. Association of Caribbean States

On May 14, 2013, Governor of Puerto Rico Alejandro J. Garcia Padilla wrote to the State Department regarding Puerto Rico's interest in becoming an Observer in the Association of Caribbean States ("ACS"). Acting Assistant Secretary of State for International Organization Affairs H. Dean Pittman responded to Governor Garcia Padilla in an August 9, 2013 letter that is available at *www.state.gov/s/l/c8183.htm*. Excerpts from that letter follow.

* * * *

In exploring the possible participation of a U.S. territory in an international organization, we have to consider several factors, including the degree to which the organization is political in nature and involved in issues of foreign policy (as opposed to one focused on technical, social or cultural matters), and the nature and scope of United States participation in the organization.

As you may be aware, the Department of State has previously declined to support participation by Puerto Rico in the ACS. We remain concerned that the ACS is at least in part a political organization that has taken positions incompatible with U.S. foreign policy. Moreover, the United States is not a member or associate member of the ACS and, based on the organization's founding convention, is excluded from membership. In light of these ongoing concerns, we cannot support Puerto Rico's request to participate in the ACS as an Observer.

As you know, the United States remains committed to working with countries in the Caribbean to address common concerns, and we continue to work closely with other organizations in the region, including the Caribbean Community and the Organization of American States. Please be assured of our continuing commitment to working with you and your government to advance U.S. interests in the region.

* * * *

b. Ibero-American Cultural Congress

The Department of State of Puerto Rico also contacted the U.S. Department of State regarding possible participation in the Ibero-American Cultural Congress to be held in Spain in November 2013. The U.S. response is available at *www.state.gov/s/l/c8183.htm* and includes the following:

> The U.S. Department of State does not object to representatives of Puerto Rico attending the 2013 Cultural Congress, provided that Puerto Rico not attend in the capacity of a member of the Congress or of the Ibero-American Cultural Community, that Puerto Rico not seek or accept to be treated as a sovereign State at the Congress, and that Puerto Rico sign no instruments in connection with the Congress without the prior authorization of the U.S. Department of State.

c. UNESCO

On November 4, 2013, Governor Alejandro García-Padilla of Puerto Rico wrote to Secretary Kerry requesting that the United States apply for Associate Member status for Puerto Rico at UNESCO. The U.S. Department of State responded to the Governor of Puerto Rico in a December 6, 2013 letter, available at *www.state.gov/s/l/c8183.htm*, explaining that the request was not received in time to "engage in the policy and legal analysis that would have been necessary for submission at the 37th plenary session of the UNESCO General Conference." The December 6 letter proposes regularized working-level meetings "to review Puerto Rico's interest in heightened engagement in regional and broader international settings."

> At a recent meeting, representatives of the Commonwealth agreed to provide us with a prioritized list of ten international organizations with which Puerto Rico is most interested in engaging. We believe that regular working-level meetings would provide a good setting to consider this, as well as other possibilities that we or your representatives may identify.

4. Gulf Cooperation Council

On December 16, 2013, President Obama determined the Gulf Cooperation Council to be eligible to receive defense articles and defense services under the Foreign Assistance Act of 1961 and the Arms Export Control Act. The determination was based on the finding "that the furnishing of defense articles and defense services to the Gulf Cooperation Council will strengthen the security of the United States and promote world peace." 78 Fed. Reg. 78,163 (Dec. 24, 2013).

5. International Civil Aviation Organization—Taiwan

On July 12, 2013, President Obama signed into law H.R. 1151, an Act concerning participation of Taiwan in the International Civil Aviation Organization ("ICAO"). Pub. Law No. 113-17. President Obama's statement on signing the legislation, Daily Comp. Pres. Docs., 2013 DCPD No. 00495, p. 1, includes the following:

> The United States fully supports Taiwan's membership in international organizations where statehood is not a requirement for membership and encourages Taiwan's meaningful participation, as appropriate, in organizations where its membership is not possible. My Administration has publicly supported Taiwan's participation at the ICAO and will continue to do so. Consistent with my constitutional authority to conduct foreign affairs, my Administration shall construe the Act to be consistent with the "one China" policy of the United States, which remains unchanged, and shall determine the measures best suited to advance the overall goal of Taiwan's participation in the ICAO. I note that sections 1(b) and 1(c) of the Act contain impermissibly mandatory language purporting to direct the Secretary of State to undertake certain diplomatic initiatives and to report to the Congress on the progress of those initiatives. Consistent with longstanding constitutional practice, my Administration will interpret and implement these sections in a manner that does not interfere with my constitutional authority to conduct diplomacy and to protect the confidentiality of diplomatic communications.

Taiwan was subsequently invited by the president of ICAO to participate in the 38th ICAO Assembly in Montreal from September 24 to October 4, 2013. The September 24, 2013 State Department press statement regarding the invitation, available at *www.state.gov/r/pa/prs/ps/2013/09/214658.htm*, notes, "Taiwan's active participation in this year's Assembly will promote global aviation safety and security, and will strengthen ICAO as an institution."

Cross References

Immunity of the UN, **Chapter 10.E.**
Strengthening the UN Environment Programme ("UNEP"), **Chapter 13.A.3.**
ILC, **Chapter 8.A.**
ILC work on transboundary aquifers, **Chapter 13.C.2.**
Middle East peace process, **Chapter 17.A.**

CHAPTER 8

International Claims and State Responsibility

A. INTERNATIONAL LAW COMMISSION

1. Draft Articles on Diplomatic Protection

On October 21, 2013, Steven Hill, Deputy Legal Adviser for the U.S. Mission to the UN, delivered remarks at the UN General Assembly Sixth Committee meeting on diplomatic protection. Mr. Hill referred to the 2007 submission by the United States on the draft articles on diplomatic protection prepared by the ILC, which is discussed in *Digest 2007* at 415-21. That submission and the U.S. statement in 2013 convey the U.S. view that the General Assembly should take no further action on the draft articles. Mr. Hill's remarks, available at *http://usun.state.gov/briefing/statements/215748.htm*, include the following:

> We agree with the many written comments received from States that, where the draft articles reflect the large body of State practice in this area, they represent a major contribution to the law of diplomatic protection, and are thus valuable to States in their present form. However, we also share the concerns expressed that a limited number of articles are inconsistent with well-settled customary international law. For additional details, I would refer delegations to the statement delivered by the United States on October 19, 2007, as reported in document A/C.6/62/SR.10.
>
> Much like the draft articles on State responsibility, we are concerned that the process of negotiating a convention would risk undermining the substantial contributions already achieved by the draft articles. We believe, therefore, that the better course is to allow the draft articles some time to inform, influence, and settle State practice in this area.

2. State Responsibility

Also on October 21, 2013, Mr. Hill delivered remarks on the ILC's draft articles on the responsibility of States for internationally wrongful acts ("draft articles on State responsibility") at the United Nations General Assembly Sixth Committee. As referenced by Mr. Hill, the United States submitted its original comments on the draft articles in 2001. See *Digest 2001* at 364-80 for discussion of, and excerpts from, the U.S. comments on the draft articles. Mr. Hill's remarks are available at *http://usun.state.gov/briefing/statements/215749.htm* and include the following:

> We thank the Secretary General for his helpful report (A/68/69) compiling the written comments of States on the future status of the draft articles.
>
> As previously stated, the United States continues to believe that the draft articles are most valuable in their present form, and that future action with regard to the articles is neither necessary nor desirable. For additional details, I would refer delegations to the comments submitted by the United States on March 2, 2001, as reported in document A/CN.4/515.
>
> We believe there is little to be gained in terms of additional authority or clarity through the negotiation of a convention. As evidenced by the Secretary General's report (A/68/72) on the application of the draft articles by international courts and tribunals, the draft articles already have tremendous influence and importance. Likewise for States and other international actors, the draft articles have proven to be a useful guide both on what the law is and on how the law might be progressively developed.
>
> However, we share the concern expressed by a number of States in their written comments that the process of negotiating a convention could risk undermining the very important work undertaken by the Commission over several decades, particularly if the resulting convention deviated from important existing rules or did not enjoy widespread acceptance. We believe the better course is to allow the draft articles to guide and settle the continuing development of the customary international law of state responsibility.

3. Other Work of the ILC

See Chapter 7.D.

B. IRAN-U.S. CLAIMS TRIBUNAL

In Case A/15(II:A) before the Iran-U.S. Claims Tribunal, Iran alleges that the United States failed to arrange for the transfer of Iranian property in violation of Paragraph 9 of the Algiers Accords. On May 6, 1992, the Tribunal issued a partial award in the case, which did not include any finding of U.S. liability, but which did dismiss Iran's claim for damages incurred prior to the entry into force of the Algiers Accords and found that

certain regulations issued by the U.S. Treasury Department were inconsistent with U.S. obligations under the Accords. The Tribunal ordered further proceedings to address all remaining issues in the case. Hearings were held October 7-11 and 14-18, 2013, and will continue into 2014.

C. LIBYA CLAIMS

On May 21, 2013, the Foreign Claims Settlement Commission ("Commission") completed the claims adjudication programs referred to the Commission by the Department of State by letters dated December 11, 2008 (the "Libya I program"), and January 15, 2009 (the "Libya II program"), involving claims of United States nationals against the Government of Libya that were settled under the "Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya." See the notice of conclusion of the programs, 78 Fed. Reg. 15,377 (Mar. 11, 2013). For background on the claims settlement agreement ("CSA") 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.

On November 27, 2013, the Department of State made its third referral of Libya claims to the Commission ("Libya III"). The Commission issued a notice of the commencement of the Libya III program on December 13, 2013, identifying the categories of claims that would be adjudicated. 78 Fed. Reg. 75,944 (Dec. 13, 2013). That notice is excerpted below.

_____

* * * *

Pursuant to the authority conferred upon the Secretary of State and the Commission under subsection 4(a)(1)(C) of Title I of the International Claims Settlement Act of 1949 (Pub. L. 455, 81st Cong., approved March 10, 1950, as amended by Pub. L. 105-277, approved October 21, 1998 (22 U.S.C. 1623(a)(1)(C))), the Foreign Claims Settlement Commission hereby gives notice of the commencement of a program for adjudication of certain categories of claims of United States nationals against the Government of Libya. These claims, which have been referred to the Commission by the Department of State by letter dated November 27, 2013, are defined as follows:

Category A: This category shall consist of claims of U.S. nationals for physical injury who had claims in the Pending Litigation, but whose claims for physical injury were previously denied by the Commission for failure to plead for injury other than emotional injury alone in the Pending Litigation, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claimant was a named party in the Pending Litigation; (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission; and (4) the claimant has not received any compensation under any other distribution under the Claims Settlement Agreement and does not qualify for any other category of compensation in this referral except Category D.

Category B: This category shall consist of claims of U.S. nationals for mental pain and anguish who are living close relatives of a decedent provided that (1) the claim was set forth as a claim for emotional distress, solatium, or similar emotional injury by the claimant in the Pending Litigation; (2) the claim meets the standard adopted by the Commission for mental pain and anguish; (3) the claimant is not eligible for compensation as part of the associated wrongful death claim; and (4) the claimant has not received any compensation under any other distribution under the Claims Settlement Agreement, and does not qualify for any other category of compensation in this referral.

Category C: This category shall consist of claims of U.S. nationals who were held hostage or unlawfully detained in violation of international law during one of the terrorist incidents listed in Attachment 2 (Covered Incidents"), provided that (1) the claimant was not a plaintiff in the Pending Litigation; (2) the claim meets the standard for such claims adopted by the Commission; and (3) the claimant has not received any compensation under any other distribution under the Claims Settlement Agreement, and does not qualify for any other category of compensation in this referral.

Category D: This category shall consist of claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by the Department of State's January 15, 2009 referral or by this referral, provided that (1) the claimant has received an award for physical injury pursuant to the Department of State's January 15, 2009 referral or this referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the claimant did not make a claim or receive any compensation under Category D of the Department of State's January 15, 2009 referral.

Category E: This category shall consist of claims of U.S. nationals for mental pain and anguish who are living close relatives of a decedent whose death formed the basis of a death claim compensated under the Claims Settlement Agreement, provided that (1) the claimant was not a plaintiff in the Pending Litigation; (2) the claimant is not eligible for compensation from the associated wrongful death claim, and the claimant did not receive any compensation from the wrongful death claim; (3) the claim meets the standard adopted by the Commission for mental pain and anguish; and (4) the claimant has not received any compensation under any other distribution under the Claims Settlement Agreement, and does not qualify for any other category of compensation in this referral.

Category F: This category shall consist of commercial claims of U.S. nationals provided that (1) the claim was set forth by a claimant named in Abbott et al. v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 1:94-cv-02444-SS; and (2) the Commission determines that the claim would be compensable under the applicable legal principles.

* * * *

A summary of the decisions issued by the Commission, the value of the awards, and decisions of the Commission in individual cases is available on the Commission's website, *www.justice.gov/fcsc*. A few noteworthy decisions of the Commission rendered in 2012 are discussed in *Digest 2012* at 270-79. Two of the more significant decisions from the Libya claims programs in 2013 are discussed below.

1. Nationality

In *Claim of SUBROGATED INTERESTS TO PAN AMERICAN WORLD AIRWAYS, INC.*, Claim No. LIB-II-171, Decision No. LIB-II-161 (2013), the Commission addressed the continuous nationality requirement as it applies to insurers, reinsurers, and subrogees. The claim arises out of the bombing of Pan Am Flight 103 over Lockerbie, Scotland on December 21, 1988 and was brought by a group of companies that describe themselves as the "Subrogated Interests to Pan American World Airways, Inc." Excerpts follow (with record citations and footnotes omitted) from the Commission's final decision, dated January 30, 2013.

* * * *

The Commission concluded in the Proposed Decision that it lacks jurisdiction over the Pan Am Subrogees' claim for a second reason as well: the Pan Am Subrogees have failed to establish that the claim was owned by U.S. nationals continuously from the date of the injury to the date of the Claims Settlement Agreement. The claimants argue on objection that the "Commission errs in imposing a continuous nationality requirement in the context of this claim." Specifically, the claimants contend that the Commission has ignored the purposes of the Claims Settlement Agreement, which they assert was intended to resolve all claims of the "Parties and their nationals." According to claimants, this includes the Pan Am 103 victims, Pan Am, and (since the claimants contend that they stand in the shoes of the Pan Am 103 victims and Pan Am) them as well.

The Proposed Decision rejected these arguments as inconsistent with the Claims Settlement Agreement, as it has been implemented by the Libya Program referral letters. The January Referral Letter states that, as a matter of jurisdiction, Category F only applies to claims of "U.S. nationals." January Referral Letter, *supra*, ¶8. 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" continuously from the date it arose until the date of the Claims Settlement Agreement. The Proposed Decision also quoted from *Claim of [redacted]*, Claim No. LIB-I-049, Decision No. LIB-I-019 (2011), in explaining that the continuous nationality requirement is a matter of customary international law and that the United States recognizes it as such:

> 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.

PD at 13 (quoting [redacted] at 6-8).

Moreover, for purposes of bringing a claim before this Commission, the fact that the Claims Settlement Agreement was intended to resolve all claims of the "Parties and their nationals" is irrelevant. As the Commission explained in great detail in [redacted]:

> Equally unsuccessful is claimant's assertion at the oral hearing that the CSA and the LCRA evince a "clear intent" to settle all claims against Libya, "not just the claims of those claimants meeting the continuous nationality requirement." The question here is not whether the United States intended to settle all claims in U.S. courts against Libya—clearly it did, and the settlement of all claims was likewise a primary objective of Libya. E.O. 13477 makes this abundantly clear by directing, in sections 1(a) and (b), respectively, the settlement of claims of "United States nationals" and those of "foreign nationals."
>
> The question is which settled claims were to be the subject of compensation by the Commission from the fund established in Article II of the CSA. ... [T]he intent of the drafters of the CSA, the LCRA or the December Referral Letters to settle all claims against Libya does not shed light on when a person must be a U.S. national in order to qualify for compensation under the settlement.

Also without merit is claimants' argument that because the continuous nationality requirement is not explicitly mentioned in the Claims Settlement Agreement, the drafters implicitly meant to reject the requirement. Again, [redacted] speaks directly to the issue:

> Claimant's assertion that because there is no language in any of these documents specifying the continuous nationality requirement, one cannot be imposed, would have some weight were it not for the fact 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 [this] principle[] would have been clearly articulated and not merely implied. In other words, the absence of language cannot be grounds for departure from well-settled law.

The Proposed Decision thus concluded, again quoting from [redacted] as follows:

> 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 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.

PD at 13 (quoting [redacted] at 6-8).

As they did before the Proposed Decision, claimants continue to argue that their own nationality is irrelevant and that the only relevant nationalities for purpose of this claim are those

of Pan Am and the American victims of the Lockerbie Disaster. The Commission's Proposed Decision addressed this argument in detail. See PD at 15-16. For all the reasons stated there, the Commission again rejects claimants' argument. Quite simply, for purposes of the continuous nationality requirement, and as noted in numerous prior international law decisions, an insurer bringing a claim as a subrogee does not adopt the nationality of its insured, the subroger. Instead, the insurer must independently—and in addition to the insured—meet the continuous nationality requirement.

The claimants reiterate their argument that continuous nationality should at least not be required of reinsurers. On objection, claimants point out—rightly—that none of the authorities cited in the Proposed Decision involved a claim that was denied solely because the reinsurer was not a U.S. national. This factual distinction, however, simply does not matter. The Commission decisions cited in the Proposed Decision consistently require 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. The claimants rely on nine Commission decisions in which, as claimants put it, "the Commission considered the claims of insurance companies without apparently ever considering whether those insurers had ceded a portion of their coverage to a reinsurer." However, there is no indication in any of the cited decisions that (a) the losses were further insured by reinsurers or (b) if confronted with a chain of reinsurance, the Commission would not have applied the continuous nationality requirement all the way through the full chain of ownership.

The Commission's jurisprudence on this score is consistent with international law. Claimants have not brought to the Commission's attention any international-law jurisprudence for the proposition that a tribunal can ignore the nationality of reinsurers. Instead, when international law has explicitly considered reinsurers, it has consistently found that their nationality has mattered. For example, when U.S. insurance companies filed claims before the Mixed Claims Commission (United States and Germany), the State Department required them to deduct the amount they received from reinsurance if the reinsurance company was not a U.S. national:

> As the basis of settlement, the actual net out of pocket payments of the American underwriters, including the Veterans Bureau [,] have been established after deducting all sums, if any, received by such underwriters under policies of re-insurance written by corporations, other than those under the laws of the United States or any State or possessions thereof, and partnerships and/or individuals other than such as owe permanent allegiance to the United States.

Hackworth, *Digest of International Law*, Vol. V, pages 809-810. Professor Bederman has likewise noted that international law as a rule requires continuous nationality in insurance claims because insurance subrogees are considered successors in interest based on the idea that the rights of an insurer vest when payment is made to the insured, and not (by virtue of the insurance contract or the relation-back doctrine) at the time the loss occurs and the claim arises. Bederman, *Beneficial Ownership of International Claims*, *supra*, at 942-943. As such, each payment of insurance, and each payment of reinsurance, is a separate step, transferring the ownership of the claim, step-by-step, from one successor in interest to the next during the relevant time period. See also *Eagle Star and British Dominions Insurance Company and Excess Insurance Company* (Great Britain v. Mexico) (1931), 5 U.N.R.I.A.A. 139 at 142 ("the decision on the nationality of

the claim from its inception until now does not depend solely upon the nationality of the Insurer claiming, but would also require an investigation of the reinsurance contracts subdividing the profits and losses from the original insurance."); Theodor Meron, *The Insurer and the Insured Under International Claims Law*, 68 Am. J. Int'l Law 628, 642 (1974) ("An international tribunal seized of such a case would have to consider the extremely complicated questions of fact involved in disentangling the web of insurance and reinsurance contracts and determining the losses and their classification according to the nationalities of the insurers (or reinsurers).").

The claimants also argue on objection that the Proposed Decision fails to take sufficient account of the fact that the U.S. facilitated the final settlement payments to all of the Pan Am 103 victims, both U.S. and non-U.S. citizens, and that this fact demonstrates that the U.S. was espousing all claims relating to Pan Am 103, regardless of nationality. However, as the Commission noted in its Proposed Decision, this limited payment to non-U.S. nationals was specifically contemplated by the parties. See PD at 19 n.15. Congress in the LCRA affirmed that the CSA delineated two classes of claims, the first specifically encompassing only the persons included in the Pan Am 103 and LaBelle Discotheque private settlements with Libya, and only with respect to a final tranche of payments due from Libya under these private settlements, and the second encompassing all "nationals of the United States who have terrorism-related claims against Libya." See LCRA §§3 and 5. The Pan Am Subrogees were not directly part of the LaBelle or Pan Am 103 private settlements and therefore must be "nationals of the United States."

The Pan Am Subrogees continue to press their argument that, as a matter of policy, the requirement of continuous nationality ought to apply only to the insured, particularly in the context of the specialized aviation insurance market. The claimants state that because the relevant reinsurance programs are complex, involving layers and multiple companies and syndicates, and that because tracing nationality through all the chains of reinsurance has the effect of denying many large insured claims, reinsurers should not be required to be U.S. nationals. They now buttress this argument with a letter from the International Union of Aerospace Insurers arguing that in the unique context of aviation insurance it is necessary to distribute the very large financial risk exposure amongst many underwriters and that the aviation insurance market is dispersed globally.

The continuous nationality requirement does appear to create substantial obstacles to recovery in the context of complex insurance claims, and in this regard the claimants have raised important issues for future policy makers. Nonetheless, the Proposed Decision answered this argument: the relevant international law is currently clear, and the Commission has no authority to change the law for policy reasons. See PD at 19. Commission precedent, U.S. practice, and customary international law all require a continuous chain of U.S. nationality in order for a claim to be cognizable, and, as the Commission made clear in [redacted] there is no evidence that either the parties that concluded the Claims Settlement Agreement or the State Department in its referral to this Commission intended to upend that settled legal principle.

* * * *

2. Unlawful Detention

In Claim No. LIB-II-183, Decision No. LIB-II-178 (2013), the Commission revisited its preliminary determination of compensation for a claimant who had been unlawfully

detained on a different occasion than all other claimants within a particular category of the claims program. The final decision of the Commission, dated February 15, 2013, and excerpted below, was to award compensation for this particular claimant in the same amount as others under the January 2009 referral letter within the same category. Specifically, claimant had been preliminarily awarded $282,000 for her detention over the course of several months in Libya, during which she was held in hotels and other locations without her passport, but without constant, severe, or imminent threat to her life. The recommendation for others in her category, all of whom had been taken hostage in an airplane hijacking, was an award of $1 million.

_____

* * * *

The January Referral Letter specifically addresses compensation for Category A claimants with the following recommendation: "[g]iven the amount we recommended for physical injury claims in our December 11, 2008 referral, we believe and recommend that a fixed amount of $1 million would be an appropriate level of compensation for all damages for a claim that meets the applicable standards under Category A." As noted in the Proposed Decision, this claim was the only claim under Category A that did not arise from the hijacking of Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986. See PD at 14.

The Commission has also previously held that the language of the January Referral Letter demonstrated that the State Department's recommendation of compensation for Category A was based on the level of compensation it recommended for physical injury claims under the December Referral Letter. Claim of. [redacted], Claim No. LIB-II-002, Decision No. LIB-II-002 (2011) (Final Decision), at 8. In [redacted], the Commission specifically noted that the recommended $1 million for Category A claimants "was based not on the intrinsic value of the claims for hostage-taking or unlawful detention, but rather on the relationship of such claims to physical injury claims, which were valued at $3 million." *Id*.

During the proceedings on the objection, counsel for claimant acknowledged that the intensity of claimant's ordeal did not approach the horror endured by those aboard Pan Am Flight 73. Yet, counsel persuasively argued that the duress claimant experienced during her detention and the length of her detention together warrant her being treated, for purposes of this claims program, exactly like the Pan Am Flight 73 Category A claimants. In particular, the Commission is persuaded that her claim bears the same relationship to the physical-injury claims as that described in [redacted]. Consequently, having considered claimant's arguments in support of her objection, the complete record in support of the claim, the January Referral Letter, and applicable law, the Commission finds that claimant is entitled to $1 million in compensation for her unlawful detention in Libya.

* * * *

D. IRAQ CLAIMS

As discussed in *Digest 2012* at 279, the State Department referred to the

Foreign Claims Settlement Commission ("Commission") for adjudication a category of claims within the scope of the Claims Settlement Agreement between the United States and Iraq, Sept. 2, 2010, T.I.A.S. No. 11-522. The Iraq claims adjudication program commenced on March 26, 2013. 78 Fed. Reg. 18,365 (Mar. 26, 2013). The Commission set June 26, 2013, as the deadline for the filing of claims. The Commission received 28 claims by this deadline. As of December 31, 2013, the Commission had not yet issued any decisions in this claims program. Further information about the Iraq claims program is available at *www.justice.gov/fcsc/current-prog.html#iraq-claims*.

E. UN COMPENSATION COMMISSION

The UN Compensation Commission ("UNCC") was established by the UN Security Council in 1991 to pay compensation for losses resulting from Iraq's illegal invasion and occupation of Kuwait. See *Digest 1991-1999* at 1099-1106; see also *Digest 2000* at 444; *Digest 2002* at 407-08; *Digest 2003* at 454-56; *Digest 2004* at 430. A fund was established for this purpose that receives a percentage (currently 5%) of the proceeds from Iraqi oil sales. The UNCC has made over one million compensation awards, totaling over $52 billion. In its Decision 258 (2005), the UNCC's Governing Council ("GC") established the Follow-up Program for Environmental Awards, under which the UNCC monitored environmental remediation projects undertaken by Iran, Jordan, Kuwait, and Saudi Arabia, using $4.3 billion in funds awarded for environmental damage.

On May 2, 2013, at its 75th session, the GC adopted Decision 270, in which it declared that the mandate under the Follow-up Program for Environmental Awards will be considered fulfilled in respect of the Kingdom of Saudi Arabia upon receipt by the GC of certain signed assurances from the Government of the Kingdom of Saudi Arabia. In Decision 270 the GC also decided that the Program is considered closed in respect of the Islamic Republic of Iran. U.N. Doc. S/AC.26/Dec.270 (2013).

On November 21, 2013, at its 76th session, the GC adopted Decision 271, making declarations with respect to the other two participating states, Jordan and Kuwait, similar to that made in Decision 270 regarding Saudi Arabia. U.N. Doc. S/AC.26/Dec.271 (2013).

Charge d'Affairs a.i. Peter Mulrean of the U.S. Mission to the UN in Geneva discussed these decisions on November 19, 2013 in his opening remarks to the 76th Session of the GC, excerpted below and available at *http://geneva.usmission.gov/2013/11/19/u-s-statement-at-the-76th-uncc-governing-council-session/*

* * * *

Since 2005, the greatest task of the UNCC, as a large part of its claims program, has been to oversee the response to a massive, man-made environmental disaster, comprising one of the largest environmental clean-up projects in human history: the $4.3 billion remediation of environmental devastation of neighboring countries resulting from the 1991 Gulf War.

We hope that during the present meeting, the Governing Council will be able to determine that the UNCC's part of that work is essentially complete. In this regard, I point to Decision 269 of the Governing Council, enacted in 2011, where we decided to assess whether the systems and controls adopted by the participating governments were sufficient for those governments to oversee their own environmental projects.

At this Council's most recent session in May, we determined that Saudi Arabia had fulfilled the Decision 269 criteria, and that Jordan and Kuwait were very close to doing so. My country's delegation looks forward to hearing details from each delegation over the next few days, but I am pleased to be able to report that it appears likely, based on the national reports and all indications to date, that Jordan and Kuwait have both met fully the Decision 269 criteria. This is a significant accomplishment of which each delegation should be proud.

If the Governing Council is able to find at this meeting that Jordan and Kuwait have met these criteria, the UNCC will essentially conclude what has been its largest task since 2005, the oversight of large-scale environmental remediation projects. The UNCC's expected completion of this task and the passing of continuing oversight responsibility to the participating countries is an occasion that warrants marking.

* * * *

Cross References

ILC, **Chapter 7.D.**
Attachment of blocked Iranian assets under TRIA and the FSIA, **Chapter 10.A.2.a.**
Investment dispute resolution, **Chapter 11.B.**
International Tribunal for the Law of the Sea, **Chapter 12.1.b.**

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 Bangui, Central African Republic, France agreed in April 2013 to represent the United States in the Central African Republic and protect United States interests in accordance with Article 45(c) of the Vienna Convention on Diplomatic Relations. See *Digest 2011* at 271 for a list of other governments that have served as protecting powers for the United States.

B. STATUS ISSUES

1. U.S. Recognition of Somalia

On January 17, 2013, U.S. Secretary of State Hillary Rodham Clinton received the president of Somalia, Hassan Sheikh Mohamud, at the U.S. Department of State. The Somali president traveled with a delegation from the new Somali government to meet with several U.S. government officials and for the announcement that the United States recognizes the government of Somalia for the first time since 1991. A State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/01/202997.htm*, and excerpted below, summarizes the changes in Somalia leading up to the U.S. decision to recognize its government.

---

* * * *

In 2012, after more than a decade of transitional governments, Somalia completed its political transition process. This culminated in a new provisional constitution, a new parliament, and the election by that parliament of Mr. Hassan Sheikh as Somalia's president. In recognizing the Government of Somalia, the United States is committing to sustained diplomatic engagement

with the Somali authorities. While we maintain responsibility for U.S. engagement in Somalia through our personnel in the Somalia Unit, led by Special Representative for Somalia, James Swan, and co-located with the U.S. Embassy in Nairobi, Kenya, we have increased our travel to Somalia over the last six months and plan to establish an even more robust presence there as security permits. In addition, recognition removes an obstacle to Somali participation in certain foreign assistance programs, including security sector programs like International Military and Education Training and Foreign Military Financing.

* * * *

Somalia's long road to representative and accountable government has not ended. We applaud President Hassan Sheikh's commitment to inclusive governance and call on Somalia's new leaders to continue the reform effort and work together to create a better future for all Somalis. We will continue to help the new government strengthen democratic institutions, improve stability and security, and improve its ability to provide services to its citizens.

* * * *

Secretary Clinton's remarks with President Mohamud after their meeting on January 17, 2013 are excerpted below and available in full at *www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm*.

---

* * * *

… Today's meeting has been a long time in the making. Four years ago, at the start of the Obama Administration, Somalia was, in many ways, a different country than it is today. The people and leaders of Somalia have fought and sacrificed to bring greater stability, security, and peace to their nation.

There is still a long way to go and many challenges to confront, but we have seen a new foundation for that better future being laid. And today, we are taking an important step toward that future. I am delighted to announce that for the first time since 1991, the United States is recognizing the Government of Somalia.

Now before I talk about what comes next for this partnership, it is worth taking a moment to remember how we got here and how far we have come together. When I entered the State Department in January 2009, al-Shabaab controlled most of Mogadishu and south and central Somalia. It looked at the time like it would even gain more territory. The people of Somalia had already endured many years of violence and isolation, and we wanted to change that. We wanted to work together, not only with the people of Somalia but with governments across the region, the international community, and other likeminded friends.

In early 2009, the final Transitional Federal Government began its work. Somali security forces, supported by the African Union Mission in Somalia, and troops from Uganda and Burundi and now Kenya and Djibouti began to drive al-Shabaab out of cities and towns. Humanitarian aid finally began getting to the people in need. Local governments resumed their work. Commerce and travel began to pick up. Now progress was halting at times, but it was unmistakable. And today, thanks to the extraordinary partnership between the leaders and people

of Somalia, with international supporters, al-Shabaab has been driven from Mogadishu and every other major city in Somalia.

While this fight was going on, at the same time, Somalia's leaders worked to create a functioning democratic government. Now that process, too, was quite challenging. But today, for the first time in two decades, this country has a representative government with a new president, a new parliament, a new prime minister, and a new constitution. Somalia's leaders are well aware of the work that lies ahead of them, and that it will be hard work. But they have entered into this important mission with a level of commitment that we find admirable.

So Somalia has the chance to write a new chapter. When Assistant Secretary Carson visited Mogadishu in June, the first U.S. Assistant Secretary to do so in more than 20 years, and when Under Secretary Sherman visited a few months ago, they discovered a new sense of optimism and opportunity. Now we want to translate that into lasting progress.

Somalia's transformation was achieved first and foremost by the people and leaders of Somalia, backed by strong, African-led support. We also want to thank the African Union, which deserves a great deal of credit for Somalia's success. The United States was proud to support this effort. We provided more than $650 million in assistance to the African Union Mission in Somalia, more than 130 million to Somalia's security forces. In the past two years, we've given nearly $360 million in emergency humanitarian assistance and more than $45 million in development-related assistance to help rebuild Somalia's economy. And we have provided more than $200 million throughout the Horn of Africa for Somali refugee assistance.

We've also concentrated a lot of our diplomacy on supporting democratic progress. And this has been a personal priority for me during my time as Secretary, so I'm very pleased that in my last weeks here, Mr. President, we're taking this historic step of recognizing the government.

Now, we will continue to work closely, and the President and I had a chance to discuss in detail some of the work that lies ahead and what the government and people of Somalia are asking of the United States now. Our diplomats, our development experts are traveling more frequently there, and I do look forward to the day when we can reestablish a permanent U.S. diplomatic presence in Mogadishu.

We will also continue, as we well know, to face the threat of terrorism and violent extremism. It is not just a problem in Somalia; it is a problem across the region. The terrorists, as we have learned once again in the last days, are not resting, and neither will we. We will be very clear-eyed and realistic about the threat they continue to pose. We have particular concerns about the dangers facing displaced people, especially women, who continue to be vulnerable to violence, rape, and exploitation.

So today is a milestone. It's not the end of the journey but it's an important milestone to that end. We respect the sovereignty of Somalia, and as two sovereign nations we will continue to have an open, transparent dialogue about what more we can do to help the people of Somalia realize their own dreams.

The President had a chance to meet President Obama earlier today at the White House, and that was a very strong signal to the people of Somalia of our continuing support and commitment. So as you, Mr. President, and your leaders work to build democratic institutions, protect human rights and fundamental freedoms, respond to humanitarian needs, build the economy, please know that the United States will be a steadfast partner with you every step of the way. Thank you.

* * * *

Also on January 17, Secretary Clinton and President Mohamud exchanged letters regarding the arrangements for the conduct of relations between the United States and Somalia. That exchange of letters appears below (with the Secretary of State's letter first) and is also available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Dear Mr. President:

On behalf of the Government of the United States of America, I congratulate the people of Somalia on their success in establishing a new Government of Somalia. The United States of America is pleased to recognize your government, upon confirmation of the following arrangements for the conduct of relations between the United States of America and Somalia.

First, recalling Somalia's existing legal obligations to the United States of America, including existing bilateral and multilateral treaty obligations and financial obligations to the United States of America, such as those that relate to the conduct of diplomatic and consular relations and those outlined under the Agreement effected by exchange of notes dated August 22, 1980, and the Agreement on Economic and Technical Cooperation, effected by exchange of notes dated June 14, October 12 and 13, 1981, I seek your commitment to work with the Government of the United States of America to fulfill these obligations. The United States of America is, of course, prepared to review any such treaties to determine whether they should be revised, terminated, or replaced to take into account developments in U.S.-Somalia relations.

Second, I seek your confirmation that the Government of Somalia will honor the United States of America's property rights in Somalia, including continued U.S. ownership of the entire 720,000 square meter site of the former U.S. embassy in Somalia. The United States of America is prepared to honor Somalia's property rights in the United States of America, including with regard to any properties or proceeds held by the United States of America.

Third, I seek your assurances that the Government of Somalia will respect human rights in accordance with international law and ensure democratic, just, and transparent governance in Somalia. This includes protecting rights enshrined in the International Covenant on Civil and Political Rights and meeting its other obligations under international human rights law. It also includes holding free and fair elections, protecting the rights necessary to permit civil society organizations to operate, taking necessary and appropriate steps to fight corruption, and enshrining the rule of law.

Fourth, I seek your confirmation that Somalia consents to the United States of America continuing to conduct its economic, technical, and security assistance programs throughout Somalia, including those in and with Somaliland and Puntland, on the understanding that future political and constitutional arrangements will clarify the respective responsibilities of the central government and regional administrative entities.

I look forward to receiving, by reply to this note, your concurrence with these arrangements and with the continued development of cordial and productive relations between the United States of America and Somalia.

Sincerely yours,
Hillary Rodham Clinton

* * * *

Dear Madam Secretary:

On behalf of the Government of Somalia, I thank the government and people of the United States of America for the recognition of our government. I am pleased to confirm the arrangements you have proposed for the conduct of relations between the United States of America and Somalia.

First, recalling Somalia's existing legal obligations to the United States of America, including existing bilateral and multilateral treaty obligations and financial obligations to the United States of America, such as those that relate to the conduct of diplomatic and consular relations and those outlined under the Agreement effected by exchange of notes dated August 22, 1980, and the Agreement on Economic and Technical Cooperation, effected by exchange of notes dated June 14, October 12 and 13, 1981, commit to work with the Government of the United States of America to fulfill these obligations. Somalia is also prepared to review any such treaties to determine whether they should be revised, terminated, or replaced to take into account developments in U.S.-Somalia relations.

Second, I confirm that the Government of Somalia will honor the United States of America's property rights in Somalia, including continued U.S. ownership of the entire 720,000 square meter site of the former U.S. embassy in Somalia. We appreciate that the United States of America is prepared to honor Somalia's property rights in the United States of America, including with regard to any properties or proceeds held by the United States of America.

Third, I assure you that the Government of Somalia will respect human rights in accordance with international law, as well as ensure democratic, just, and transparent governance in Somalia. This includes protecting rights enshrined in the International Covenant on Civil and Political Rights and meeting its other obligations under international human rights law. It also includes holding free and fair elections, protecting the rights necessary to permit civil society organizations to operate, taking necessary and appropriate steps to fight corruption, and enshrine the rule of law.

Fourth, I also confirm that Somalia consents to the United States of America continuing to conduct its economic, technical, and security assistance programs throughout Somalia, including those in and with Somaliland and Puntland, on the understanding that future political and constitutional arrangements will clarify the respective responsibilities of the central government and regional administrative entities.

We look forward to the continued development of cordial and productive relations between Somalia and the United States of America.

Sincerely,
Hassan Sheikh Mohamud

* * * *

2. Serbia and Kosovo: EU-facilitated Dialogue

In an April 19, 2013 press statement, Secretary Kerry congratulated Serbia and Kosovo on reaching agreement in the European Union-facilitated Dialogue led by EU High Representative Catherine Ashton.* The statement, available at *www.state.gov/secretary/remarks/2013/04/207782.htm*, explains:

> This agreement on principles for normalization of relations required compromise and political courage from both sides, and I applaud the governments of Kosovo and Serbia for making the hard decisions that will move them closer to their goals of European integration. I encourage both countries now to implement expeditiously and fully all Dialogue agreements reached to date, so that all of those living in Kosovo and Serbia can continue to build a more peaceful and prosperous future.
>
> …
>
> The United States will remain deeply committed to seeing the people of Serbia, Kosovo, and the entire region realize their aspirations of integration into a Europe free, whole, and at peace.

On November 5, 2013, the State Department issued a press statement commending the Republic of Kosovo for elections held November 3rd. The press statement is available at *www.state.gov/r/pa/prs/ps/2013/11/217213.htm*, and includes the following:

> We applaud the commitment of both the Governments of Kosovo and Serbia to encourage voter participation and enable the people of Kosovo to democratically choose their leaders. The successful conduct of these elections is an important aspect of the implementation of the EU-facilitated Dialogue agreement to normalize relations between Kosovo and Serbia. We urge all parties to ensure the next phase of the election process is conducted in a peaceful, free and fair manner.

On November 19, 2013, Ambassador Rosemary A. DiCarlo, Deputy U.S. Permanent Representative to the United Nations, delivered remarks at a Security Council Debate on UNMIK, in which she addressed the recent elections in Kosovo, the agreement on normalizing relations with Serbia, and progress on EU integration. Ambassador DiCarlo's remarks are available at *http://usun.state.gov/briefing/statements/217752.htm* and include the following:

* Editor's note: The April agreement is called an "Agreement on Principles of Normalization," and is often referred to as a "normalization" agreement. However, the April 2013 agreement does not require Serbia to recognize Kosovo as an independent state or to establish diplomatic relations.

First, the United States congratulates Kosovo, the OSCE, and all the individuals and organizations that contributed to the success of the November 3rd municipal elections and applauds Kosovo and Serbia for their efforts to encourage voter participation. …These elections have demonstrated that Kosovo is capable of conducting future elections that are consistent with international standards and its European aspirations. We now look forward to the peaceful conduct of the run-off polls on December 1st.

Second, the United States supports the normalization of relations between Kosovo and Serbia, which is crucial for stability and reconciliation in the region. We are pleased by the progress both countries have made in the EU-facilitated dialogue. The municipal elections in Kosovo are just one, albeit highly vital, element of the April 19th agreement. We look to the Governments of Kosovo and Serbia to move forward with full implementation of all aspects of the April 19th agreement and all previous agreements, including integrated border management. We commend both governments for concluding additional agreements in recent weeks, particularly regarding telecommunications and energy. The Prime Ministers and EU High Representative Ashton deserve our praise and continued support for their efforts, and we also thank EULEX and NATO for their support for implementing the Dialogue agreements.

Finally, Mr. President, the United States views the elections and the progress of the dialogue as positive steps on Kosovo and Serbia's respective paths towards EU membership. We strongly support Serbia's commitment to joining the European Union and, with full implementation of the April 19th agreement, look forward to the European Council's vote on starting accession talks with Serbia. We also welcome the October 28th start of negotiations between the European Union and Kosovo on a Stabilization and Association Agreement. This milestone demonstrates the progress Kosovo has made both on internal reforms and towards normalization of relations with Serbia. So does Kosovo's growing number of recognitions, which now represent a majority of UN Member States. The United States stands ready to support Kosovo's efforts to implement the reforms necessary to achieve its Euro-Atlantic integration goals, including strengthening the rule of law and the fight against crime and corruption, the protection of minority rights, and the development of a strong market-based economy.

3. Nagorno-Karabakh

The State Department issued a press statement on November 19, 2013 welcoming the Armenia-Azerbaijan summit on Nagorno-Karabakh held that day in Vienna under the auspices of the OSCE Minsk Group co-chairs. The meeting of the presidents of Armenia and Azerbaijan on the Nagorno-Karabakh conflict was their first in almost two years. The United States serves as co-chair of the OSCE Minsk Group along with Russia and France.

The November 19 press statement is available at *www.state.gov/r/pa/prs/ps/2013/11/217743.htm*. On December 5, 2013, the State Department issued a media note containing the joint statement by the heads of delegation of the OSCE Minsk Group co-chair countries and the foreign ministers of Azaerbaijan and Armenia. The joint statement is available at *http://www.state.gov/r/pa/prs/ps/2013/218399.htm*. Included in the joint statement is the indication of continued engagement and future meetings to advance the peace process.

4. Georgia

a. Geneva Discussions

On July 4, 2013, Ambassador to the OSCE Ian Kelly delivered a statement on the 24th round of the Geneva Discussions on the conflict in Georgia. Ambassador Kelly's statement is excerpted below and available at *http://osce.usmission.gov/jul_4_13_georgia.html*.

* * * *

The United States was pleased to participate in the 24th round of the Geneva International Discussions on June 25 and 26. During the discussions, the United States joined the Co-Chairs and the Georgian participants in expressing deep concern over the accelerated installation of physical barriers on the administrative boundary lines (ABLs). As we noted during the talks, such "borderization" is inconsistent with Georgia's sovereignty and territorial integrity within its internationally recognized borders and is therefore contrary to customary international law, as well as the commitments made by the Russian Federation in the August 12, 2008, six-point ceasefire agreement.

We regret that some participants chose to cut short their participation in Working Group II, ending the discussion on important humanitarian issues and challenging an agreed format that has endured for almost five years. The United States continues to call on all sides to focus the discussions on substance rather than format in order to make tangible improvements to the lives of those living in the conflict-affected communities.

The United States remains committed to finding a long-term, peaceful solution to the conflict in Georgia, and reiterates its strong support for Georgia's sovereignty and territorial integrity within its internationally recognized borders. We remain convinced that the OSCE and other international actors can play a valuable role in resolving problems, providing humanitarian assistance, and monitoring human rights and humanitarian conditions. In this regard, unhindered access to the whole of Georgia is essential.

We appreciate the ongoing efforts of the Geneva Co-Chairs to facilitate progress towards these goals, and reiterate our support for the vital work of the European Union Monitoring

Mission in promoting transparency and stability along the ABLs with the Abkhazia and South Ossetia regions. We continue to value the Geneva International Discussions and their role in addressing issues of stability and security, human rights and humanitarian concerns, and the peaceful resolution of the conflict in Georgia, and look forward to working constructively on this agenda in the coming months.

* * * *

b. Georgia and Moldova Agreements with the EU

On November 29, 2013, Secretary Kerry issued a press statement congratulating Georgia and Moldova on initialing association agreements and free trade agreements with the European Union at the Eastern Partnership Summit in Vilnius. The press statement, available at *www.state.gov/secretary/remarks/2013/11/218124.htm* also includes the following expressions of U.S. support for and commitment to greater European integration of Georgia and Moldova:

> The United States strongly supports the integration of Georgia and Moldova into the Euro-Atlantic community, which will spur greater economic opportunity, development and prosperity across the continent.
>
> We commend Georgia and Moldova for strengthening the rule of law, democracy, and free markets. Meeting the goals of the EU's Eastern Partnership program is one of the surest paths to a Europe whole, free and at peace.
>
> We reaffirm our commitment to deepening our partnership with the people of Georgia and Moldova, and we will continue to support their governments as they lay the groundwork for greater European integration and a better, more prosperous future.

C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION

On July 23, 2013, a three judge panel of the U.S. Court of Appeals for the District of Columbia decided the case, *Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013). The case was remanded by the U.S. Supreme Court to the court of appeals in 2012 for a determination of the constitutionality of a law requiring the Department of State to record "Israel" as the place of birth for a U.S. citizen born in Jerusalem upon request of that citizen. 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, *Digest 2011* at 278-82, and *Digest 2012* at 283-86. On remand, the court of appeals struck down the provision as unconstitutional, reasoning that it infringes on the exclusive authority of the executive branch to determine which states, governments, and sovereign territories the United States recognizes. Excerpts follow from the opinion of the majority of the

appeals court (with footnotes omitted). One of the three judges wrote a separate concurring opinion. On November 20, 2013, a petition for writ of certiorari was filed.[**]

---

* * * *

Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107–228, 116 Stat. 1350, requires the Secretary (Secretary) of the United States Department of State (State Department) to record "Israel" as the place of birth on the passport of a United States citizen born in Jerusalem if the citizen or his guardian so requests. *Id.* § 214(d), 116 Stat. at 1366. The Secretary has not enforced the provision, believing that it impermissibly intrudes on the President's exclusive authority under the United States Constitution to decide whether and on what terms to recognize foreign nations. We agree and therefore hold that section 214(d) is unconstitutional.

* * * *

A. The Recognition Power

Recognition is the act by which "a state commits itself to treat an entity as a state or to treat a regime as the government of a state." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 94(1). "The rights and attributes of sovereignty belong to [a state] independently of all recognition, but it is only after it has been recognized that it is assured of exercising them." 1 John Bassett Moore, *A Digest of International Law* § 27, at 72 (1906) (MOORE'S INT'L LAW DIGEST). Recognition is therefore a critical step in establishing diplomatic relations with the United States; if the United States does not recognize a state, it means the United States is "unwilling[ ] to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Recognition also confers other substantial benefits. For example, a recognized sovereign generally may (1) maintain a suit in a United States court, *see id.* at 408–09, 84 S.Ct. 923; *Guaranty Trust Co. v. United States,* 304 U.S. 126, 137, 58 S.Ct. 785, 82 L.Ed. 1224 (1938); (2) assert the sovereign immunity defense in a United States court, *see Nat'l City Bank v. Republic of China,* 348 U.S. 356, 359, 75 S.Ct. 423, 99 L.Ed. 389 (1955); and (3) benefit from the "act of state" doctrine, which provides that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," *Oetjen v. Cent. Leather Co.,* 246 U.S. 297, 303, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (quotation marks omitted).

A government typically recognizes a foreign state by "written or oral declaration." 1 MOORE'S INT'L LAW DIGEST § 27, at 73. Recognition may also be implied as "when a [recognizing] state enters into negotiations with the new state, sends it diplomatic agents, receives such agents officially, gives exequaturs to its consuls, [and] forms with it conventional relations." *Id.; see also* David Gray Adler, *The President's Recognition Power, reprinted in The Constitution and the Conduct of American Foreign Policy* 133 (David Gray Adler & Larry N. George eds., 1996) ("At international law, the act of receiving an ambassador of a foreign

---

[**] Editor's note: On April 21, 2014, the Supreme Court granted the petition for certiorari.

government entails certain legal consequences. The reception of an ambassador constitutes a formal recognition of the sovereignty of the state or government represented.”).

As noted earlier, the Supreme Court has directed us to examine the “textual, structural, and historical evidence” the parties have marshaled regarding “the nature ... of the passport and recognition powers.” *Zivotofsky V,* 132 S.Ct. at 1430. We first address the recognition power and, in particular, whether the power is held exclusively by the President.

B. The President and the Recognition Power

Text and Originalist Evidence

Neither the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President’s recognition power. In support of his view that the recognition power lies exclusively with the President, the Secretary cites the “receive ambassadors” clause of Article II, Section 3 of the Constitution, which provides, *inter alia,* that the President “shall receive Ambassadors and other public Ministers.” U.S. CONST., art. II, § 3. But the fact that the President is empowered to receive ambassadors, by itself, does not resolve whether he has the exclusive authority to recognize foreign nations. Some scholars have suggested other constitutional provisions as possible sources of authority for the President to exercise the recognition power but conclude that the text of those provisions does not itself resolve the issue.

Originalist evidence also fails to clarify the Constitution’s text. …

* * * *

Post-ratification History

Both parties make extensive arguments regarding the post-ratification recognition history of the United States. As the Supreme Court has explained, longstanding and consistent post-ratification practice is evidence of constitutional meaning. ...We conclude that longstanding post-ratification practice supports the Secretary’s position that the President exclusively holds the recognition power.

Beginning with the administration of our first President, George Washington, the Executive has believed that it has the exclusive power to recognize foreign nations. In 1793, President Washington’s cabinet unanimously concluded that Washington need not consult with the Congress before receiving the minister from France’s post-revolutionary government, notwithstanding his receiving the minister recognized the new government by implication. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs,* 111 YALE L.J. 231, 312 (2001). Nor did the Congress “purport[ ] to tell Washington which countries or governments to recognize.” *Id.* at 312–13. The Washington administration also took sole control of issuing exequaturs to foreign consuls. *Id.* at 313 (President Washington “not only signed exequaturs, he also set policy respecting their issuance” (footnote omitted))…

In 1817, President James Monroe prevailed in a standoff with Speaker of the House Henry Clay over the recognition power. Clay had announced that he “intended moving the recognition of Buenos Ayres and probably of Chile.” Julius Goebel, Jr. *The Recognition Policy of the United States* 121 (1915). But when Clay attempted to amend an appropriations bill to appropriate $18,000 for an American minister to be sent to South America, *id.* at 123–24, he was forced to modify the amendment to manifest that the decision whether to send the minister belonged to the President, *see* 32 ANNALS OF CONGRESS 1498–1500 (1818). And, in fact, even Clay’s weakened amendment was defeated in the House; “the reason for the defeat appears

to have been that the amendment was interfering with the functions of the executive." *Goebel, supra,* at 124; *see also* 32 ANNALS OF CONG. 1538 (1818) (statement of Rep. Smith) ("The Constitution has given ... to the President the direction of our intercourse with foreign nations. It is not wise for us to interfere with his powers...."); *id.* at 1570 (statement of Rep. Smyth) ("[T]he acknowledgement of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation."). According to Goebel, Clay's defeat "meant a great increase of strength for the administration" because "it had received a direct confirmation of its ultimate right to determine whether a government was to be recognized." *Goebel, supra,* at 124.

In 1864 and, again, 1896, the Executive branch challenged the individual houses of the Congress for intruding into the realm of recognition, which eventually led the Congress to refrain from acting. In 1864, the House passed a resolution asserting that it did not acknowledge Archduke Ferdinand Maximilian von Habsburg as the Emperor of Mexico. CONG. GLOBE, 38TH CONG., 1ST SESS. 1408 (1864). The then-Secretary wrote to the United States Minister to France, stating that the recognition authority is "purely executive," belonging "not to the House of Representatives, nor even to Congress, but to the President." *Id.* at 2475. The Senate ultimately did not act on the bill. In 1896, the Senate Foreign Relations Committee presented a joint resolution to the full Senate purporting to recognize Cuba's independence. 29 CONG. REC. 326, 332 (1896). The then-Secretary responded with a statement that the power to "recognize the so-called Republic of Cuba as an independent State rests solely with the Executive"; a joint resolution would have only "advice of great weight." Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act,* 50 TEX. L.REV. 866–67 (1972) (quotation marks omitted)…. Again, the Senate did not act on the proposed joint resolution.

In 1919, the Congress once again relented in response to the President's assertion of exclusive recognition power. That year, the Senate considered a resolution which recommended withdrawing recognition of the then-existing Mexican government. PRELIM. REPORT & HR'GS OF THE SEN. COMM. ON FOREIGN RELATIONS, INVESTIGATION OF MEXICAN AFFAIRS, S. DOC. NO.. 66–285, at 843D (2d. Sess.1919–20). In response, President Woodrow Wilson informed the Congress that the resolution, if enacted, would "constitute a reversal of our constitutional practice which might lead to very grave confusion in regard to the guidance of our foreign affairs" because "the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive, and to the Executive, only." *Id.* "Within half an hour of the letter's receipt[,] Senator Lodge, Chairman of the Foreign Relations Committee, announced that the [ ] resolution was dead. President Wilson, Mr. Lodge said, must now accept entire responsibility for Mexican relations." Wilson Rebuffs Senate on Mexico, N.Y. TIMES, Dec. 8, 1919, *available at* http://query.nytimes.com/gst/abstract.html?res=9C00E2DD123BEE32A2575AC0A9649D946896D6CF.

Zivotofsky marshals several isolated events in support of his position that the recognition power does not repose solely in the Executive but they are unconvincing. First, Zivotofsky argues that in 1898 the Senate passed a joint resolution stating "the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that Island." Br. for Appellant 42. But review of the Congressional Record shows that the quoted language was not included in the joint resolution; rather, it was included in a *proposed* joint resolution in the Senate. *See* 31 CONG. REC. 3988 (1898). And the proposed resolution raised separation-of-powers concerns with many Senators. *See id.* at 3990 (statement of Sen. Gorman) ("I regret

exceedingly ... for the first time in the history of the country, this great body should incorporate ... a power which has been disputed by every Executive from Washington down—the right of Congress by law to provide for the recognition of a state."); *id.* at 3991 (statement of Sen. Allison (calling amendment "contravention of ... well-settled principles" and Executive "alone can deal with this question in its final aspects")); *id.* at 3991–92 (statement of Sen. Aldrich) ("We have no right at such a time to exercise functions that belong to the Executive."). When the House received the proposed joint resolution, it removed the recognition clause. *See id.* at 4080. The joint resolution,as passed, stated only that "the people" of Cuba were "free and independent." *See* 30 Stat. 738 (Apr. 20, 1898.

Zivotofsky also relies on events that occurred during the administrations of President Andrew Jackson and President Abraham Lincoln. In both instances, however, the Congress did not attempt to exercise the recognition power. Instead, it authorized appropriations to be used by the President to dispatch diplomatic representatives. In 1836, President Jackson expressed a desire to "unite" with the Congress before recognizing Texas as independent from Mexico. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES UPON THE SUBJECT OF THE POLITICAL, MILITARY, AND CIVIL CONDITION OF TEXAS, H.R. DOC. NO.. 24–35, at 4 (2d Sess.1836). But in doing so, Jackson did not suggest that he lacked the exclusive recognition power. *See id.* at 2 ("[O]n the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject."). Rather, Jackson merely enlisted the support of the Congress as a matter of political prudence. In any event, the Congress did not attempt to exercise the recognition power on its own. Instead, the Congress appropriated funds for the President to authorize a "diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States ... shall deem it expedient to appoint such minister." 5 Stat. 107 (1837). Similarly, President Lincoln expressed a desire to coordinate with the Congress by requesting that it use its appropriations authority to endorse his recognition of Liberia and Haiti. *See* Lincoln's First Annual Message to Congress (Dec. 3, 1861), *available at http://www.presidency.ucsb.edu/ws/?pid= 29502*. And the Congress subsequently did so. 12 Stat. 42.

Supreme Court Precedent

It is undisputed that "in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.' " *Clinton v. City of New York,* 524 U.S. 417, 445, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (quoting *United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936)). While the President's foreign affairs powers are not precisely defined, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 634–35, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring), the courts have long recognized the President's presumptive dominance in matters abroad. *See, e.g., Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 415, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."); *Youngstown,* 343 U.S. at 610, 72 S.Ct. 863 (President has "vast share of responsibility for the conduct of our foreign relations") (Frankfurter, J., concurring); *Johnson v. Eisentrager,* 339 U.S. 763, 789, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) ("President is exclusively responsible" for "conduct of diplomatic and foreign affairs"); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State,* 104 F.3d 1349, 1353 (D.C.Cir.1997) ("[C]ourts have been

wary of second-guessing executive branch decision[s] involving complicated foreign policy matters.”). Thus, the Court, echoing the words of then-Congressman John Marshall, has described the President as the “sole organ of the nation in its external relations, and its sole representative with foreign nations.” *Curtiss–Wright,* 299 U.S. at 319, 57 S.Ct. 216 (quoting 10 ANNALS OF CONG. 613 (Mar. 7, 1800)).

The Supreme Court has more than once declared that the recognition power lies exclusively with the President. *See Williams v. Suffolk Ins. Co.,* 38 U.S. 415, 420, 13 Pet. 415, 10 L.Ed. 226 (1839) (“[If] the executive branch ... assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department[.]”); *United States v. Belmont,* 301 U.S. 324, 330, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) (“[T]he Executive had authority to speak as the sole organ of th[e] government” in matters of “recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto....”); *Guaranty Trust Co. v. United States,* 304 U.S. 126, 138, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) (“We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government....”); *United States v. Pink,* 315 U.S. 203, 229, 62 S.Ct. 552, 86 L.Ed. 796 (1942) (“The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.... [including t]h[e] authority ... [to determine] the government to be recognized.”); *Baker v. Carr,* 369 U.S. 186, 213, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (“[I]t is the executive that determines a person’s status as representative of a foreign government.”); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (“Political recognition is exclusively a function of the Executive.”). To be sure, the Court has not *held* that the President exclusively holds the power. But, for us—an inferior court—“carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative,” *United States v. Dorcely,* 454 F.3d 366, 375 (D.C.Cir.2006) (quotation marks omitted); *see also Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.), especially if the Supreme Court has repeated the dictum, *see Overby v. Nat’l Ass’n of Letter Carriers,* 595 F.3d 1290, 1295 (D.C.Cir.2010) (Supreme Court dictum is “especially” authoritative if “the Supreme Court has reiterated the same teaching”).

In *Williams v. Suffolk Insurance Company,* the issue before the Court was whether “the Falkland islands ... constitute any part of the dominions within the sovereignty of the government of Buenos Ayres.” 38 U.S. at 419. The Court decided that the President’s action in the matter was “conclusive on the judicial department.” *Id.* at 420.

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

Id. Similarly, in *Banco Nacional de Cuba v. Sabbatino,* without determining whether the United States had de-recognized Cuba’s government under Fidel Castro, the Court explained that

"[p]olitical recognition is exclusively a function of the Executive." 376 U.S. at 410, 84 S.Ct. 923. The Court emphasized that were it to decide for itself whether Cuba had been de-recognized, there would be a real "possibility of embarrassment to the Executive Branch in handling foreign relations." *Id.* at 412, 84 S.Ct. 923.

President Franklin D. Roosevelt's 1933 recognition of the Soviet Union led to three cases supporting the conclusion that the President exclusively holds the recognition power. *Belmont,* 301 U.S. 324, 57 S.Ct. 758; *Guaranty Trust,* 304 U.S. 126, 58 S.Ct. 785; *Pink,* 315 U.S. 203, 62 S.Ct. 552. On November 16, 1933, the United States recognized the Soviet Union as the government of Russia "and as an incident to that recognition accepted an assignment (known as the Litvinov Assignment) of certain claims." *Pink,* 315 U.S. at 211, 62 S.Ct. 552. Under the Litvinov Assignment, the Soviet Union agreed to "take no steps to enforce claims against American nationals; but all such claims were released and assigned to the United States." *Belmont,* 301 U.S. at 326, 57 S.Ct. 758. When the United States sought to collect on the assigned claims, its action spawned litigation resulting in the three cases.

In *Belmont,* the Court held that New York State's conflicting public policy did not prevent the United States from collecting assets assigned by the Litvinov Assignment. *Id.* at 330, 57 S.Ct. 758. It noted that "who is the sovereign of a territory is not a judicial question, but one the determination of which by the *political departments* conclusively binds the courts." *Id.* at 328, 57 S.Ct. 758 (emphasis added). But the Court then more specifically explained that "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction" and plainly "within the competence *of the President.*" *Id.* at 330, 57 S.Ct. 758 (emphasis added). Moreover, "in respect of what was done here, the *Executive had authority to speak as the sole organ of that government.* The assignment and the agreements in connection therewith *did not, as in the case of treaties, ... require the advice and consent of the Senate.*" *Id.* (emphases added). In other words, the Court not only emphasized the President's exclusive recognition power but also distinguished it from the *shared* treaty power.

In *Guaranty Trust,* the Court held that a United States claim for payment of funds held in a bank account formerly owned by Russia was barred by New York State's statute of limitations. 304 U.S. at 130, 143–44, 58 S.Ct. 785. In so doing, it relied on the Executive branch's recognition determination: which "government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.... We accept as conclusive here *the determination of our own State Department* that the Russian State was represented by the Provisional Government." *Id.* at 137–38, 58 S.Ct. 785 (emphasis added).

Finally, the Supreme Court in *Pink,* following *Belmont,* held that New York State could not "deny enforcement of a claim under the Litvinov Assignment because of an overriding [state] policy." *Pink,* 315 U.S. at 222, 62 S.Ct. 552. The Court defined the recognition power broadly and placed it in the hands of the President:

> The *powers of the President* in the conduct of foreign relations included the power, *without consent of the Senate,* to determine the public policy of the United States with respect to the Russian nationalization decrees.... That authority is not limited to a determination of the government to be recognized. It *includes the power to determine the policy which is to govern the question of recognition.* Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts....

Id. at 229, 62 S.Ct. 552 (citations omitted and emphases added).

The Court also treated the recognition power as belonging exclusively to the Executive in *Baker v. Carr.* It explained that "recognition of [a] foreign government[ ] so strongly defies judicial treatment that without *executive recognition* a foreign state has been called a republic of whose existence we know nothing." 369 U.S. at 212, 82 S.Ct. 691 (quotation marks and footnote omitted). The Court further explained that "the judiciary *ordinarily follows the executive* as to which nation has sovereignty over disputed territory" and that "it is *the executive* that determines a person's status as representative of a foreign government." *Id.* at 212–13, 82 S.Ct. 691 (emphases added).

Zivotofsky relies on *United States v. Palmer,* 16 U.S. 610, 3 Wheat. 610, 4 L.Ed. 471 (1818), where the Court stated that "the courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." *See id.* at 643. But this observation simply means that the judiciary will not decide the question of recognition. When the High Court has discussed the recognition power with more specificity, as it did in the above-cited cases, it has not merely stated that the judiciary lacks authority to decide the issue but instead has explained that the President has the *exclusive* authority. …

Having reviewed the Constitution's text and structure, Supreme Court precedent and longstanding post-ratification history, we conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign.

C. Section 214(d) and the "Passport Power" vis-à-vis the Recognition Power

Having concluded that the President exclusively holds the recognition power, we turn to the "passport power," pursuant to which section 214(d) is alleged to have been enacted. We must decide whether the Congress validly exercised its passport power in enacting section 214(d) or whether section 214(d) "impermissibly intrudes" on the President's exclusive recognition power. *Zivotofsky V,* 132 S.Ct. at 1428.

Zivotofsky first contends that section 214(d) is a permissible exercise of the Congress's "passport power." In its remand to us, the Supreme Court directed that we examine, *inter alia,* the parties' evidence regarding "the nature of ... the passport ... power[ ]." *Id.* at 1430. Neither party has made clear the textual source of the passport power in the Constitution, suggesting that it may come from the Congress's power regarding immigration and foreign commerce. … Nonetheless, it is clear that the Congress has exercised its legislative power to address the subject of passports. It does not, however, have exclusive control over all passport matters. Rather, the Executive branch has long been involved in exercising the passport power, especially if foreign policy is implicated. *See Haig v. Agee,* 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981). Until 1856, no passport statute existed and so "the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States." *Id.* at 293, 101 S.Ct. 2766. After the first passport law was enacted in 1856, "[t]he President and the Secretary of State consistently construed the 1856 Act to preserve their authority to withhold passports on national security and foreign policy grounds." *Id.* at 295, 101 S.Ct. 2766. And once the Congress enacted the Passport Act of 1926, each successive President interpreted the Act to give him the authority to control the issuance of passports for national security or foreign policy reasons: "Indeed, by an unbroken line of Executive Orders, regulations, instructions to consular officials, and notices to passport holders, the President and

the Department of State left no doubt that *likelihood of damage to national security or foreign policy of the United States was the single most important criterion in passport decisions.*" *Id.* at 298, 101 S.Ct. 2766 (footnotes omitted and emphasis added); *see also* 16 U.S. Op. Off. Legal Counsel 18, 23 (1992) ("Executive action to control the issuance of passports in connection with foreign affairs has never been seriously questioned.").

Zivotofsky relies on Supreme Court precedent that, he contends, shows the Executive cannot regulate passports unless the Congress has authorized him to do so. In both cases cited, the Court held that the Executive branch acted properly once the Congress had authorized it to so act. *See Haig,* 453 U.S. at 282, 289, 309, 101 S.Ct. 2766 (upholding Executive authority to revoke passport on national security and foreign policy grounds after concluding revocation was authorized by Congress); *Zemel v. Rusk,* 381 U.S. 1, 8, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) (upholding State Department's refusal to validate passport for travel to Cuba because "the Passport Act of 1926 embodie [d] a grant of authority to the Executive" (citation omitted)). But in neither case did the Court state that the Congress's power over passports was exclusive. Indeed, in *Haig,* the Court made clear that it did *not* decide that issue. *Haig,* 453 U.S. at 289 n. 17, 101 S.Ct. 2766 ("In light of our decision on this issue, we have no occasion in this case to determine the scope of the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress...." (quotation marks omitted)). Likewise, in *Zemel,* the Court in effect rejected the dissenters' statements implying that the Congress exclusively regulates passports. 381 U.S. at 21, 85 S.Ct. 1271 (Black, J., dissenting) ("[R]egulation of passports ... is a law-making—not an executive, law-enforcing—function...."); *id.* at 29, 85 S.Ct. 1271 (Goldberg, J., dissenting) (Executive lacks "an inherent power to prohibit or impede travel by restricting the issuance of passports"). Instead, the Court emphasized that the "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Id.* at 17, 85 S.Ct. 1271. Thus, while the Congress has the power to enact passport legislation, its passport power is not exclusive. And if the Congress legislates pursuant to its non-exclusive passport power in such a way to infringe on Executive authority, the legislation presents a separation of powers problem. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* —— U.S. —— –, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (Sarbanes–Oxley Act's dual for-cause limitations on removal of members of financial oversight board unconstitutional on separation of powers ground); *Bowsher v. Synar,* 478 U.S. 714, 769, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) ("[E]ven the results of the constitutional legislative process may be unconstitutional if those results are in fact destructive of the scheme of separation-of-powers.").

The question we must answer, then, is whether section 214(d)—which speaks only to passports—nonetheless interferes with the President's exclusive recognition power. Zivotofsky contends that section 214(d) causes no such interference because of its limited reach, that is, it simply regulates one detail of one limited type of passport. But the President's recognition power "is not limited to a determination of the government to be recognized"; it also "includes the power to determine the policy which is to govern the question of recognition." *Pink,* 315 U.S. at 229, 62 S.Ct. 552. Applying this rule, the *Pink* Court held that New York State policy was superseded by the Litvinov Assignment when the policy—which declined to give effect to claims under the Litvinov Assignment—"collid[ed] with and subtract[ed] from the [President's recognition] policy" by "tend[ing] to restore some of the precise impediments to friendly relations which the President intended to remove" with his recognition policy. *Id.* at 231, 62

S.Ct. 552.

With the recognition power overlay, section 214(d) is not, as Zivotofsky asserts, legislation that simply—and neutrally—regulates the form and content of a passport. Instead, as the Secretary explains, it runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem. Since 1948, American presidents have steadfastly declined to recognize any foreign nation's sovereignty over that city. The Executive branch has made clear that the status of Jerusalem must be decided not unilaterally by the United States but in the context of a settlement involving all of the relevant parties. *See supra* p. 200. The State Department [Foreign Affairs Manual or] FAM implements the Executive branch policy of neutrality by designating how a Jerusalem-born citizen's passport notes his place of birth. For an applicant like Zivotofsky, who was born in Jerusalem after 1948, the FAM is emphatic: denote the place of birth as "Jerusalem." 7 FAM 1383.5–6 (JA 115); *see also* 7 FAM 1383 Ex. 1383.1 pt. II (JA 127) (stating that "Israel" "[d]oes not include Jerusalem" and that for applicants born in "Jerusalem," "[d]o not write Israel or Jordan"). In his interrogatory responses, the Secretary explained the significance of the FAM's Jerusalem directive: "Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." Def.'s Resps. to Pl.'s Interrogs. at 8–9, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* No. 03–cv1921 (D.D.C. June 5, 2006) (JA 58–59). Furthermore, "[t]he Palestinians would view any United States change with respect to Jerusalem as an *endorsement of Israel's claim to Jerusalem* and a rejection of their own." *Id.* at 9 (JA 59) (emphasis added). Thus, "[w]ithin the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that *would recognize, or might be perceived as constituting recognition of,* Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." *Id.* (emphasis added). "[R]eversal of United States policy not to prejudge a central final status issue could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." *Id.* at 11 (JA 61). We find the Secretary's detailed explanation of the conflict between section 214(d) and Executive recognition policy compelling, especially given "our customary policy to accord deference to the President in matters of foreign affairs." *Ameziane v. Obama,* 699 F.3d 488, 494 (D.C.Cir.2012) (quotation marks omitted); *see also Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 348, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) (noting "our customary policy of deference to the President in matters of foreign affairs" that "may implicate our relations with foreign powers ... requir[ing] consideration of changing political and economic circumstances" (quotation marks omitted)); *Rattigan v. Holder,* 689 F.3d 764, 769 (D.C.Cir.2012) (finding "the government's arguments quite powerful, especially given the deference owed the executive in cases implicating national security" (quotation marks omitted)). By attempting to alter the State Department's treatment of passport applicants born in Jerusalem, section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power.

Our reading of section 214(d) as an attempted legislative articulation of foreign policy is consistent with the Congress' characterization of the legislation. By its own terms, section 214 was enacted to alter United States foreign policy toward Jerusalem. The title of section 214 is

"*United States Policy* with Respect to Jerusalem as the Capital of Israel." Pub.L. No. 107–228 § 214, 116 Stat. at 1365 (emphasis added). Section 214(a) explains that "[t]he Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President ... to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." *Id.* § 214(a), 116 Stat. at 1365–66. The House Conference report accompanying the bill that became the Foreign Relations Authorization Act explained that section 214 "contain[ed] four provisions related to the recognition of Jerusalem as Israel's capital." H.R. Conf. Rep. 107–671 at 123 (Sept. 23, 2002). Various members of the Congress explained that the purpose of section 214(d) was to affect United States policy toward Jerusalem and Israel. …

Moreover, as the Secretary averred earlier in this litigation, the 2002 enactment of section 214 "provoked strong reaction throughout the Middle East, even though the President in his signing statement said that the provision would not be construed as mandatory and assured that 'U.S. policy regarding Jerusalem has not changed.' " Def.'s Resps. to Pl.'s Interrogs. at 9–10, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* No. 03–cv–1921 (D.D.C. June 5, 2006) (JA 59–60). For example, various Palestinian groups issued statements asserting that section 214 "undermine[d] the role of the U.S. as a sponsor of the peace process," "undervalu[ed] ... Palestinian, Arab and Islamic rights in Jerusalem" and "rais[ed] questions about the real position of the U.S. Administration vis-à-vis Jerusalem." *Id.* at 10 (JA 60) (quotation marks omitted). As in *Pink*, the Secretary's enforcement of section 214(d) "would collide with and subtract from the [President's] policy" by "help[ing] keep alive one source of friction" between the United States and parties in conflict in the Middle East "which the policy of recognition was designed to eliminate." *Pink*, 315 U.S. at 231–32, 62 S.Ct. 552.

* * * *

Cross References

Passports, **Chapter 1.B.**
TPS status for Somalia, **Chapter 1.D.3**
ILC's draft articles on diplomatic protection, **Chapter 8.A.1.**
Somalia sanctions, **Chapter 16.A.7.d.**
Middle East peace process, **Chapter 17.A.**
Somalia, **Chapter 17.B.7.**

CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs claims of immunity in civil actions against foreign states in U.S. courts. The FSIA's various statutory exceptions to a foreign state's immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, and 1607, 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 2013 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Service of Process

Section 1608(a) of the FSIA specifies the proper methods of service of process on a foreign state. Section 1608(b) similarly identifies the proper methods of service on agencies or instrumentalities of a foreign state.

On February 4, 2013, the United States filed a motion to clarify or vacate an order of the U.S. District Court for the Northern District of Georgia regarding service in a case brought against multiple defendants, including the Nigerian Embassy. *Ahmed v. Attorney General of the United States et al.*, No. 1:12-CV-0122-RLV (N.D. Ga.). The court had issued an order regarding service that did not distinguish the Nigerian Embassy from the other listed defendants, resulting in an attempt by the pro se plaintiff to address a service package to the Consulate General of Nigeria in New York for delivery by the U.S. Marshals Service. The United States sought clarification that the court's order did not require the Marshals Service to effect service of process on the Nigerian consulate or the defendant Embassy, and in the alternative sought vacatur of any such

requirement. Excerpts below are from the brief in support of the U.S. motion. The motion with supporting memorandum is available in full at *www.state.gov/s/l/c8183.htm*. On February 25, 2013, the court granted the motion for clarification, explaining that its previous order regarding service was not intended to require service on the Nigerian embassy or consulate.

---

* * * *

If the Court's prior order is, in fact, intended to require the Marshals Service to effect service on a Nigerian consulate or the Nigerian Embassy, the proper course is to vacate any portion of the order imposing such a requirement. Both domestic and international legal authorities compel the Court to vacate that service requirement.

First, the service requirement would be inconsistent with the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611. Both the Consulate General of Nigeria and the Nigerian Embassy are considered foreign states, *see Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), and thus the exclusive procedures for effecting service of the summons and complaint are set forth in 28 U.S.C. § 1608(a).

The methods of service set forth in § 1608(a) are mandatory, require strict compliance, and cannot be replaced with other procedures. *See Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001) (concluding that "the provisions for service of process upon a foreign state . . . outlined in section 1608(a) can only be satisfied by strict compliance" and collecting cases holding the same); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (stating that the procedures of § 1608(a) are "exclusive" and that "strict adherence to the terms of 1608(a) is required"); *Finamar Investors Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 118 (S.D.N.Y. 1995) (discussing § 1608(a) and stating that "[w]hether or not respondent received actual notice of the suit is irrelevant when strict compliance is required").

Section 1608(a) sets forth four potential methods for service: (1) pursuant to a special arrangement between the parties; (2) in accordance with "an applicable international convention on service of judicial documents"; (3) if methods (1) or (2) are unavailable, then by "sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned"; and (4) if service cannot be made within 30 days using method (3), then by: sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. 28 U.S.C. § 1608(1)-(4). These four methods are ordered hierarchically, and each is "available only if the previously enumerated options are in some way foreclosed." *Democratic Republic of Congo v. FG Hemisphere Assocs., LLC* 508 F.3d 1062, 1063 (D.C. Cir. 2007); *see also Magness*, 247 F.3d at 613.

As relevant here, none of the four methods of service permit the Marshals Service to deliver the summons and complaint directly to the Consulate General of Nigeria in New York, or for that matter to the Nigerian Embassy. An order requiring the Marshals Service to perform such an act would therefore be inconsistent with the FSIA, and even if followed would not result in either entity being a proper defendant before this Court. To avoid a conflict with domestic law, therefore, the Court should vacate any portion of its order requiring the Marshals Service to perform such service.

Moreover, any such service requirement would also be inconsistent with international law. Specifically, an order requiring the Marshals Service to deliver the summons and complaint to a Nigerian consulate would run contrary to the Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820 (entered into force with respect to the United States Dec. 13, 1972).

Under the VCCR, to which both the United States and Nigeria are parties, a country's consular premises are inviolable such that "[t]he authorities of the receiving State shall not enter … the consular premises" except with consent. *Id.* art. 31(2). Directing service of process on consular premises would be contrary to this inviolability. *See* Restatement (Third) of Foreign Relations Law § 466 note 2 (1987) ("Service of process at . . . consular premises is prohibited."); *see also Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012).

Under the VCCR, therefore, the Marshals Service cannot intrude upon the consular premises in an effort to effect service. *See also* VCCR art. 43(1) ("Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions."). Any requirement that the Marshals Service deliver service of process to a Nigerian consulate should therefore be vacated.

International law would similarly prohibit the Marshals Service from effecting service on the Nigerian Embassy, which is the entity named as a defendant in Ahmed's complaint. The Vienna Convention on Diplomatic Relations ("VCDR"), 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 both the United States and Nigeria are parties—provides that "[t]he premises of the mission shall be inviolable." *See* Art. 22(1). Thus, a court order requiring service of legal documents upon an embassy conflicts with Article 22(1) of the VCDR. *See also 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."). Any requirement to effect service on the Nigerian Embassy should therefore also be vacated.

* * * *

2. Execution of Judgments and Other Post-Judgment Actions

*a. Attachment of blocked assets under TRIA and the FSIA (*Heiser*)*

As discussed in *Digest 2012* at 305, the United States submitted statements of interest in separate proceedings brought by the same plaintiffs in U.S. district courts in the

District of Columbia and the Southern District of New York, attempting to execute on a judgment against Iran and Iranian entities. These filings were among several made in 2012 on the issue of whether attachment under the Terrorism Risk Insurance Act ("TRIA") and under sections 1610(g) and 1610(f)(1) of the FSIA is predicated on demonstrating an ownership interest by the terrorist party. After the district court in the District of Columbia agreed with the U.S. position that only assets which the terrorist party actually owns—not all assets that are blocked—may be attached, plaintiffs appealed. On March 11, 2013, the United States filed its *amicus* brief with the Court of Appeals for the District of Columbia. Excerpts from the U.S. *amicus* brief follow (with footnotes omitted). The brief is available in full at *www.state.gov/s/l/c8183.htm*. On November 19, 2013, the Court of Appeals issued its decision in the case, affirming the district court's holding that plaintiffs could not attach the contested accounts under either TRIA or the FSIA without an Iranian ownership interest in the accounts, and that Iran lacked an ownership interest in the accounts. *Heiser v. Iran*, 735 F.3d. 934 (D.C. Cir. 2013).

* * * *

A. 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).6 Thus, if plaintiffs could demonstrate that the funds in the intermediary banks' possession are the blocked assets "of Iran," or the blocked assets "of" one of its agencies or instrumentalities, plaintiffs would be able to attach the assets notwithstanding provisions of the Foreign Sovereign Immunities Act that might otherwise preclude such action.

Similarly, Section 1610(g) allows certain terrorism victims to attach "the property of a foreign state" subject to a judgment under 28 U.S.C. § 1605A, and "the property of an agency or instrumentality of such a state." 28 U.S.C. § 1610(g). Thus, as with TRIA, plaintiffs could pursue an attachment under this section if they could demonstrate that the targeted assets were "of Iran," or "of" one of its agencies or instrumentalities.

The district court found that neither Iran, nor any of the Iranian banks, owns the assets in question. The United States takes no position on the question of ownership.

Plaintiffs are wrong, however, insofar as they claim that they may attach the blocked assets even if they are not owned by Iran or its affiliated banks. Assets subject to OFAC blocking regulations are not, as plaintiffs urge, perforce within the scope of TRIA or Section 1610(g).

TRIA authorizes attachment against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphases added). And Section 1610(g) similarly applies to the property "of" a foreign state or "of" its agency or instrumentality. See 28 U.S.C. § 1610(g). OFAC regulations, by contrast, typically contain far broader language. See, *e.g.*, 31 C.F.R. § 515.201 (Cuban Assets Control Regulations, which apply to property in which Cuba or a Cuban national has had "any interest of any nature whatsoever"); *id.* §§ 538.201, 538.307 (Sudan sanctions, which apply to property in which the Sudanese government has "an interest of any nature whatsoever"); id. §§ 595.201,

595.307 (Middle East terrorism sanctions, which apply to property in which various terrorist entities have "an interest of any nature whatsoever"). Congress was presumably aware of the language used in regulations like these, and there is no sound basis for amending the statute to supply the language that Congress omitted.

2. The assets "of" Iran are not naturally understood to include all 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 to 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." 26 U.S.C. § 7403(a) (emphases added); 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 (emphasis removed). TRIA and Section 1610(g) omit that additional phrase; the former only applies to the blocked assets "of" a terrorist party, see TRIA § 201(a), and the latter only applies to the property "of" a terrorist state, see 28 U.S.C. § 1610(g)(1).

Plaintiffs urge that the word "of" can have multiple meanings. They note, for example, that TRIA refers to an "agency or instrumentality of [a] terrorist party," TRIA § 201(a) (emphasis added), and observe that an agency or instrumentality need not be "owned" by the terrorist party. This misses the point of the Supreme Court's reasoning. The word "of" is a preposition whose meaning depends on context. Sovereigns do not own their agencies. They do, however, own assets, including deposited funds. TRIA and Section 1610(g) apply to bank funds that are owned by the sovereign (or its agency or instrumentality). But they do not purport to allow plaintiffs to attach assets that the terrorist party does not own in the first place.

Indeed, plaintiffs' reading would expand these statutes well beyond common law execution principles. 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 and Section 1610(g) against the background of these principles, and the statutes should be interpreted consistent with those common-law precepts. See *Staples v. United States*, 511 U.S. 600, 605 (1994); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991).

3. Plaintiffs' reading would not further 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 helps deter future terrorist acts. *Ibid*. Paying judgments from assets that are not owned by the terrorist party, on the other hand, would not impose a similar cost on the terrorist party and might, indeed, permit a plaintiff to satisfy its judgment by attaching assets owned by a third party.

Plaintiffs offer no support for their assertion that TRIA (and Section 1610(g) by implication) incorporate language used in OFAC's 2001 Terrorism Asset Report, and thus should be given an identical interpretation. See Plaintiffs' Br. 22-26. Congress did not employ language used in the 2001 Report: the phrase "blocked assets of" does not appear in the report at all. See JA 366-378. And plaintiffs are on no firmer ground in noting that the Report uses "of" to refer to something other than ownership. The cited passages use the word "of" in distinguishing between entities to which assets are linked, not in defining the scope of interests in the assets. See, *e.g.*, JA 368-371 (section of the report discussing "assets of international terrorist organizations"); JA 371 (section of the report discussing "assets of the Taliban"); JA 371-373 (section of the report discussing "assets of state sponsors of terrorism").

4. Plaintiffs' interpretation of Section 1610(g) is also specifically in tension with that statute's legislative history. The conference committee report explained that Section 1610(g) 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)). These references to "ownership" confirm that the use of language far narrower than that in OFAC blocking regulations was not inadvertent.

Furthermore, Section 1610(g)'s text only underscores plaintiffs' error in urging that they may attach any assets subject to a blocking sanction. Section 1610(g) makes no reference to "blocked assets" except to state that an OFAC blocking sanction does not render the assets "immune" from attachment and execution. 28 U.S.C. § 1610(g)(2).

* * * *

B. Plaintiffs rely heavily on arguments accepted by the district court in *Hausler v. JP Morgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 562-68 (S.D.N.Y. 2012), appeal docketed sub nom., *Estate of Fuller v. Banco Santander, S.A.*, Nos. 12-1264, 12-1272, 12-1384, 12-1386, 12-1463, 12-1466 & 12-1945 (2d Cir.), and *Hausler v. JP Morgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 529-41 (S.D.N.Y. 2010). Those arguments cannot be squared with the language in TRIA (the statute before the *Hausler* court) or in Section 1610(g) (which was not before that court), and another district court in the Southern District of New York correctly rejected *Hausler*'s reasoning. See *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 399-405 (S.D.N.Y. 2011), appeal docketed, No. 12-75 (2d Cir.).

The district court in *Hausler* fundamentally misunderstood the relationship between OFAC sanctions regimes and existing sources of property law, declaring that OFAC's regulations "are plainly intended to broadly demarcate the scope of and establish [a targeted entity's] interests in specified assets, not to attach consequences to property interests defined elsewhere." *Hausler*, 740 F. Supp. 2d at 532; see also Heisers' Br. 19 (repeating that assertion). OFAC's regulations do not attempt to define whether particular assets are "of" or "owned by" a terrorist party. They define terms such as "property" and "interest," see, e.g., 31 C.F.R. §§

544.305, 544.308, to demarcate the scope of OFAC's blocking sanctions, which incontrovertibly extend beyond assets owned by the relevant sanctions target. See, *e.g.*, *id*. § 515.201(b)(2) (barring transactions in "property" in which Cuba or one of its nationals has had an "interest"); *id*. §§ 544.201(a), 544.305, 594.201(a), 594.306 (barring transactions in "property" in which a designated entity has "an interest of any nature whatsoever").

The *Hausler* district court mistakenly justified its holding on the ground that its approach would provide a uniform definition of assets subject to attachment, and would make it unnecessary to look to definitions of property interests that might vary from state to state. *Hausler*, 845 F. Supp. 2d at 563-64. But if an attachment statute like TRIA or Section 1610(g) preempted state law (as the district court in *Hausler* believed), and if uniformity were deemed essential, courts could achieve that uniformity by developing a federal law understanding of ownership, akin to federal common law. See, *e.g.*, *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (where Congress instructed that Title VII was to incorporate agency law principles, "a uniform and predictable standard must be established as a matter of federal law"); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (in construing a federal statute that used common law terms, court relied on "general common law of agency, rather than on the law of any particular State"). Indeed, the district court in this case took essentially that approach. A court should not, however, in the interests of uniformity, insist that OFAC regulations define the scope of TRIA or Section 1610(g).

* * * *

b. Discovery to aid in execution under the FSIA

(1) Discovery regarding central bank accounts

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.

On May 17, 2013, 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 a district court order permitting discovery concerning, inter alia, U.S. bank accounts held by the Lao Central Bank. *Thai-Lao Lignite and Hongsa Lignite v. Government of the Lao People's Democratic Republic et al.*, No. 13-495 (2d Cir. 2013). The case arises from efforts by two foreign corporations to satisfy a foreign arbitral award against the Lao Government that was previously confirmed by the district court. The U.S. *amicus* brief explains the United

States' interest in protecting foreign governments from intrusive discovery targeted at central bank accounts given the many foreign central banks that hold reserves in accounts in the United States. The section of the U.S. *amicus* brief that follows (with citations to the record omitted) argues that the Lao Central Bank's accounts are protected from discovery by Section 1611(b)(1) of the FSIA. Another section of the brief, relating to the immunity of the Lao government's diplomatic accounts and diplomatic personnel, is discussed in section D.3., *infra.* The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

FSIA Section 1611(b)(1) Protects the Lao Central Bank's Accounts From Discovery

The FSIA, which establishes a comprehensive and exclusive scheme for obtaining and enforcing judgments against a foreign state in civil cases in U.S. courts, *see generally Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989), includes a specific provision immunizing foreign central banks from attachment and execution. Section 1611(b)(1) of the FSIA provides that "the property of a foreign state shall be immune from attachment and from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account." This provision recognizes that "foreign central banks are not treated as generic agencies and instrumentalities of a foreign state under the FSIA; they are given special protections befitting the particular sovereign interest in preventing the attachment and execution of central bank property." *NML Capital*, 652 F.3d at 188 (citation and internal quotation marks omitted). Furthermore, this Court has acknowledged that this protection extends to discovery. *Id.* at 194 ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation."). The district court's February 11, 2013 order misapplies *NML Capital*, and fails to recognize the special protection due the Lao Central Bank under § 1611(b)(1).

In *NML Capital*, this Court made three holdings with respect to central bank immunity under the FSIA. First, it held that "the plain language, history, and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state…." *Id.* at 187-88. Second, it determined that "the plain language of the statute suggests that Congress recognized that the property of a central bank, immune under § 1611, might *also* be the property of that central bank's parent state." *Id.* at 188-89 (emphasis in original); *accord id.* at 189 (" 'By referring to the property of a foreign state and the property of a central bank interchangeably, Congress indicated its understanding that central bank property could be viewed as the property of a foreign state, and nonetheless be immune from attachment.' " (quoting *amicus* brief filed by the United States)). Third, the Court concluded that the phrase "held for its own account" in § 1611(b)(1) describes funds used for traditional central banking functions. *Id.* at 194. Recognizing that the immunity conferred by § 1611(b)(1) includes immunity "from the costs, in time and expense, and other disruptions attendant to litigation," the Court adopted a test whereby funds held in an account in the name of a central bank are presumed to be immune from

attachment absent a specific showing by the judgment creditor that the funds "are not being used for central banking functions as such functions are normally understood." *Id.*

Here, the district court improperly ordered discovery concerning the Lao Central Bank's U.S. accounts. The district court determined that the Lao Central Bank had provided "ample statutory evidence" that it was a separate entity (with a separate claim to sovereign immunity) from the Lao Government, and that unlike the Lao Government, the Lao Central Bank had not waived its immunity. The district court further determined that it had "not established jurisdiction over the Lao [Central] Bank as a separate entity." Moreover, the district court acknowledged "that specific details of accounts held by the Lao [Central] Bank are immune from discovery as well as attachment." And lastly, the district court recognized that in order to rebut the presumption that the Lao Central Bank's accounts are immune under FSIA § 1611, Thai-Lao and Hongsa must "show, with specificity, 'that the funds are not being used for central banking functions as such functions are normally understood.' " (quoting *NML Capital*, 652 F.3d at 194)).

Yet despite these observations, the district court concluded that petitioners were entitled to discovery because the Lao Central Bank "[did] not conclusively establish that these accounts are the Lao [Central] Bank's property, and not [the Lao Government's]," pointing to a Lao law that it characterized as requiring the Lao Central Bank "to act as a custodian for the Lao Government's assets abroad." On this basis, the district court concluded that "Petitioners are thus entitled to discovery regarding [the Lao Government's] accounts, even though they may be held in the name of the Lao [Central] Bank."

The district court's ruling misapplied *NML Capital* by focusing on whether the Lao Central Bank accounts belonged to the Lao Central Bank or the Lao Government, a question that this Court has made clear is irrelevant to § 1611(b)(1) immunity determinations. *NML Capital*, 652 F.3d at 189. As this Court stated in *NML Capital*, the FSIA recognizes that central bank funds will often also be the property of the foreign state. *Id.* Furthermore, the Declaration of Oth Phonhxiengdy, Deputy Director General of the Lao Central Bank's Banking Operations Department ("Oth Declaration"), made clear that the Lao Central Bank's accounts in the United States are held in its own name, rather than the Lao Government's. Thus, applying the test set forth in *NML Capital*, the funds in the Lao Central Bank accounts are "presumed to be immune from attachment under § 1611(b)(1)." 652 F.3d at 194. Thai-Lao and Hongsa could rebut this presumption only "by demonstrating with specificity" that the funds in question were "not being used for central banking functions as such functions are normally understood." *Id.*

Thai-Lao and Hongsa provided no "specific showing" of facts that would provide a basis to rebut this presumption. To the contrary, the Oth Declaration provides further support for the presumption that funds in the Lao Central Bank account are in fact being used for central banking functions. The Oth Declaration explained that the Lao Central Bank is authorized to engage in traditional central banking functions, including issuing legal tender and regulating the money supply, holding and managing foreign currency reserves, acting as a lender of last resort, and serving as the Lao Government's agent in dealing with international financial institutions such as the International Monetary Fund. Furthermore, and in particular, the Oth Declaration clarified that the Lao law cited by the district court merely establishes that the Lao Central Bank holds the Lao Government's foreign currency reserves—a paradigmatic traditional central banking function. *See NML Capital*, 652 F. 3d at 195 (noting that the accumulation of foreign exchange reserves is a "paradigmatic central banking function[ ]"); *accord Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106, 1113

(S.D.N.Y. 1993) ("When the central bank acts as a bank for its parent foreign state…, it is engaged in a central banking and governmental function."). By failing to accord the Lao Central Bank a presumption of immunity, and allowing discovery to proceed despite the absence of any evidence that the funds at issue were not used for central banking functions, the district court incorrectly applied § 1611(b)(1).

It is critically important that district courts properly apply this Court's test with respect to the immunity of foreign central banks under § 1611(b)(1). The United States has an interest both in promoting reciprocal international principles of central bank immunity to ensure that U.S. reserves held by the Federal Reserve abroad receive adequate protection, and also in protecting foreign central banks engaged in central banking activities from interference by unwarranted litigation in U.S. courts. Many foreign central banks choose to hold their reserves in dollar-denominated assets in accounts in the United States. Foreign central banks invest their reserves in the United States because of the stability of the U.S. dollar, the unparalleled depth and liquidity of our financial markets, and the reliability of our political and judicial institutions. Equally critical has been the assurance long provided by United States law that central bank funds held in this country and used for traditional central banking functions are immune from attachment, save for very narrow exceptions, and not subject to discovery. If this traditional immunity is weakened through a misinterpretation of the FSIA and misapplication of this Court's binding precedent, foreign central banks might be led to withdraw their reserves from the United States and place them in other countries, and the preeminence of the U.S. dollar as a reserve currency could be jeopardized. *See generally* Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. Ill. L. Rev. 265, 265-71 (1982); *see also* H.R. Rep. No. 94-1487, at 25 (explaining that the purpose of FSIA § 1611 is to protect the "funds of a foreign central bank . . . deposited in the United States," because "execution against the reserves of a foreign state could cause significant foreign relations problems"). Any significant withdrawal of these reserves could have an immediate and adverse impact on the U.S. economy and the global financial system.

* * * *

(2) Discovery regarding sovereign assets outside the United States

On December 4, 2013, the United States filed a brief as *amicus curiae* in support of the petition for writ of certiorari filed in *Argentina v. NML Capital, Ltd.*, No. 12-842. For background on the case, see *Digest 2012* at 315-19. The U.S. brief was filed in response to a Court order inviting the United States' views, and it urges the Court to grant review of a decision by the U.S. Court of Appeals for the Second Circuit that permitted blanket discovery into a foreign state's assets located outside the United States, even though such property could not be attached or executed upon by the district court, or any United States court, under the FSIA. The brief argues that the Court of Appeals also erred in holding that the fact that the discovery was directed to third parties eliminated any sovereign immunity concerns. The U.S. brief identifies a circuit conflict between the Second Circuit's decision and the Seventh Circuit's holding in *Rubin v. Iran* (discussed in *Digest 2011* at 318-21), notes that the issues are important and recurring, and asserts

that the Court of Appeals' decision raises foreign policy concerns for the United States. Excerpts follow from the U.S. *amicus* brief, which is available in full at *www.state.gov/s/l/c8183.htm*.

---

* * * *

1. The FSIA codifies, with some modifications, long-recognized foreign sovereign-immunity principles by establishing two general rules of immunity. First, a foreign state is immune from the jurisdiction of the court unless an enumerated exception to immunity applies. See 28 U.S.C. 1604, 1605, 1605A, 1607 (2006 & Supp. V 2011). Second, the property of a foreign state is immune from attachment and execution unless an exception to that immunity applies. 28 U.S.C. 1609-1611 (2006 & Supp. V 2011).

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 exceptions to attachment immunity are narrower than, and independent of, the exceptions to jurisdictional immunity. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012); see *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010). Even when the foreign state has been held subject to the court's jurisdiction under Sections 1605 through 1607, the "property in the United States of a foreign state," 28 U.S.C. 1609, is immune unless it is "used for a commercial activity in the United States" and certain other conditions are satisfied, 28 U.S.C. 1610(a) (Supp. V 2011). See *Walters v. Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011).

Because the FSIA expressly provides that a foreign state's property is immune under Section 1609 absent an applicable exception, see *Peterson*, 627 F.3d at 1127-1128, a judgment creditor seeking to enforce a judgment against the property of a foreign sovereign bears the burden of identifying the property to be executed upon and proving that it falls within an exception to immunity from execution. See, *e.g.*, *Walters*, 651 F.3d at 297; *Rubin*, 637 F.3d at 796; *Walker Int'l Holdings Ltd. v. Congo,* 395 F.3d 229, 233 (5th Cir. 2004), cert. denied, 544 U.S. 975 (2005).

2. When the availability of an asset for execution turns on factual issues, a judgment creditor may seek discovery to develop facts establishing that the property is subject to execution under the FSIA. Although the FSIA does not expressly address the permissible scope of discovery under these circumstances, see *House Report* 23, a district court ordering discovery should not proceed as though only private interests were implicated, but should instead tailor discovery in a manner that respects the general rule of immunity Congress established in Section 1609.

The presumptive immunity in the FSIA protects foreign sovereigns not only from liability or seizure of their property, but also from "the costs, in time and expense, and other disruptions attendant to litigation." *EM Ltd. v. Republic of Arg.*, 473 F.3d 463, 486 (2d Cir.) (citation omitted), cert, denied, 552 U.S. 818 (2007); *Rubin*, 637 F.3d at 796-797; *Peterson*, 67 F.3d at 1127 (similar). To permit burdensome and intrusive discovery into the property of a foreign state, without regard to whether that property could be subject to execution under the FSIA, would be inconsistent with both the FSIA's protections and the comity principles the statute implements. See *Rubin*, 637 F.3d at 795-797. The court of appeals was therefore wrong to

conclude that "because the district court ordered only discovery, not the attachment of sovereign property, *** Argentina's sovereign immunity is not affected." Pet.App.3.

The court of appeals made a similar error in reasoning (Pet. App. 18) that once the district court "had subject matter *** jurisdiction over Argentina," it could order discovery in aid of execution "as over any other party." The FSIA unambiguously provides that even when a foreign state is subject to suit, its property remains 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 immunity in connection with litigation to enforce a judgment, even if they are subject to the court's jurisdiction - and attendant discovery - for purposes of adjudicating the merits of the underlying suit. See *Peterson,* 627 F.3d at 1127-1128.

Discovery in aid of execution accordingly should be conducted in a manner that respects the comity and reciprocity principles that the FSIA was enacted to implement and safeguard. 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). 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) (citation and internal quotation marks omitted; brackets in original). Similarly here, permitting extensive discovery in aid of execution, irrespective of whether any specified property may actually be subject to attachment, could impose significant burdens on the foreign state and impugn its dignity, which could harm the United States' foreign relations.

Such discovery could also lead to reciprocal adverse treatment of the United States in foreign courts. The United States maintains extensive overseas holdings as part of its worldwide diplomatic missions and security operations. 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 United States court's allowance of unduly broad discovery concerning a foreign state's assets may cause the United States to be subjected to similar treatment abroad. Cf. *Boos v. Barry,* 485 U.S. 312, 323 (1988) (highlighting importance of the "concept of reciprocity" in international law); *McCulloch v. Sociedad National de Marineros de Hond.,* 372 U.S. 10, 21 (1963).

* * * *

B. The Court Of Appeals Erred In Upholding The District Court's Discovery Order

1. Consistent with the principles discussed above, a district court presented with a discovery request concerning foreign-state property must consider the judgment creditor's interest in discovery in the context of the foreign state's "legitimate claim to immunity," *EM Ltd.,* 473 F.3d at 486, and the principles of comity and reciprocity reflected in the FSIA. Specifically, the court should require the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there exists a reasonable basis to believe that an exception to immunity applies and that the court would have authority to order execution on the assets. Thus, as most courts of appeals to have addressed the question have held, discovery concerning a foreign state's assets "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Rubin,* 637 F.3d at 796 (quoting *EM Ltd.,* 473 F.3d at 486); see *Connecticut Bank of Commerce v. Congo,* 309 F.3d 240,

260 n.10 (5th Cir. 2002); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007).

* * * *

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 v. Yousuf*

After the Supreme Court decided the issue of applicability of the FSIA to foreign official immunity in *Samantar* in 2010, the case was remanded to the district court. The United States filed a statement of interest in the district court concluding that petitioner was not immune. See *Digest 2011* at 338-40. Samantar appealed the district court's denial of his motion to dismiss and the United States submitted an *amicus* brief in the U.S. Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed, but on grounds that differed from those relied on by the district court and in a manner that conflicted with the principles articulated by the United State in its submissions. In addition, in January 2013, the United States recognized a government of Somalia for the first time since 1991. See Chapter 9.B.1. On December 10, 2013, the United States filed an *amicus* brief in the case after Samantar petitioned for certiorari in the U.S. Supreme Court. The U.S. *amicus* brief is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*.[*]

_____

* * * *

2. The court of appeals sought to draw a distinction between Executive Branch determinations of status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations of conduct-based immunities, which the court considered itself free to second-guess. That distinction has no basis.

a. As an initial matter, this Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the

[*] Editor's note: On January 14, 2014, the Supreme Court denied the petition for certiorari.

Samantar Court recognized that the same procedures applied in cases involving foreign officials. 130 S. Ct. at 2284-2285. Indeed, the two cases cited by this Court involving foreign officials—*Heaney* and *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960)—both involved consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity. And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department's recognition of conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see 130 S. Ct. at 2290.

b. In concluding that conduct-based immunity determinations are not binding on the judiciary, the court of appeals relied on two law review articles for the proposition that the Executive's determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive's conduct-based determinations are not grounded on a similar "constitutional basis." Pet. App. 16a-17a. But this Court has long recognized that the Executive's authority to make, and the requirement of judicial deference to, foreign sovereign immunity determinations flow from the Executive's constitutional responsibility for conducting the Nation's foreign relations, not the more specific recognition power. See, *e.g.*, *Ex Parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that "continued retention of the vessel interferes with the proper conduct of our foreign relations"); *Hoffman*, 324 U.S. at 34 (stating that courts will "surrender[]" jurisdiction upon a suggestion of immunity "by the political branch of the government charged with the conduct of foreign affairs"); *Lee*, 106 U.S. at 209 ("[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."); see also *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-361 (1955) (stating that "[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit," and that "the rule enunciated in The Schooner Exchange" rests on the need to avoid interfering in the Executive's conduct of foreign relations).

The Executive's authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. While the scope of foreign state and foreign official immunity is not invariably coextensive, see 130 S. Ct. at 2290, the basis for recognizing the immunity of current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff'd,* 168 U.S. 250 (1897); see also Pet. App. 40a-41a. As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate much the same considerations of comity and respect for other Nations' sovereignty as suits against foreign states. See *ibid.*; *Heaney*, 445 F.2d at 503 (same).

c. Accordingly, in the years before the FSIA, courts routinely deferred to Executive Branch determinations of conduct-based immunity of both foreign states and foreign officials. Because the Executive Branch applied the restrictive theory of sovereign immunity, under which foreign states enjoy immunity only as to sovereign, not commercial, activity, 130 S. Ct. at 2285, determinations of foreign state immunity were conduct-based, and courts deferred to the Executive's decisions. See, *e.g.*, *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971); Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.) (affirming denial of immunity based on Executive Branch's conclusion that

acts in question were "private acts"), cert. denied, 385 U.S. 931 (1966); *Amkor Corp. v. Bank of Korea*, 298 F. Supp. 143, 144 (S.D.N.Y. 1969) (holding that Executive's conclusion that Bank of Korea was engaged in commercial activities was "binding on this Court"). In the relatively few cases involving foreign officials, moreover, courts also followed the "same two-step procedure" as in cases involving foreign states. 130 S. Ct. at 2284-2885 (citing *Heaney* and *Waltier*).

That deferential judicial posture as to both conduct-based and status-based immunity determinations is based in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). As this Court recognized in this case, the Executive Branch's constitutional authority over the conduct of foreign affairs continues as a foundation for the Executive's authority to determine the immunity of foreign officials. 130 S. Ct. 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."); see *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government . . . give meaning to the Constitution.") (citation and internal quotation marks omitted). In the absence of a governing statute (such as the FSIA), it continues to be the Executive Branch's role to determine the principles governing foreign official immunity from suit. See, *e.g.*, *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). The court of appeals therefore erred in holding that the Executive Branch's determinations of conduct-based immunity are not entitled to controlling weight.

B. The Court Of Appeals Erred In Creating A New Categorical Judicial Exception To Immunity

The court of appeals also committed legal error in declining to rest its determination of non-immunity on the specific ground set forth in the Executive Branch's Statement of Interest, which turned on the unique circumstances of this case, and instead fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms.

The per se rule of non-immunity adopted by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the United States specifically requested the court not to address respondents' broader argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. Pet. App. 68a n.3. The court of appeals' decision is thus inconsistent with the basic principle that Executive Branch immunity determinations establish "substantive law governing the exercise of the jurisdiction of the courts." Hoffman, 324 U.S. at 35-36.

Indeed, both before and after this Court's decision in *Samantar*, the United States has suggested immunity for former foreign officials who were alleged to have committed *jus cogens* violations. See U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004) (suggestion of immunity on behalf of then-President Zemin of China in district court; after he left his position as head of state, the United States continued to recognize his immunity); see also Suggestion of Immunity Submitted by the U.S. at 6, *Doe v. Zedillo*, No. 3:11-cv-01433-MPS (D. Conn. Sept. 7, 2012); Statement of Interest and Suggestion of Immunity of and by the U.S. at 5-6, *Giraldo v. Drummond Co*., No. 1:10-mc-00764-JDB (D.D.C. Mar. 31, 2011) (third-party testimony was sought from former Colombian President Uribe in a suit in which he was alleged to have committed jus cogens violations); Statement of Interest and Suggestion of Immunity at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP (E.D.N.Y. Dec. 17, 2012). The courts deferred to the United States' Suggestions of Immunity in these cases. *Matar v. Dichter*,

563 F.3d 9, 14-15 (2d Cir. 2009); *Ye*, 383 F.3d at 626-627; *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1637 (2013); Tr., *Doe v. Zedillo*, No. 3:11-cv-01433-MPS (D. Conn. July 18, 2013); *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP, 2013 WL 5502851, at *5-*7 (E.D.N.Y. Sept. 30, 2013).

Respondents erroneously assert (Br. in Opp. 17, 19-20) that the court of appeals' creation of a categorical exception to immunity whenever *jus cogens* violations are alleged is supported by the United States' amicus brief filed in this case when it was previously before the Court. See 08-1555 U.S. Amicus Br. 7, 24-26. Specifically, they contend that the United States stated that various factors, including the nature of the acts alleged, are "appropriate to take into account" in immunity determinations, and that courts (including the Fourth Circuit in this case) therefore are free to make immunity determinations on the basis of those factors. Br. in Opp. 19. That is incorrect.

The passages in the United States' brief in this Court identified considerations, not accounted for under the FSIA, that the Executive Branch could find it appropriate to take into account in making immunity determinations. The passages thereby served to underscore the range of discretion properly residing in the Executive Branch under the Constitution to make immunity determinations. The United States' brief in this Court did not state that the Executive Branch had in fact decided how or if any particular consideration should play a role in immunity determinations, much less suggest that a court should weigh those considerations (or invoke any one of them) to make a determination of immunity or non-immunity on its own. In any event, this Court unanimously ruled in this case that the courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before the enactment of the FSIA. The Executive Branch made a determination of immunity in this case. The court of appeals fundamentally erred in failing to rest on the United States' submission and instead itself announcing a categorical exception to official immunity whenever allegations of jus cogens violations are made. 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.").

II. THIS COURT SHOULD REMAND FOR FURTHER CONSIDERATION IN LIGHT OF CHANGED CIRCUMSTANCES

The court of appeals erred in two significant respects, and its decision conflicts with the Second Circuit's decision in *Matar v. Dichter*, *supra*, which held that courts must defer to the immunity determination in the Executive Branch's suggestion of immunity and sustained a suggestion of immunity in a case involving alleged violations of *jus cogens* norms. An appellate decision holding that courts need not defer to the Executive's immunity determination and announcing a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would warrant review by the Court at an appropriate time. In the view of the United States, however, it would be premature for this Court to grant plenary review at this time in light of significant developments that occurred after the lower courts' consideration of the case. The lower courts should have an opportunity to consider any further determination by the United States on the immunity issue in light of those developments and diplomatic discussions between the United States and the recently recognized Government of Somalia.

* * * *

3. President Zedillo of Mexico

As discussed in *Digest 2012* at 345-46, 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. On July 18, 2013, the court ruled from the bench (without a written opinion) that the case should be dismissed, deferring to the U.S. suggestion of immunity.[**]

4. *Ahmed v. Magan*

In 2011, the United States filed a statement of interest (to the effect that defendant Magan was not immune) in this case alleging torture and indefinite detention against a former Somali security chief residing in the United States. See *Digest 2011* at 344. In 2012, the U.S. District Court for the Southern District of Ohio granted plaintiff's motion for summary judgment. See *Digest 2012* at 326. In 2013, a magistrate judge in the U.S. District Court for the Southern District of Ohio issued a report and recommendation, finding Magan liable under the Alien Tort Statute ("ATS") as well as the Torture Victim Protection Act ("TVPA"), and recommending a total of $5 million in compensatory damages and $10 million in punitive damages. The magistrate's report and recommendation is available at *www.state.gov/s/l/c8183.htm*. Defendant Magan failed to file any objection before the court-imposed deadline, thereby waiving review by the district court and any appeal. On October 2, 2013, the district court adopted the report and recommendation. *Ahmed v. Magan*, No. 2:10-00342 (S.D. Ohio 2013), slip opinion, 2013 WL 5493032.

5. *Rosenberg v. Lashkar-e-Taiba*

In this case, discussed in *Digest 2012* at 293-95 and 331-33, relatives of victims of the 2008 Mumbai terrorist attacks asserted that defendants, the Inter-Services Intelligence Directorate of Pakistan ("ISI") and its former directors, Ahmed Shuja Pasha and Nadeem Taj, were not entitled to immunity because they engaged in violations of *jus cogens* norms by providing support for acts of terrorism. The United States filed a statement of interest and suggestion of immunity in 2012. On September 30, 2013, the court issued its decision, dismissing the case as to the ISI, Pasha, and Taj for lack of jurisdiction based on their immunity. *Rosenberg et al. v. Lashkar-e-Taiba et al*., Nos. 10-05381, 10-05382, 10-05448, 11-03893, 12-05816 (E.D. N.Y. 2013). The court applied precedent in the Second Circuit, *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) in deferring to the Executive Branch's immunity determination. Excerpts from the court's opinion follow. Plaintiffs appealed the dismissal as to Pasha and Taj.

[**] Editor's note: Plaintiffs appealed to the Court of Appeals for the Second Circuit, which affirmed the district court's dismissal in an unpublished opinion on February 18, 2014. *Doe v. De Leon*, --- Fed.Appx. ----, 2014 WL 591167 (2d Cir.).

* * * *

Turning to the instant action, the United States submitted the Suggestion of Immunity, taking the position that the ISI was immune from suit (Stmt. at 2-6). The United States also took the position that defendants Pasha and Taj, former Directors General of the ISI, are immune pursuant to the common law of foreign sovereign immunity as they were sued in their official capacities for activity arising out of their official duties. (Stmt. at 7-11.)

A. Defendant ISI

Under the FSIA, and the Supreme Court's clarification regarding its breadth, the Court must surrender jurisdiction once the United States has taken the position that a foreign entity is entitled to sovereign immunity and there is no indication that an exception to the FSIA applies. As set forth above, it is the position of the United States that the ISI is entitled to immunity as it is an agency of the government of the Islamic Republic of Pakistan and it performs core investigative and military functions. (Stmt. at 2-6.) The United States further explained that none of the exceptions to the FSIA are applicable to the ISI in these actions. (*Id.*) Plaintiffs have not opposed the United States' position with respect to the ISI, nor have they argued that any of the exceptions to the immunity that the ISI derives from the FSIA are applicable in this action. Based on the pleadings and the record in these actions, the Court is satisfied that the ISI has met its burden under the FSIA and the ISI is entitled to immunity from these actions. *See Gomes v. ANGOP, et al.*, 2012 WL 3637453, at *11 (E.D.N.Y. Aug. 22, 2012) (concluding that various ministries of the government of Angola were immune from suit under the FSIA as those ministries were "organs of the state with core governmental functions" thereby "entitled to the presumption of immunity" and plaintiff failed to establish any exception to the FSIA). Accordingly, the ISI's motion to dismiss the complaint is granted. The complaint against the ISI is dismissed with prejudice.

B. Defendants Pasha and Taj

The remaining issue is whether defendants Pasha and Taj, foreign officials, are immune from these actions. The United States based its position on a detailed analysis of the Complaint conducted by the Department of State. (*See* Letter from Harold Hongju Koh, Department of State, attached as Ex. 1 to Stmt. ("Koh Letter").) The Department of State "determined that former ISI Directors General Pasha and Taj enjoy immunity from suit with respect to this consolidated action." (*Id.* at 2.) In reaching this conclusion, the Department of State explained that:

> [T]he complaint contains largely unspecific and conclusory allegations against the Directors General, and relies centrally on plaintiff's incorrect view that the ISI is not part of the Government of Pakistan. By expressly challenging defendants Pasha's and Taj's exercise of their official powers as Directors General of the ISI, plaintiff's 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. All of their allegations in the Complaint are bound up with plaintiff's 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. 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.

(*Id*. at 1-2.)

As a preliminary matter, it was implicit in Plaintiffs' earlier filings that the Statement of Interest would be dispositive on the issue of sovereign immunity. The Plaintiffs described the United States' potential opinion as "critical" and "highly probative" on the issue of immunity. (Pls.' Opp'n at 11-16.) Plaintiffs further urged this Court to defer its ruling on the Moving Defendants' motion until the United States had the opportunity to submit a statement. (*Id*. at 2-3.) Consequently, the Court issued an order staying the case and requesting that the United States submit a statement. Understandably, Plaintiffs now seek to distance themselves from the Statement of Interest, which is unfavorable to the survival of their claims. However, given Plaintiffs' prior position in this case, the Court would be justified in deeming Plaintiff's current arguments against the United States' position as waived. Nonetheless, the Court addresses below the merits of Plaintiffs' contention that Pasha and Taj are not entitled to foreign official immunity.

It is the position of the Executive Branch that defendants Pasha and Taj, former Directors General of the ISI, are entitled to foreign sovereign immunity under the common law as foreign officials who were sued in their official capacity for acts conducted in their official capacity. Under the common law on sovereign immunity, the Court's inquiry ends here. *See Matar v. Dichter*, 563 F. 3d 9, 14 (2d Cir. 2009) (affirming dismissal of a suit against a former head of the Israeli Security Agency for whom the United States submitted a Suggestion of Immunity as the official was "immune from suit under common-law principles that pre-date, and survive, the enactment of [the FSIA]").

Plaintiffs argue that the United States' determination as to defendants Pasha and Taj is not controlling. Plaintiffs contend that courts should afford a different level of deference to the United States' determinations depending upon whether individual defendants are shielded from civil liability under head of state or foreign official immunity. Plaintiffs do not appear to question the well settled authority that courts should afford "absolute deference" to the United States' determination that an individual defendant is protected from civil suit by head of state immunity. (Pls.' Resp. at 2.) As Plaintiffs recognize, it is the province of the Executive Branch to determine whether an individual is entitled to immunity as a sitting head of state because that determination "rests on a defendant's status as the representative of the sovereign." (*Id*. at 2 n.1.) However, Plaintiffs maintain that "there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity" as such immunity derives from the official's specific conduct at issue on behalf of the sovereign and not the individual's status as the sovereign. (*Id*. at 2 (quoting *Yousuf v. Samantar*, 699 F. 3d 763, 773 (4th Cir. 2012).)

In making this status and conduct based distinction with respect to foreign official immunity, Plaintiffs posit that, when a foreign official, who is only entitled to conduct based immunity, violates a *jus cogens* norm of customary international law, the foreign official is not acting in official or state capacity, as no state has the authority to engage in such conduct. (Pls.' Resp. at 2-5.) According to Plaintiffs, Pasha and Taj are not immune from these actions because their specific acts at issue—their alleged involvement in terroristic acts and summary executions of civilians—are classic examples of *jus cogens* violations and, because they are foreign officials

and not sitting heads of state, the court is free to make its own determination as to whether they are immune. (*Id*. at 2.)

Plaintiffs' proposed conduct and status based distinction is a complicated and novel issue of law. Indeed, as set forth more fully below, a circuit split has emerged. The Fourth Circuit recently noted that "[t]here has been an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms . . . ." *Id*. at 776. "American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims." *Id*. (summarizing cases). The Fourth Circuit concluded 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." *Id*. at 777-78 (denying former foreign official's motion to dismiss based on foreign official sovereign immunity "[b]ecause this case involves acts that violated *jus cogens norms* . . . we conclude that [the foreign official] is not entitled to conduct-based official immunity under the common law, which in this area incorporates international law").

However, the exception to foreign official immunity that the Fourth Circuit announced in *Yousuf* is not recognized in this Circuit. Indeed, in *Matar*, the Second Circuit reached the opposite conclusion, holding that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." *Matar*, 563 F. 3d at 15. In reaching that result, the Second Circuit affirmed its prior holding that there is no *jus cogens* exception to the FSIA, *see Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F. 3d 239, 242-45 (2d Cir. 1996) (rejecting the argument that "a foreign state should be deemed to have forfeited its sovereign immunity whenever it engages in conduct that violates fundamental humanitarian standards"), and further expanded upon that holding to reject such an exception to the common law on foreign official immunity. *Matar*, 563 F. 3d at 14-15.

While the Fourth Circuit's approach would allow Plaintiffs to proceed to the merits of their claims, rather than succumbing to dismissal on a procedural ground, this Court is bound by the law of this Circuit. Moreover, it is uncertain whether *Yousuf* will have enduring precedential value in the Fourth Circuit, as the defendant in that case, who was denied foreign official immunity, has a petition for a writ of certiorari pending before the Supreme Court. *See* Petition for Writ of Certiorari, *Samantar v. Yousuf*, No. 12-1078, 2013 WL 836952 (Mar. 4, 2013). Accordingly, the claims against Pasha and Taj are dismissed without prejudice. If the Supreme Court grants certiorari in *Samantar v. Yousuf*, and affirms the Fourth Circuit's exception to foreign official immunity, Plaintiffs may move to reinstate their claims against defendants Pasha and Taj.

* * * *

C. HEAD OF STATE IMMUNITY

President Rajapaksa of Sri Lanka

On March 29, 2013, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal on immunity grounds of a civil suit against the sitting president of Sri Lanka. *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013). The United States had filed a suggestion of immunity in the district court and an *amicus* brief in the court of appeals in 2012. See *Digest 2012* at 336-42. The decision of the court of appeals is excerpted below.

---

* * * *

The plaintiffs have brought civil claims against the sitting president of Sri Lanka under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. Although the defendant maintains that the plaintiffs failed to serve him with process, he appeared before the district court for the limited purpose of requesting the United States' view as to whether he was immune from suit. The United States Department of State filed a Suggestion of Immunity in the district court. Without expressing any opinion regarding the merits of the plaintiffs' claims, the State Department "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." Suggestion of Immunity at 6 (Jan. 13, 2012) (J.A. 47). The district court then dismissed the plaintiffs' suit.

On appeal, the plaintiffs urge us to reverse the judgment of the district court, contending that the sitting president of Sri Lanka is not immune from civil suit under the TVPA. We disagree.

As the Supreme Court has held, "[t]he doctrine of foreign sovereign immunity developed as a matter of common law." *Samantar v. Yousuf*, ——U.S. ——, ——, 130 S.Ct. 2278, 2284, 176 L.Ed.2d 1047 (2010). In *Samantar,* the Court explained that "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity," and that "the same two-step procedure was typically followed when a foreign official asserted immunity." *Id.* at 2284–85. Under the first step of that procedure, the only one that is relevant here, "the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department," and "[i]f the request was granted, the district court surrendered its jurisdiction." *Id.* at 2284; *accord Habyarimana v. Kagame,* 696 F.3d 1029, 1032–33 (10th Cir.2012); *Matar v. Dichter*, 563 F.3d 9, 13–14 (2d Cir.2009); *Ye v. Zemin,* 383 F.3d 620, 625–27 (7th Cir.2004); *Spacil v. Crowe,* 489 F.2d 614, 617 (5th Cir.1974); *cf. Republic of Mexico v. Hofman,* 324 U.S. 30, 36, 65 S.Ct. 530, 89 L.Ed. 729 (1945) ("[I]t is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune."). Here, the defendant did request a suggestion of immunity, and the United States granted that request by submitting a suggestion of immunity to the court. Accordingly, as the district court recognized, it was without jurisdiction,

see Saltany v. Reagan, 886 F.2d 438, 441 (D.C.Cir.1989), unless Congress intended the TVPA to supersede the common law.

"The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that," as here, "clearly covers a field formerly governed by the common law." *Samantar*, 130 S.Ct. at 2289. "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)). Whether or not legislative history would be sufficient to satisfy the requirement of speaking "directly," the plaintiffs' view is that the legislative history of the TVPA is ambiguous on the subject of head of state immunity. In fact, if anything the legislative history appears to indicate that Congress expected the common law of head of state immunity to apply in TVPA suits. *See* H.R. REP. NO. 102–367, at 5 (1991) ("[N]othing in the TVPA overrides the doctrines of diplomatic and head of state immunity.").

This leaves only the language of the TVPA, which the plaintiffs contend supersedes the common law because it renders "an individual" liable for damages in a civil action, and a head of state is "an individual." But as even the plaintiffs acknowledge, the term "an individual" cannot be read to cover every individual; plaintiffs agree that both diplomats and visiting heads of state retain immunity when they visit the United States. Oral Arg. Recording at 33:19–34:04. Indeed, although the most analogous statute, 42 U.S.C. § 1983, provides a cause of action against *"[e]very* person" who deprives another of his or her Constitutional rights under color of state law, *id.* (emphasis added), the Court has held that Congress did not intend that language to abrogate the preexisting common law of immunity applicable to executive officials. *See Malley v. Briggs*, 475 U.S. 335, 339–40, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). We likewise conclude that the common law of head of state immunity survived enactment of the TVPA. *Accord Matar*, 563 F.3d at 15; *see Devi v. Rajapaksa*, No. 12–4081 (2d Cir. Jan. 30, 2013) (holding that the defendant, who is the same defendant as in this case, "clearly is entitled to head-of-state immunity").

Because, as a consequence of the State Department's suggestion of immunity, the defendant is entitled to head of state immunity under the common law while he remains in office, and because the TVPA did not abrogate that common law immunity, the judgment of the district court dismissing the plaintiffs' complaint is *affirmed.*

* * * *

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Inviolability of Diplomatic and Consular Premises

See discussion of *Ahmed v. Attorney General of the United States* in section A.1., *supra*, in which the United States filed a motion to clarify or vacate an order of the U.S. District Court for the Northern District of Georgia regarding service of process. The United States' brief explains that an order requiring the U.S. Marshals Service to deliver a summons and complaint to a Nigerian consulate or the Nigerian Embassy would run

contrary to the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations, respectively.

2. AIT-TECRO Agreement on Privileges, Exemptions, and Immunities

On February 4, 2013, the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") signed an agreement on privileges, exemptions, and immunities. The agreement replaces an agreement on privileges, exemptions, and immunities signed in 1980 by AIT and the then-Coordination Council for North American Affairs. The English text of the 2013 agreement between AIT and TECRO is available at *www.ait.org.tw/en/ait-tecro-privileges-and-immunities-agreements.html.*

3. Immunity of Diplomatic Accounts and Personnel

As discussed in Section A.2.b., *supra*, the United States filed an *amicus* brief in the Second Circuit in support of reversal of a district court's order permitting discovery concerning the Lao Government's diplomatic bank accounts and central bank accounts in the United States. *Thai-Lao Lignite and Hongsa Lignite v. Government of the Lao People's Democratic Republic et al.*, No. 13-495 (2d Cir. 2013). As to the diplomatic accounts, the U.S. brief argues that the district court improperly interpreted both the FSIA and the Vienna Convention on Diplomatic Relations ("Vienna Convention" or "VCDR") in concluding that the accounts were subject to discovery and possible attachment under the FSIA because a portion of them was being used for "commercial activities." The U.S. brief identifies provisions in the Vienna Convention that shield these accounts from discovery. Finally, this section of the brief explains that the district court's order would give rise to a host of negative foreign policy consequences. The section of the U.S. brief discussing the diplomatic accounts appears below (with record citations omitted). The section of the brief discussing the accounts of the Central Bank of Laos is excerpted in Section A.2.b., *supra*. The brief in full is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

A. The VCDR Shields the Lao Government's Diplomatic Accounts from Attachment and Discovery

The VCDR governs the relationship between a sending state (here, Laos) and receiving state (here, the United States) with respect to the operation of the sending state's diplomatic mission, and affords certain privileges and immunities to embassies and diplomatic agents. These protections also extend to U.N. missions. *See* Agreement Between the United Nations and the

United States Regarding the Headquarters of the United Nations, art. V, § 15, June 26, 1947, T.I.A.S. 1676 (U.N. representatives will be entitled to the same privileges and immunities as the United States accords to diplomatic envoys); Convention on Privileges and Immunities of the United Nations, art. IV, § 11(g) (member state representatives to the U.N. will receive the same privileges and immunities as diplomatic envoys); *accord 767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 298 (2d Cir. 1993) (applying VCDR to define protection afforded to U.N. permanent mission). In particular, as relevant here, the Lao Government's diplomatic bank accounts, both its embassy and U.N. mission bank accounts, are entitled to the protections set forth in the VCDR. These protections shield the accounts from attachment and discovery.

The district court offered two rationales in support of its holding that the VCDR did not preclude discovery on the Lao Government's diplomatic accounts. First, the district court concluded that the funds might be subject to attachment (and thus also to discovery) because they were used for commercial activities. Second, applying the FSIA analysis in *EM Ltd.* to the VCDR context, the district court concluded that the fact that the diplomatic accounts might be immune from attachment did not render them immune from discovery. Both rationales are erroneous.

1. The VCDR Protects Diplomatic Property Used for Commercial Transactions That Are Related to Diplomatic Functions

The district court's characterization of the Lao Government's diplomatic accounts as being used for commercial activities, and thus subject to potential attachment, substitutes the scope of protection afforded by the FSIA for the distinct protections provided by the VCDR. Under the FSIA, the property of a foreign state may be subject to attachment or execution to satisfy a judgment if the property is both "in the United States" and "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). But Congress enacted the FSIA "[s]ubject to existing international agreements to which the United States is a party," 28 U.S.C. § 1609, and the FSIA therefore does not circumscribe the broad protections and immunities conferred by the VCDR, *see* H.R. Rep. No. 94-1487, at 12 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (FSIA is "not intended to affect either diplomatic or consular immunity"); *id.* at 23 (noting that, even following the enactment of the FSIA, "if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply"). Put simply, the FSIA exceptions to immunity from attachment are "inapplicab[le]" to an analysis of the validity of attachment where an international agreement such as the VCDR provides immunity. *767 Third Ave. Assocs.*, 988 F.2d at 297.

Under Article 25 of the VCDR, "[t]he receiving State shall accord full facilities for the performance of the functions of the mission." Accordingly, the standard for determining whether a diplomatic bank account is immune from attachment under the VCDR is not whether that account is used for commercial activities, but rather whether such immunity is necessary to ensure the "full facilities" to which the diplomatic mission of the sending state is entitled. VCDR, art. 25; *see also id.*, Preamble (explaining that the privileges and immunities conveyed by the VCDR are meant "to ensure the efficient performance of the functions of diplomatic missions"). Although no appellate court has reached this question, numerous district courts (most of which are in this Circuit) have concluded that according "full facilities" to a diplomatic mission includes providing immunity from execution or attachment on embassy or mission bank accounts that are used for diplomatic purposes, because such bank accounts are critical to the functioning of a diplomatic mission. *See, e.g., Avelar v. J. Cotoia Const., Inc.*, 11-CV-2172

(RMM)(MDG), 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) ("Bank accounts used for diplomatic purposes are immune from execution under [Article 25], as facilities necessary for the mission to function."); *Sales v. Republic of Uganda*, 90 Civ. 3972 (CSH), 1993 WL 437762, at *1(S.D.N.Y. Oct. 23, 1993) ("It is well settled that a foreign state's bank account cannot be attached if the funds are used for diplomatic purposes."); *Foxworth v. Perm. Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761, 763 (S.D.N.Y. 1992) (holding that "attachment of defendant's bank account is in violation of the United Nations Charter and the [VCDR] because it would force defendant to cease operations"); *Liberian Eastern Timber Corp. v. Gov't of the Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987) ("The Liberian Embassy lacks the 'full facilities' the Government of the United States has agreed to accord if, to satisfy a civil judgment, the Court permits a writ of attachment to seize official bank accounts used or intended to be used for purposes of the diplomatic mission.").

Indeed, the VCDR acknowledges that diplomatic staff will engage in commercial activities as part of their official duties without losing immunity for such activities. *See* VCDR, art. 31(1)(c) (providing that a diplomatic agent shall be immune from the civil jurisdiction of the receiving state "except in the case of…an action relating to any…commercial activity exercised by the diplomatic agent in the receiving State *outside his official functions*" (emphasis added)); *Tabion v. Mufti*, 73 F.3d 535, 538-39 (4th Cir. 1996) ("commercial activity" refers to "the pursuit of trade or business activity" unrelated to diplomatic mission); *Swarna v. Al-Awadi*, 622 F.3d 123, 139 (2d Cir. 2010) ("*Tabion* articulates the scope of acts as they relate to the term 'commercial activity' under Article 31(1)(c) for sitting diplomats."). Clearly, to the extent the Lao Government uses its diplomatic accounts to purchase office supplies and telephone and internet services, as well as to pay rent on the facilities that house its embassy and U.N. mission, such use is not commercial activity outside the official functions of the diplomatic staff, but rather is in connection with the performance of the functions of the mission.

Thus, absent evidence that the accounts were being used for activities unrelated to the Lao Government's diplomatic mission, there was no basis for the district court to conclude that the diplomatic accounts were arguably exempt from the VCDR's immunity provisions. Courts that have addressed the "full facilities" provision of VCDR Article 25 have routinely relied on sworn affidavits submitted by mission officials attesting that the accounts at issue were used for the functioning of the mission. *See, e.g.*, *Avelar*, 2011 WL 5245206, at *4 ("A sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes."); *Sales*, 1993 WL 437762, at *2 (reliance on mission head's affidavit, rather than "painstaking examination of the Mission's budget and books of account," is consistent with principle of diplomatic immunity); *Foxworth*, 796 F. Supp. at 762 (relying on declaration to describe nature and purpose of accounts); *Liberian Eastern Timber Corp.*, 659 F. Supp. at 610 (same). Here, the Thongmoon Declaration submitted by the Lao Government was more than sufficient to establish the diplomatic nature of the accounts. As the magistrate judge observed in her November 26, 2012 order, the Thongmoon Declaration "states that the accounts in question are used for the purpose of maintaining the diplomatic functions of the Embassy and Mission, that any commercial transactions with third parties reflected in account statements were ancillary to that purpose, and that it would be 'difficult, and perhaps impossible' for the Embassy and Mission to function if the accounts were under threat of attachment." The district court credited the magistrate judge's summary of the Thongmoon Declaration'scontents, including Mr. Thongmoon's assertion of the substantial difficulties that the threat of attachment would place on the diplomatic mission's ability to function. Accordingly, the Thongmoon Declaration should

have foreclosed any discussion of the "commercial" nature of the Lao Government's diplomatic accounts. Applying the appropriate VCDR standard, the accounts are entitled to immunity.

2. The VCDR Immunizes a Foreign Mission from Discovery and Precludes Testimony from Diplomatic Agents and Staff

The district court's conclusion that the Lao Government is subject to discovery regarding its embassy and U.N. mission accounts even if those accounts might be immune from attachment is likewise mistaken. In its opinion, the district court noted that "the concerns animating the Second Circuit's opinion in *EM* seem equally applicable in this context: once the Court has established jurisdiction over a foreign sovereign, the Court may order discovery as it would over any other defendant." But there is no basis for extending *EM Ltd.*'s holding to discovery relating to diplomatic property that is otherwise protected by the VCDR. At the threshold, as discussed above, the FSIA does not circumscribe the protections afforded by the VCDR. Moreover, the Court's holding in *EM Ltd.* rested on its determination that postjudgment discovery did not implicate the FSIA because it did not affect the foreign state's immunity from attachment. 695 F.3d at 208. Thus, once subject matter jurisdiction was established under the FSIA, a district court "could exercise its judicial power over [the foreign state] as over any other party, including ordering third-party compliance with the disclosure requirements of the Federal Rules." *Id.* at 209.

There are several provisions of the VCDR, however, that provide immunity from the types of discovery allowed by the district court in this case. *Cf. Liberian Eastern Timber Corp.*, 659 F. Supp. at 610 n.5 (in light of the VCDR's provisions, it would be "a difficult task at best" to obtain discovery regarding diplomatic accounts). VCDR Article 31 provides that diplomatic agents "enjoy immunity from [the receiving state's] civil and administrative jurisdiction" and may not be compelled "to give evidence as [ ] witness[es]." Indeed, under Article 31, "[s]itting diplomats are accorded near-absolute immunity in the receiving state to avoid interference with the diplomat's service for his or her government." *Swarna*, 622 F.3d at 137. VCDR Article 37 extends those same protections to administrative and technical staff, who are immune from the receiving state's civil jurisdiction for acts performed within "the course of their duties," and may not be compelled to give evidence as witnesses. *See Vulcan Iron Works, Inc. v. Polish Am. Machinery Corp.*, 472 F. Supp. 77, 79-80 (S.D.N.Y. 1979) (VCDR protects administrative and technical staff, and "[t]hus, their failure to appear for depositions in response to the plaintiffs' subpoenas was excusable"). Thai-Lao and Hongsa's attempts to compel deposition testimony from Lao diplomats, or administrative and technical staff of the Lao embassy, are in direct conflict with VCDR articles 31 and 37.

Additionally, VCDR Article 24 provides that the archives and documents of the mission are "inviolable." According to a leading diplomatic law expert, "the expression 'inviolable' was deliberately chosen by the International Law Commission to convey both that the receiving State must abstain from any interference through its own authorities and that it owes a duty of protection of the archives in respect of unauthorized interference by others." Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 192 (3d ed. 2008); *see also 767 Third Ave. Assocs.*, 988 F.2d at 300 (concluding that the VCDR "was intended to and did provide for the inviolability of mission premises, archives documents, and official correspondence," and that the VCDR "recognized no exceptions to mission inviolability"). Compelled production of financial and operational records from the Lao Government's embassy and U.N. mission conflicts with this provision; so too would compelled production of documents more recently sought by Thai-Lao and Hongsa, such as written reports

prepared by the embassy and U.N. mission for the Lao Government concerning finances and accounts, and yearly proposals made to the Lao Government for funding.

Similarly, VCDR Article 27 provides for the inviolability of official correspondence of the mission. Insofar as the discovery sought by Thai-Lao and Hongsa seeks correspondence concerning diplomatic funds between the embassy and U.N. mission and the Lao Government, it could compromise the ability of the embassy and U.N. mission to carry out their functions in confidence, thus implicating the United States' obligation to "permit and protect free communication on the part of the mission for all official purposes" and to ensure the inviolability of the mission's official correspondence. VCDR, art. 27(1)-(2); *see also* Denza, Diplomatic Law at 211 ("Free and secret communication between a diplomatic mission and its sending government is from the point of view of its effective operation probably the most important of all the privileges and immunities accorded under international diplomatic law."). The district court's perfunctory rejection of the VCDR as a basis for immunity from discovery failed to account for these provisions, instead employing a commercial activity test that has no applicability and that led to an incorrect result.

The Court should defer to the Executive Branch's interpretation of the VCDR. *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (citation and internal quotation marks omitted)). That is particularly true where, as here, the Executive's interpretation of the VCDR is agreed to by other parties to the treaty—in this case, the Lao Government—and flows from the treaty's clear language. *See id.* at 1993-95; *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); ….

B. The District Court's Order Would Have an Adverse Effect on the United States' Foreign Policy

The district court's February 11, 2013 order would have several adverse consequences for U.S. foreign policy. For example, by subjecting the property of diplomatic missions to wide-ranging discovery and the threat of potential attachment, the district court's order makes it exceedingly difficult for those missions to plan for and carry out their day-to-day operations, thereby straining the United States' bilateral relationships and its relationships with the U.N. and its member state missions.

Moreover, the United States has a strong interest in promoting reciprocity with respect to the treatment of its own diplomatic missions abroad. *See Boos v. Barry*, 485 U.S. 312, 323 (1988) (respecting diplomatic immunity "ensures that similar protections will be accorded those that we send abroad to represent the United States"). Applied reciprocally, the district court's order would permit discovery into (and foreign judicial scrutiny of) sensitive communications discussing operational details of the United States' foreign missions, as well as the compulsion of testimony from United States diplomats and other diplomatic staff overseas, all of which the United States would vigorously oppose. The unique nature of U.S. discovery counsels in favor of U.S. courts treading carefully in this area, where the United States typically is not subject to this kind of judicial action abroad. The Executive Branch's assessment of the foreign policy consequences of the district court's February 11, 2013 order is entitled to deference. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 261 n.9 (2d Cir. 2007).

* * * *

E. INTERNATIONAL ORGANIZATIONS

United Nations

In 2013, the United States filed a statement of interest in a case brought in U.S. District Court for the District of Columbia against U.S. Permanent Representative to the UN Susan Rice,[***] the UN, and the UN Development Program ("UNDP") alleging breach of contract, fraud, and harassment relating to plaintiff's failure to secure a position with UN Volunteers ("UNV") in Laos after allegedly being offered the job. *Lempert v. Rice et al.*, No. 12-01518 (D. D.C. 2013). The U.S. asserted absolute immunity for the UN and the UNDP in its statement of interest, filed on May 3, 2013, which is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*.

* * * *

I. THE UN IS ABSOLUTELY IMMUNE FROM SUIT UNDER THE CONVENTION ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS.

Absent an express waiver, the UN is absolutely immune from suit and all legal process. 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." The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, art 105.1. The Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946 21 U.S.T. 1418, 1 U.N.T.S. 16 ("General Convention"), adopted by the UN shortly after the UN Charter, defines the UN's privileges and immunities by 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, sec. 2.

The United States understands this provision to mean what it unambiguously says: the UN, including its integral component the UNDP, enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity. Here, the UN has not expressly waived its immunity. On the contrary, it has expressly invoked its immunity and has requested the United States to take appropriate steps to protect its privileges and immunity from suit. *See* February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A) ("[W]e wish to advise that the United Nations expressly maintains its privileges and immunities" with respect to plaintiff's lawsuit, and that "we respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action."). To the extent there could be any contrary reading of the General Convention's text, the Court should defer to the Executive Branch's interpretation that the UN is immune from suit here. *See Kolovrat v.Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves,the meaning

[***] Editor's Note: Susan Rice left her post as U.S. Ambassador to the UN on June 25, 2013 to become National Security Adviser to President Obama. On August 5, 2013 Samantha Power was sworn in as U.S. Ambassador to the UN.

given them by the departments of government particularly charged with theirnegotiation and enforcement is given great weight").

* * * *

Therefore, because the General Convention provides for the UN to be immune in a suit such as this one, and because the UN has not waived its immunity, the Court lacks jurisdiction over plaintiff's claims against the UN Defendants.

II. THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT DOES NOT AUTHORIZE THE UNITED STATES TO WAIVE THE IMMUNITY OF THE UN.

Plaintiff alleges that the International Organizations Immunities Act of 1945 ("IOIA"), 22 U.S.C. §§ 288 *et seq*., provides jurisdiction over his claims against the UN Defendants and that it authorizes the United States to waive the UN's immunity from suit. *See* Compl. ¶¶ 2, 6, 48. Plaintiff's position is without merit, because the IOIA neither requires nor authorizes the United States to waive the immunity of the UN.

* * * *

The plaintiff filed an opposition to the U.S. statement of interest, to which the United States replied on June 10, 2013. Excerpts from the U.S. reply brief follow (with footnotes omitted). The U.S. reply is also available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

I. The UN Is Immune From "Every Form of Legal Process" Under the General Convention Unless The UN Itself Expressly Waives Its Own Immunity.

Plaintiff repeatedly, and mistakenly, argues that the UN's immunity is qualified, and further that the UN has somehow impliedly or constructively waived its immunity. *See, e.g.*, Opp. to SOI at 6, 13. That is not the case. The Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946 21 U.S.T. 1418, 1 U.N.T.S. 16 ("General Convention"), plainly states 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, sec. 2 (emphasis added). The U.S. Government and an unbroken line of U.S. judicial decisions have interpreted this language to mean precisely what it says: namely, that the UN, including the UNDP, is absolutely immune from all legal process unless the UN, and the UN alone, "expressly" waives its immunity in a particular case. *See Boimah v. United Nations General Assembly*, 664 F.Supp. 69, 71 (E.D.N.Y. 1987) ("Under the [General] Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases."); *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008) ("[W]here, 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."), *aff'd*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010); *Sadikoglu v. UN Development Programme*, No. 11-Civ-0294 (PKC), 2011

WL 4953994 at * 3 (S.D.N.Y. Oct. 14, 2011) (ruling that "because UNDP — as a subsidiary program of the UN that reports directly to the General Assembly — has not waived its immunity," the General Convention "mandates dismissal . . . for lack of subject matter jurisdiction"); *see also* SOI at 4-5. Therefore, because the UN has not waived its immunity, Plaintiff's suit against the UN should be dismissed.

Ignoring the clear language of Article II, Section 2 of the General Convention, Plaintiff contends that the General Convention provides only qualified immunity for the UN. *See, e.g.*, Response to SOI at 12; Opp. to MTD at 22-23. Specifically, he argues that, pursuant to Section 29 of the General Convention, the UN's alleged failure to provide an adequate settlement mechanism for his contract dispute has resulted in a constructive waiver of the UN's immunity. *Id*. Plaintiff is mistaken. Section 29 merely requires the UN to "make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party." General Convention, art. VIII, sec. 29(a). "[N]othing in this section," however, "or any other portion of the [General Convention] refers to or limits the UN's absolute grant of immunity as defined in article II [of the General Convention] — expressly or otherwise." *Sadikoglu*, 2011 WL 4953994 at *5. For this reason, the United States District Court for the Southern District of New York ruled in the *Sadikoglu* case, which also involved a contract dispute, that "any purported failure of UNDP to submit to arbitration or settlement proceedings does not constitute a waiver of its immunity." *Id*. Similarly, the Second Circuit in *Brzak* rejected the argument "that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of [ ] immunity[;] crediting this argument would read the word 'expressly' out of the [General Convention]." *Brzak*, 597 F.3d at 112. As these decisions demonstrate, when the UN does not expressly waive its own immunity in a particular case, as it has not done here, then it is immune under the General Convention "from every form of legal process[,]" General Convention, art. II, sec. 2, including this lawsuit. In any event, the fact that Plaintiff has not been able to resolve his dispute with the UN does not establish that the UN's dispute resolution mechanisms are inadequate. Further, the UN has stated that it has had extensive discussion with Plaintiff concerning his grievances and remains open to continued discussions. *See* February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A).

Plaintiff incorrectly asserts that the Secretary-General has a duty to waive the UN's immunity under the General Convention. Opp. to MTD at 24-25; Resp. to SOI at 11. In support, he quotes from Article 20 of the General Convention, which states that the Secretary-General "shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." Resp. to SOI at 11 (quoting General Convention, art. V, sec. 20). This section addresses the Secretary-General's authority to waive the immunity of UN officials, rather than the UN itself, and is clearly discretionary.

II. Because The UN Is Immune, Plaintiff Is Mistaken That The UN Is Required To Submit To Service Of Process, Answer Plaintiff's Complaint Or Provide Sworn Testimony.

Plaintiff argues that the UN has failed to provide "good cause" for refusing to submit to service of process, Resp. to SOI at 9, and that the UN is obligated to answer his Complaint and provide sworn testimony in response to his allegations, *id*. at 7-8. Plaintiff's position is at odds with every U.S. judicial decision addressing the UN's immunity under the General Convention.

The General Convention's extension of the UN's immunity to "every form of legal process" quite clearly includes service of process. *See Askir v. Boutros-Ghali*, 933 F. Supp. 368, 369 (S.D.N.Y. 1996) (dismissing suit against UN on the basis of immunity where plaintiff sought an order directing the U.S. Marshal to serve the UN). Nor is there any requirement for the UN to answer Plaintiff's Complaint, provide sworn testimony, or take any other affirmative steps in order to enjoy immunity from suit. Under Article II, Section 2 of the General Convention, unless the UN affirmatively waives its immunity from suit in a particular case, it is absolutely immune. Here, there are no allegations and no evidence whatsoever that the UN has waived its immunity. *See, e.g., De Luca v. United Nations Org.*, 841 F. Supp. 531, 533 (S.D.N.Y.1994) ("Plaintiff has not alleged that the U.N. has expressly waived its immunity in this instance and no evidence presented in this case so suggests. Finding the U.N. to be immune from plaintiff's claims, we dismiss them.").

Furthermore, the United Nations in fact has expressly invoked its immunity and has requested that the United States take steps to protect its immunity in this litigation. *See* SOI at 4 (citing February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A) ("[W]e wish to advise that the United Nations expressly maintains its privileges and immunities" with respect to plaintiff's lawsuit, and that "we respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action.")). Because the UN has not expressly waived its immunity, but, to the contrary, has expressly invoked its immunity, dismissal is clearly warranted. *See Brzak*, 551 F. Supp. 2d at 318 ("[W]here, 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.").

III. Plaintiff Is Wrong That The UN's Immunity Is Governed By The International Organizations Immunities Act, Or That This Statute Incorporates A "Commercial Activities Exception" to Immunity.

Plaintiff argues that the UN's immunity is governed by the International Organizations Immunities Act of 1945 ("IOIA), 22 U.S.C. §§ 288 *et seq.*, and that this statute, through the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, creates a "commercial activities exception" that precludes the UN from enjoying immunity in a contract dispute. *See* Resp. to SOI at 9-10; Opp. to MTD at 25-26. This argument is wrong for at least two reasons. First, as the United States explained in its Statement of Interest, the UN is immune pursuant to the General Convention; therefore, its immunity from suit is not dependent upon any immunity that may also be provided by the IOIA. *See* SOI at 6 (citing *Brzak*, 597 F.3d at 112) ("[W]hatever immunities are possessed by other organizations [under the IOIA], the [General Convention] unequivocally grants the United Nations absolute immunity without exception."); *Sadikoglu*, 2011 WL 4953994 at *4 (rejecting argument that the IOIA limits the immunity of the UNDP because the UNDP's immunity derives from the General Convention). This is a clear case of the specific applicability of the General Convention to the UN trumping the general applicability of the IOIA to international organizations.

Second, the D.C. Circuit has squarely rejected the argument that the IOIA incorporates a commercial activities exception to immunity. *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1340-1 (D.C. Cir. 1998). In *Atkinson*, the Court held that the immunity provided by the IOIA is "absolute" and subject only to limitation by Executive Order. *Id*. at 1341. In short, the D.C. Circuit has determined that the IOIA does not incorporate a commercial activities

exception; moreover, that question has no bearing on whether the UN is immune under the General Convention, which it clearly is given the lack of an express waiver by the UN.
The cases cited by Plaintiff fail to support his claim that the UN is not immune in cases involving commercial disputes. Specifically, he cites a D.C. Circuit decision that addressed whether the International Finance Organization was immune under the IOIA, where the organization expressly waived its immunity from suit in its charter document. Resp. to SOI at 15 (citing *Osseiran v. International Finance Corp.*, 552 F.3d 836, 838-39 (D.C. Cir. 2009)). This case did not address and has no relevance to whether the UN is immune under the General Convention. Plaintiff also relies on a Third Circuit decision holding that the IOIA, via the FSIA, incorporates a commercial activities exception to immunity. Resp. to SOI at 15 (citing *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 766 (3rd Cir. 2010)). Not only is this ruling directly contrary to the D.C. Circuit's *Atkinson* decision, 156 F.3d at 1341, *see supra*, the case did not address nor did it imply that the UN's immunity is anything but absolute under the General Convention.

In contrast to Plaintiff's arguments to the contrary, the United States has offered clear support in its Statement of Interest for the proposition that the UN is immune under the General Convention in all classes of cases, including breach of contract claims. *See* SOI at 5-6 (citing *Sadikoglu*, 2011 WL 4953994 at *2-3 (finding UNDP immune under General Convention with respect to breach of contract claim)).

Plaintiff also erroneously argues that, because the President may waive an international organization's immunity under the IOIA, Ambassador Rice has the power to waiver the UN's immunity. Opp. to MTD at 20-21. Again, this argument fails to recognize that the UN is immune pursuant to the General Convention, and that under the General Convention only the UN may waive its own immunity. General Convention, art. II, sec. 2.

IV. The UN Is Not Subject To The Due Process Requirements Of The United States Constitution.

Finally, Plaintiff claims that the UN does not enjoy immunity from suit because he has alleged that he is entitled under the Due Process Clause of the Fifth or Fourteenth Amendments to have his claims against the UN heard. *See, e.g.*, Resp. to SOI at 8. Unsurprisingly, Plaintiff offers no authority or case law in support of his claim. It is beyond dispute that the United Nations is not subject to the due process requirements of the United States Constitution. *See, e.g.*, *McGehee v. Albright*, 210 F. Supp. 2d 210, 216 n.4 (S.D.N.Y. 1999) (noting that the United Nations "is not subject to the due process requirements of the United States Constitution"). Moreover, to the extent Plaintiff is arguing that the UN's immunity from suit violates his right to due process, that argument was rejected conclusively in *Brzak*, where the Second Circuit stated, with equal applicability here: "If appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist. Suffice it to say, they offer no principled arguments as to why the continuing existence of immunities violates the Constitution." 597 F.3d at 114. Therefore, absent an express waiver in a particular case, the UN is immune from all lawsuits in U.S. Courts, presenting any type of legal claim, including claims purportedly brought under the Constitution.

* * * *

The court granted defendants' motion to dismiss in a July 19, 2013 opinion and order. The section of the opinion relating to the UN defendants is excerpted below.

---

* * * *

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, para. 1. The Convention on Privileges and Immunities of the United Nations (the "General Convention"), which was adopted by the UN shortly after the UN Charter and which the United States has ratified, defines the UN's privileges and immunities by 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, sec. 2 (emphasis added). Several federal courts that have addressed the issue have relied on the General Convention in recognizing the UN's absolute immunity from suit absent an express waiver by the UN. *See, e.g.*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010); *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994).

In this case, the UN has not expressly waived its immunity. To the contrary, it has affirmatively requested that the United States take steps to protect its privileges and immunities in this case. *See* Gov't Stmt. of Interest, Ex. A (Feb. 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Rice) ("[W]e wish to advise that the United Nations expressly maintains its privileges and immunities" with respect to Plaintiff's lawsuit, and that "we respectfully request that the Government of the United States to take appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action."). Accordingly, under the plain language of the General Convention, the UN is immune from all legal process, including suit, and the Court therefore lacks subject matter jurisdiction over Plaintiff's claims against it. Further, the Court concludes that as a subsidiary program of the UN that reports directly to the General Assembly, the UNDP also enjoys immunity under the Convention and therefore Plaintiff's claims against it must also be dismissed for lack of subject matter jurisdiction. *See Sadikoglu v. United Nations Dev. Programme*, Civ. A. No. 11-0294 (PKC), 2011 WL 4953994 at *3 (S.D.N.Y. Oct. 14, 2011).

This conclusion is further supported by the International Organizations Immunity Act of 1945 ("IOIA"), 22 U.S.C. § 288a(b), which similarly provides that international organizations designated by the President "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." The UN has been so designated. *See* Exec. Order 9698, 11 Fed. Reg. 1809 (Feb. 20, 1946).

Plaintiff asserts several arguments as to why the United Nations is not entitled to absolute immunity from legal process—none of which the Court finds availing. For instance, Plaintiff argues that even where an international organization such as the UN asserts immunity, the organization should nevertheless be required to at the very least submit to service and answer

Plaintiff's Complaint "in order to protect the [c]onstitutional due process rights of Plaintiff." Pl.'s Response to Gov't Stmt. of Interest at 7. *See also id*. at 12 (seeming to argue that the UN has impliedly waived its immunity by failing to provide an adequate settlement mechanism for his contract dispute in violation of his due process rights and the UN's own obligations under the General Convention); *id*. at 11 (arguing that the Secretary-General has a duty to waive immunity in cases where such is necessary to protect an individual's fundamental rights).

These arguments need not detain the Court long, as Plaintiff points to no authority supporting his assertion that the immunity "from every form of legal process" conferred upon the UN by the General Convention is anything but absolute absent express waiver, and the Court is aware of none. To the contrary, at least one Circuit to address the issue has firmly rejected Plaintiff's approach. *See Brzak*, 597 F.3d at 114 ("The short-and conclusive-answer is that legislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law. . . . If appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist. Suffice it to say, they offer no principled arguments as to why the continuing existence of immunities violates the Constitution.").

Additionally, Plaintiff appears to argue that the IOIA no longer confers absolute immunity on designated organizations in all cases because subsequent to the passing of that act, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et. seq.*, which strips foreign sovereigns of their immunity in certain circumstances, including in "any case . . . in which the 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." *Id*. § 1605(a)(2). While the Court harbors doubt that Plaintiff – who has remained in Laos, *see* Compl. ¶ 73 – has suffered a "direct effect" in the United States resulting from the UN Defendants' alleged misconduct, even assuming that this could be shown, Plaintiff's argument must be rejected for two reasons. First, even if the IOIA does not confer immunity in this case, Plaintiff has provided no explanation as to why the General Convention does not nevertheless serve as an independent source of the UN's absolute immunity. Second, Plaintiff's argument runs directly counter to binding Circuit authority finding that the IOIA does not incorporate the FSIA's commercial activity exception. *See Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341-42 (D.C. Cir. 1998) ("In light of this text and legislative history [of the IOIA], we think that despite the lack of a clear instruction as to whether Congress meant to incorporate in the IOIA subsequent changes to the law of immunity of foreign sovereigns, Congress' intent was to adopt that body of law only as it existed in 1945 – when immunity of foreign sovereigns was absolute. . . . The FSIA is 'beside the point' because it does not 'reflect any direct focus by Congress upon the meaning of the earlier enacted provisions' of the IOIA.") (quoting *Almendarez-Torres v. U.S.*, 523 U.S. 224, 237). In view of this binding precedent, Plaintiff's heavy reliance on case law outside of this Circuit is misplaced. *See* Pl.'s Response to Gov't Stmt. of Interest at 15-16 (discussing *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010)).

The Court has considered all other arguments asserted by Plaintiff on this issue and finds them without merit. Accordingly, because the UN Defendants have not expressly waived their immunity to legal process in the instant suit, but, to the contrary, have expressly invoked such immunity, both the General Convention and the IOIA mandate dismissal of Plaintiff's claims against them for lack of subject matter jurisdiction. For the same reason, Plaintiff's request for an

order requiring the U.S. Marshals to serve the UN Defendants and to impose sanctions against them for the costs of effectuating service is denied. …

* * * *

Cross References

ICC proceedings against sitting president of Kenya, **Chapter 3.C.2.b.**
Alien Tort Claims Act and Torture Victim Protection Act, **Chapter 5.B.**
ILC's work on immunity of State officials, **Chapter 7.D.1.**
ILC's draft articles on diplomatic protection, **Chapter 8.A.1.**
Protecting power agreement in the Central African Republic, **Chapter 9.A.**
U.S. recognition of government of Somalia, **Chapter 9.B.1.**

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 2013, activities on Open Skies included the following:

- On February 14, the United States and Russia agreed, *ad referendum*, on a protocol with attached annexes to replace the annexes to the 1994 Air Transport Agreement between the Government of the United States of America and the Government of the Russian Federation (the initialed protocol and annexes are available at *www.state.gov/e/eb/rls/othr/ata/r/rs/205175.htm*);
- On March 25, the United States and Guyana signed the U.S.-Guyana Air Transport Agreement, with entry into force upon signature (available at *www.state.gov/e/eb/rls/othr/ata/g/gy/206955.htm*);
- On May 28, the United States and Saudi Arabia signed an Open Skies air transport agreement which has been applied on the basis of comity and reciprocity since it was initialed in 2011 (agreement available at *www.state.gov/e/eb/rls/othr/ata/s/sa/210079.htm*);
- On July 8, the United States and Suriname signed an air transport agreement, available at *www.state.gov/e/eb/rls/othr/ata/s/ns/212480.htm*, that will enter into force upon an exchange of diplomatic notes confirming that all necessary internal procedures have been completed for entry into force;
- On August 15, the United States and Bangladesh reached *ad referendum* agreement on, and initialed the text of, an air transport agreement (agreement available at *www.state.gov/e/eb/rls/othr/ata/b/bg/213413.htm*).

2. Preclearance Agreement with the United Arab Emirates

The Agreement Between the Government of the United States of America and the Government of the United Arab Emirates on Air Transport Preclearance, with its Annex, and as amended, signed at Washington April 15, 2013, entered into force on December 8, 2013 after an exchange of notes between the two governments. The agreement allows travelers on non-stop flights to the United States who are pre-cleared at Abu Dhabi International Airport to be free from any further customs and immigration processing upon arrival in the United States. The text of the agreement and the exchange of notes bringing it into effect are available at *www.state.gov/s/l/c8183.htm*.

3. Addressing Aviation Impacts on Climate Change

For background on U.S. efforts to arrive at a multilateral approach to addressing aviation's impact on climate change and to prevent application of the European Union's Emissions Trading Scheme ("ETS"), see *Digest 2012* at 352-56 and *Digest 2011* at 358-59. At the 38th session of the Assembly of the International Civil Aviation Organization ("ICAO"), held September 24-October 4, 2013, members considered draft resolution 17/2, "Consolidated statement of continuing ICAO policies and practices related to environmental protection—Climate change." The United States delivered a statement of reservation regarding the resolution, which follows. The Report of the ICAO Executive Committee including the text of resolution 17/2 is available at *www.icao.int/Meetings/a38/Documents/WP/wp430_en.pdf*.

---

* * * *

In the United States, we have put addressing environmental challenges, including climate change, as one of the critical goals in the modernization of our national airspace system, and we have pioneered progress—in concert with industry—in the development and deployment of sustainable alternative fuels.

We are also committed to developing a global approach to address climate change.

During the last three years, the United States and others have taken important steps to move forward from 2010. In large part, the climate resolution reflects the progress we have made and moves us forward on a comprehensive approach to addressing the impacts of aviation on climate change. We are supportive of the resolution provisions on technology standards, operational improvements, and sustainable alternative jet fuels.

We also support moving forward on work to develop a global market-based measure for international aviation. A global market-based measure would serve to complement the many other efforts that ICAO and its member States are undertaking to reduce aviation emissions. We look forward to working diligently on this task over the next three years.

Despite support for the global approach and work on the global market-based measure, we do have concerns related to some provisions of this resolution. We are reserving on paragraph 16(b) and guiding principle (p) in the annex.

Reservation on Paragraph 16(b)

With respect to paragraph 16(b), while the United States supports the concept of "de minimis" thresholds in principle, it does not believe that 1% is an appropriate threshold, that the threshold should be based on the aviation activities of states as opposed to operators, or that accommodations should depend upon whether routes are to or from developing States. These criteria amount to an inappropriate means of addressing the de minimis concept, particularly in light of ICAO's principle of non-discrimination and commitment to the avoidance of market distortion. If applied, this de minimis threshold would have the effect of excluding the vast majority of the world's countries from participation in an MBM. Consistent with the language of the provision, the United States sees such a threshold as having no bearing on the development of a global MBM. The United States reserves to Paragraph 16(b).

Reservation on Guiding Principle (p)

The United States objects to the inclusion of guiding principle (p) in the annex. For reasons that are well known, the United States does not consider that the principles of the United Nations Framework Convention on Climate Change, including the principle of "common but differentiated responsibilities and respective capabilities," apply to ICAO, which is governed by its own legal regime. Accordingly, the United States reserves to guiding principle (p) in the Annex to this resolution.

* * * *

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Investment Dispute Settlement under Chapter 11 of the North American Free Trade Agreement Involving the United States

a. Apotex, Inc. v. United States of America

On June 14, 2013, the Tribunal constituted to hear the dispute brought against the United States by Apotex Inc. issued its Award on Jurisdiction and Admissibility. Apotex Inc., a Canadian pharmaceuticals corporation, alleged that U.S. courts committed errors in interpreting federal law, and that those errors violated NAFTA Article 1102 (national treatment) and Article 1105 (minimum standard of treatment). Apotex also alleged that the challenged U.S. court decisions expropriated Apotex's investments under NAFTA Article 1110. The June 14 Award dismisses all claims and orders Apotex to pay the United States' legal fees and arbitral expenses. The Tribunal considered and discussed objections to jurisdiction based on the lack of an "investment" or "investor;" the lack of judicial finality; and the time bar. The Award and other documents in the matter are available at *www.state.gov/s/l/c27648.htm*. Excerpts follow from the Tribunal's Award (with footnotes omitted).

---

* * * *

(B) NO "INVESTMENT" OR "INVESTOR"

* * * *

243. Apotex has failed to establish that it made or sought to make an "*investment*" in the United States. It therefore does not qualify as an "*investor*" under NAFTA Article 1116.

244. Apotex's activities with respect to the contemplated sales of its sertraline and pravastatin products in the United States are those of an exporter, not an investor. As such, the position is analogous to that in *Grand River Enterprises, Inc. v. United States*, where the tribunal found that: "claimants activities centered on the manufacture of cigarettes at Grand River's manufacturing plant in Canada for export to the United States," and, as a result, determined that: "such activities and investments by investors in the territory of one NAFTA party do not satisfy the jurisdictional requirements for a claim against another NAFTA party."

245. Apotex, like any company that intends to export generic drug products to the United States for sale in the U.S. market, sought regulatory approval from the FDA through the submission of [Abbreviated New Drug Applications or] ANDAs. But this process cannot change the nature of the underlying activity, or constitute an "investment" in and of itself, within the meaning and scope of NAFTA Article 1139.

246. It follows that the Tribunal lacks jurisdiction over Apotex's claims, which must be dismissed in their entirety.

247. This is a complete answer to all of Apotex's claims in both cases before this Arbitral Tribunal, such that, strictly, there is no need for the Arbitral Tribunal to consider the Respondent's two remaining objections. However, since each of the remaining objections was the subject of detailed written and oral argument, the Arbitral Tribunal considers it appropriate to address them.

* * * *

(C) JUDICIAL FINALITY WITH RESPECT TO THE PRAVASTATIN CLAIM

* * * *

260. In line with both Parties' approach, the Tribunal proceeds on the basis that this objection concerns the Tribunal's jurisdiction *ratione materiae*. In the alternative, the Tribunal has also considered the matter in terms of the admissibility of claims.

261. *Relevant Chronology*: It is clear, as a matter of fact, that two further avenues of recourse within the U.S. judicial system were available to Apotex, and that Apotex elected not to pursue them.

262. First, Apotex never sought review in the U.S. Supreme Court of the pravastatin-related decisions by the U.S. Court of Appeals. In fact, none of the pravastatin-related judicial acts now relied upon by Apotex as breaching U.S. obligations under the NAFTA was finally reviewed within the U.S. judicial system.

263. Second, Apotex voluntarily agreed to the dismissal of its entire pravastatin claim in the U.S. courts, most of which was dismissed with prejudice, instead of proceeding at the District Court level.

* * * *

267. Stated thus, the judicial acts now challenged by Apotex in its Pravastatin Claim do not appear as "final" manifestations of justice within the U.S. judicial system such as to allow for international law claims—because Apotex still had other options to pursue.

268. The key issue is therefore the basis upon which Apotex elected not to exhaust all available remedies, and whether such remedies were (according to the Parties' common test) "*obviously futile*".

269. *Application to the U.S. Supreme Court*: Apotex explains that after the FDA issued its letter decision on 11 April 2006 (refusing to treat the BMS - Apotex dismissal as a triggering court decision), Apotex promptly sought injunctive relief from the District Court. After the D.C. District Court denied Apotex's motion, the FDA then approved Teva's ANDA on 24 April 2006. Teva immediately launched its respective ANDA products, thereby triggering the 180-day exclusivity period, which would expire on 23 October 2006. Apotex immediately appealed the District Court's decision and Teva moved for summary affirmance.

* * * *

270. As already noted, on 6 June 2006, the D.C. Circuit summarily affirmed the District Court's decision on Apotex's motion for a preliminary injunction. Apotex petitioned for rehearing of that decision, which the D.C. Circuit denied on 17 August 2006. At that point, the case returned to the D.C. District Court for further proceedings on the merits, on a non-expedited basis.

271. The core point, as far as Apotex is concerned, is that once its petition for rehearing *en banc* was denied, only 67 days remained of Teva's 180-day exclusivity period. After this period expired (i.e., on 23 October 2006), Apotex would then be eligible for final approval of its pravastatin ANDA—regardless of the outcome of its case.

272. Moreover, even if Apotex had eventually succeeded on the merits on or after that date, Apotex would not have been entitled to damages from the FDA, or any other party for that matter. Thus, once the 180-day exclusivity period had expired, Apotex would no longer be able to obtain any meaningful or effective relief from either the FDA or the Courts.

273. Therefore, against these facts, Apotex submits that it should not have been required to petition for *certiorari* requesting expedited relief to overturn the D.C. Circuit's summary Affirmance—particularly given that the decision by the D.C. Circuit Court related solely to Apotex's request for injunctive relief, and was not a full decision on the merits.

274. Further, Apotex submits that it is wholly unrealistic to suppose that the Supreme Court would not only have granted the petition, but could have scheduled argument and render an opinion in Apotex's favour within 67 days. Any efforts to achieve such a result would have been "objectively futile".

275. Had Apotex immediately petitioned the Supreme Court for *certiorari*, under the relevant U.S. Supreme Court rules, the FDA would have had 30 days from the date the case was docketed to submit a response, after which Apotex would have had an additional 10 days to reply. Thus, Apotex argues that the Supreme Court Clerk could not even have distributed Apotex's petition to the Supreme Court until less than a month was left in Teva's exclusivity period. Thus, the Court would not have granted the petition, ordered briefing and a hearing, and decided the matter at any time before 23 October 2006, when the relief requested would have been rendered moot.

276. The Tribunal has sympathy for Apotex's position, and can readily appreciate that a judgment call was taken at the time that petitioning the U.S. Supreme Court was unlikely to secure the desired relief. However, as the Respondent has observed, under established principles, the question whether the failure to obtain judicial finality may be excused for "obvious futility" turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief. In this case, and on balance, the Tribunal is not satisfied that finality was achieved, such as to allow for a claim under NAFTA in respect of the particular judicial decisions in question.

277. The starting point is to recall the very serious nature of the allegations against the U.S. judicial system in Apotex's Pravastatin Claim. Apotex asserts that the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the D.C. Circuit, administered justice so deficiently as to violate Apotex's rights under the U.S. Constitution, and to put the United States in breach of its international law obligations under the NAFTA. Yet, at the same time (and notwithstanding the gravity of the alleged breaches), Apotex elected not to allow the U.S. Supreme Court all possible opportunities to correct the alleged errors and transgressions. Instead, Apotex now requests that this Tribunal—in effect—substitute itself for the U.S. Supreme Court, and sit as a supranational appellate court, to review the judicial decisions of lower U.S. courts. The Tribunal declines to do so, for three reasons.

278. First, as a general proposition, it is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court. This has been repeatedly emphasised in previous decisions. For example:

(a) Mondev Award, at paragraph 126: "Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal."

(b) Azinian Award, at paragraph 99: "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."

(c) Waste Management Award, at paragraph 129:"Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties."

279. Second, and related to this, the "obvious futility" threshold is a high one. This necessarily follows from the nature of the rule to which it is an exception.

280. The requirement that local judicial remedies be exhausted before judicial acts may found an international complaint was said by both Parties to flow from two sources: (a) NAFTA Article 1101, by which any impugned act must be a "measure adopted or maintained" by the host State (and the proposition that a judicial act is not a measure adopted or maintained by the State unless "final"); and (b) customary international law, as applicable by virtue of NAFTA Article 1131, which provides that: "A tribunal established under this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law."

281. As a matter of customary international law, both Parties asserted that an act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate State responsibility—unless such recourse is obviously futile. As summarised on behalf of the Respondent:

> "The finality requirement is fundamental to claims that may result in holding a State's Judiciary in violation of international law. National judicial systems including those of the three NAFTA Parties, provide for higher courts to correct errors below. Decisions by higher courts harmonise the interpretation and application of the law by lower courts. A finding by an International Tribunal such as this one, that national courts violated international law implicates a systemic failure of the national judiciary. International law recognises, therefore, that the national court system must be given a chance to correct errors."

282. Although both Parties asserted that this rule applies to all causes of action premised upon judicial acts, both Parties primarily invoked authorities concerning denial of justice claims. Such claims depend upon the demonstration of a systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself. In the words of Jan Paulsson, *Denial of Justice in International Law* 108 (2005): "For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."

And as stated in *Loewen Group v. United States*:

> "The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."

* * * *

284. Because each judicial system must be allowed to correct itself, the "obvious finality" exception must be construed narrowly. It requires an actual unavailability of recourse, or recourse that is proven to be "manifestly ineffective"—which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued.

285. It is not enough, therefore, to allege the "absence of a reasonable prospect of success or the improbability of success, which are both less strict tests." In the (frequently quoted) words of Professor Borchard, a claimant is not: "relieved from exhausting his local remedies by alleging … a pretended impossibility or uselessness of action before the local courts."

* * * *

287. Third, on the facts of this case, even if the chance of the U.S. Supreme Court agreeing to hear Apotex's case was remote, the availability of a remedy was certain. Pursuant to 28 U.S.C. § 1254(1), Apotex could have sought U.S. Supreme Court review on an expedited basis of the Court of Appeals decision on injunctive relief, even after its petition for rehearing *en banc* was denied.

288. As against this, Apotex submits that because the chances of a successful outcome were "unrealistic", a petition to the U.S. Supreme Court was "objectively futile", or to be treated as if unavailable. In effect, the Tribunal is being asked to determine the likelihood of a successful

result before the U.S. Supreme Court—which the Tribunal does not consider is its proper task, or indeed the correct enquiry. In the words of Judge Lauterpacht, in *Norwegian Loans* case: "[H]owever contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them."

* * * *

291. Pursuing the Claim at District Court Level: As to the Respondent's argument that Apotex should have pressed onward with its claim at the District Court level, Apotex submits that the D.C. District Court had already denied Apotex's request for emergency relief, which the D.C. Circuit affirmed on appeal. Thus, at the District Court level, Apotex would have been forced to proceed at the standard litigation pace, as expedited relief was no longer an option.

292. On remand, the District Court scheduled a status hearing to be held on 6 October 2006. On 3 October 2006, a mere 20 days before Teva's exclusivity period expired, Apotex voluntarily dismissed its suit. According to Apotex, even if it had immediately filed a summary judgment motion after the 6 October 2006 status conference, under the local rules of that District Court, the time permitted to fully brief the matter would have extended beyond the date the issue became moot on 23 October 2006.

293. Once again, however, the Tribunal does not consider that Apotex has met the "obvious futility" exception here.

294. The Tribunal is not persuaded that pursuing substantive relief on remand would have been "*absurd*", because Apotex "*would have been forced to proceed at standard litigation pace, as expedited relief was no longer an option*." Just as Apotex had sought expedited consideration of its appeal (on the interlocutory issue) before the D.C. Circuit, it remains unclear why it could not have sought expedited consideration of its claim on the merits before the D.C. District Court. On any view, it made no attempt to do so.

295. Further, after the D.C. Circuit rejected Apotex's petition for rehearing *en banc* on 17 August 2006, Apotex waited 47 days (until 3 October 2006) before voluntarily dismissing all of its claims against the FDA.

296. Further still, as is clear from its Stipulation of Dismissal, Apotex dismissed all claims "with prejudice" for 10, 20, and 40 mg strengths, but "without prejudice" for the 80 mg strength. As the Respondent notes, the 180-day exclusivity period for 80 mg generic pravastatin had not yet begun to run, because Ranbaxy (the company that had been awarded the 180-day exclusivity for 80 mg generic pravastatin) had not yet launched that strength. Ranbaxy did not in fact do so until 25 June 2007. Importantly, Apotex preserved its ability to continue litigating before the District Court with respect to 80 mg pravastatin—but it never did.

* * * *

(D) THE NAFTA TIME BAR

* * * *

318. *Claims Based on the FDA Decision Itself*: In so far as Apotex seeks to advance any claim based exclusively on the FDA decision of 11 April 2006, this clearly falls outside of the NAFTA three-year limitation period, and is therefore time-barred. In other words, Apotex

cannot now assert that the FDA decision constituted—in and of itself—a breach of NAFTA Articles 1102, 1105, and 1110.

319. Contrary to Apotex's subsequent submissions, this is a claim that was in fact pleaded in terms in the Pravastatin Notice of Arbitration.

320. It is clear that in April 2006 Apotex already had knowledge of the FDA measure and knowledge of any resulting loss or damage allegedly arising from it. According to its own pleading, Apotex's inability to bring its pravastatin products to market in April 2006 (by which time, in Apotex's view, the market exclusivity period held by the first paragraph IV applicants should have expired) caused Apotex "*to suffer substantial damages*."

321. Apotex further alleges in its Statement of Claims that the ability of the first paragraph IV applicants to launch their generic pravastatin products while enjoying market exclusivity in April 2006 enabled those companies to "secur[e] a stranglehold over the market."

322. Apotex even pre-emptively challenged the FDA measure in court on 5 April 2006, claiming that Apotex had been "adversely affected by final agency action and/or agency action unlawfully withheld."

323. And yet Apotex delayed submitting its Pravastatin Notice of Arbitration until 5 June 2009. There is no obvious reason why Apotex could not have made its claims regarding the FDA measure in a timely manner. The FDA decision was taken in April 2006. All U.S. litigation over the measure ended in August 2006, and Apotex voluntarily dismissed all claims relating to the measure in October 2006. Apotex then had ample time to bring its NAFTA claim challenging the FDA decision. Indeed, Apotex brought its Sertraline Claim on 11 December 2008, which, had it included the Pravastatin Claim, would have been within the required time limit.

324. Accordingly, the Tribunal accepts the Respondent's submission that by reason of NAFTA Article 1116(2), all claims based exclusively upon the FDA decision of 11 April 2006 are time-barred, and so must be dismissed.

325. Apotex cannot avoid this conclusion by asserting that the FDA measure is part of a "continuing breach" by the United States, or "part of the same single, continuous action," in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure.

* * * *

333. Claims Based on the 6 June & 17 August 2006 D.C. Decisions: Having so ruled, it must be made clear that there is no time-bar difficulty with respect to Apotex's claims based upon the 6 June 2006 and 17 August 2006 decisions of the D.C. Circuit. And clearly, any claim that these judicial decisions constituted a breach of the NAFTA would require at least some consideration of the prior administrative and judicial decisions.

334. But the two types of claim are clearly analytically distinct. One is a claim that a breach occurred, and loss was incurred, as at 11 April 2006, by reason of the FDA's (administrative) ruling that the dismissal of Apotex's declaratory judgment action against the patent owner did not constitute a "court decision trigger". The other is a claim that a breach occurred, and loss was incurred, as at 6 June 2006, or alternatively 17 August 2006, by reason of the (judicial) decisions of the Court of Appeals for the D.C. Circuit.

* * * *

b. Apotex Holdings Inc. and Apotex Inc. v. United States of America

As discussed in *Digest 2012* at 356-60, the United States filed its Counter-Memorial and Objections to Jurisdiction, including a request for bifurcation, in the arbitration initiated by Apotex and Apotex Holdings in 2012 alleging injuries arising out of "Import Alerts" issued by the FDA concerning two of Apotex's Canadian manufacturing facilities. On January 25, 2013, the tribunal in the case issued its order denying the request for bifurcation and directing that jurisdictional and liability issues (but not damages) be presented at an oral hearing in November. Claimants replied to the U.S. Counter-Memorial on May 24, 2013. The United States submitted a rejoinder on the merits and a reply on jurisdiction on September 27, 2013. Excerpts below from the rejoinder (with most footnotes omitted) address the issue of *res judicata*. The rejoinder is available at *www.state.gov/documents/organization/217858.pdf*. The hearing on jurisdiction and the merits took place in November 2013. Transcripts of the hearing and other relevant documents are available at *www.state.gov/s/l/c50826.htm*.

* * * *

99. Consistent with the principle of *res judicata*, this Tribunal should give effect to the decision of the *Apotex I-II* tribunal and dismiss Apotex Inc.'s claim for lack of jurisdiction. *Res judicata*, which includes the principle of issue estoppel, precludes relitigation of an issue of fact or law decided between two parties.

100. *Res judicata*—which applies to these proceedings pursuant to NAFTA's governing law provision—is a well-established general principle of international law. As early as 1905, the French-Venezuelan Mixed Claims Commission recognized:

> The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.[225]

101. Over the ensuing century, international courts and tribunals repeatedly have applied this general principle in order to promote the twin goals of efficiency and finality. These include the Permanent Court of International Justice (*e.g.*, in *Chorzów Factory*), the International Court of Justice (*e.g.*, in *Land and Maritime Boundary Between Cameroon and Nigeria*), interstate arbitral tribunals (*e.g.*, in *UK-French Continental Shelf*), and investor-State arbitral tribunals (*e.g.*, in *Amco Asia v. Indonesia*).

[225] *Company General of the Orinoco Case*, Award (July 31, 1905), 10 UNRIAA 184, 276 (emphasis altered) (citing *Southern Pacific Railroad Co. v. United States*, 168 SCR 1) [RLA-267].

102. The International Law Association (ILA) more recently confirmed the crucial role *res judicata* plays in promoting efficiency and finality in international commercial arbitration. The ILA's "Recommendations on *Res Judicata* and Arbitration" recognize that an arbitral award is conclusive and preclusive where it (1) has become final and binding; (2) has disposed of a claim for relief sought or reargued in further arbitral proceedings; (3) is based upon the same cause of action in subsequent proceedings or forms the basis for subsequent proceedings; and (4) has been rendered between the same parties. The ILA further recommended that arbitral awards have conclusive and preclusive effects in subsequent arbitral proceedings as to:

> 4.1 determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto; and
> 4.2 issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.

103. Recommendation 4.1 endorses the more extensive notion "followed in public international law, under which *res judicata* not only is to be read from the dispositive part of an award but also from its underlying reasoning." Recommendation 4.2 "endorses common law concepts of issue estoppel, which for reasons of procedural efficiency and finality, seem to be acceptable on a worldwide basis, notwithstanding the fact that they are yet unknown in civil law jurisdictions." The ILA Final Report confirmed that issue estoppel applies not only to the same claim, but also to "different claims in further arbitral proceedings."

104. Issue estoppel also is widely recognized in domestic law. In the United States and Canada, for instance, a party is precluded from relitigating the same issue between the same parties in a different suit involving a different cause of action if a court has finally decided that issue.

105. Here, Apotex Inc.'s claims fall squarely within the ILA's Recommendations on *Res Judicata* and Arbitration. *First*, the parties are the same. In both cases, Apotex Inc. is a claimant, and the United States is the respondent.

106. *Second*, the issue in both arbitrations is the same, notwithstanding the different claims raised on the merits. In both cases, Apotex Inc. contends that it qualifies as an "investor" whose ANDAs constitute "investments" in the United States for purposes of NAFTA Articles 1116 and 1139.

107. *Third*, the issue of whether Apotex Inc. is a qualifying "investor" with covered "investments" was fully arbitrated and determined in the *Apotex I-II* claims. The tribunal in that case rendered a lengthy, reasoned decision after two rounds of briefing and an oral hearing.

108. *Fourth*, the *Apotex I-II* tribunal decided the issue in a final and binding award. The tribunal's unanimous decision addressed the issue in its operative part as well as in the associated reasoning and was essential to its *dispositif*.

109. Although Apotex has presented additional argument in this case to try to bolster its jurisdictional claim, issue estoppel precludes relitigation of the *entire issue*, not simply arguments raised in connection with that issue in the prior case. Were it otherwise, any party could evade the preclusive effect of issue estoppel simply by devising new legal arguments for repeated cases that raise the same issues.

110. In sum, in accordance with the well-established principle of *res judicata*, which includes issue estoppel, Apotex should be barred "from contradicting an issue of fact or law that has already been distinctly and finally decided in earlier proceedings between the same parties."

* * * *

2. Non-Disputing Party Submission under Chapter 11 of the North American Free Trade Agreement

On April 19, 2013, the United States made a submission pursuant to Article 1128 of the NAFTA as a non-disputing party in a case brought against the government of Canada, *Clayton/Bilcon v. Canada*. U.S. investors, members of the Clayton family and a corporation they control called Bilcon, filed a claim against Canada alleging that the type of environmental assessment undertaken with respect to the White Point Quarry and/or Marine Terminal Project, as well as the administration and conduct of the environmental assessment, violate NAFTA Article 1102 (national treatment), Article 1103 (most favored nation treatment), and Article 1105 (minimum standard of treatment).The U.S. submission is excerpted below (with most footnotes omitted) and is available in full at *www.state.gov/documents/organization/208140.pdf*.

---

* * * *

Article 1105 (Minimum Standard of Treatment)

2. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation confirming that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." The Commission clarified that "[t]he 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 the customary international law minimum standard of treatment of aliens." The Commission also stated that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

3. NAFTA Article 1131, entitled "Governing Law," states in part that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." The power to issue an authentic interpretation of a treaty remains with the States Parties themselves.

4. The Commission's interpretation confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. As the United States has observed in previous submissions in NAFTA Chapter Eleven cases, 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.[8] Article 1105 thus reflects a standard 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.[7] 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 1105. While there may be overlap in the substantive protections both types of treaty provisions ensure, a claimant submitting a claim under an agreement such as NAFTA, in which fair and equitable treatment is expressly a part of the customary international minimum standard of treatment, still must demonstrate that the rights claimed are in fact a part of customary international law.

5. The burden is on a 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*. "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party." 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.[10] 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."[11]

6. Finally, the principle of "good faith" is not 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."

Article 1102 (National Treatment)

7. NAFTA's national treatment provision, Article 1102, is designed to prohibit discrimination on the basis of nationality. Article 1102 paragraphs (1) and (2) are not intended to prohibit all differential treatment among investors or investments. Rather, they are intended only

---

[8] See, *e.g.*, *Methanex v. United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, NAFTA/UNCITRAL (Nov. 13, 2000); *ADF Group Inc. v. United States*, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and Pope & Talbot, NAFTA/ICSID Case No. ARB(AF)/00/1 (June 27, 2002); *Glamis Gold Ltd. v. United States*, Counter-Memorial of Respondent United States of America, NAFTA/UNCITRAL (Sept. 19, 2006); *Grand River Enters. v. United States*, Counter-Memorial of Respondent United States of America, NAFTA/UNCITRAL (Dec. 22, 2008).

[7] See, *e.g.*, *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶¶ 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"); see also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*) 2012 I.C.J. ¶ 55 (Judgment of Feb. 3) ("While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite opinio juris and therefore sheds no light upon the issue currently under consideration by the Court.").

[10] See *Feldman v. Mexico*, 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 law, 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.").

[11] *S.D. Myers v. Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000).

to ensure that Parties do not treat entities that are "in like circumstances" differently based on their domestic nationality. If the challenged measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments on the basis of nationality, then there can be no violation of Article 1102.

8. The phrase "in like circumstances" ensures that comparisons are made with respect to investors or investments on the basis of characteristics that are relevant for purposes of the comparison. Thus, identifying appropriate domestic comparators for purposes of the "in like circumstances" analysis under Article 1102 is a highly fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics.

9. Nothing in Article 1102 paragraphs (1) and (2) requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best or most favorable treatment given to any domestic investor or investment. The relevant comparison is between the treatment that a Party accords to an investment of an investor of another Party and the best treatment that it accords to the investments of its nationals (or between the treatment that it accords to an investor of another Party and the best treatment that it accords to investors that are its nationals) only if the foreign investment or investor and a domestic investment or investor are in like circumstances. This distinction is important and was intended by the Parties. Thus, a NAFTA Party may adopt measures that draw legitimate distinctions among entities without necessarily violating Article 1102.

10. The national treatment obligation does not, as a general matter, prohibit a Party from adopting or maintaining measures that apply to or affect only a part of its national territory. The NAFTA Parties did not intend Article 1102 to foreclose the use of location-based regulatory measures. The United States, for example, limits business activities in certain environmentally sensitive areas and imposes additional limitations on emissions from manufacturing operations in areas where air pollution is more serious.

11. For the foregoing reasons, an investor or investment that operates within the territory covered by a location-specific measure may not be in circumstances "like" those of an investor or investment that does not operate within that territory. Therefore, an investor cannot rest its claim under Article 1102 on the fact that a domestic enterprise operating in another part of the country receives a different or greater benefit or is subject to a different or lesser burden unless it is "in like circumstances" with that enterprise.

Article 1116(2) (Limitations Period)

12. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Articles 1116(2) and Article 1117(2).15 Although a legally distinct injury can give rise to a separate limitations period under NAFTA Chapter Eleven, a continuing course of conduct does not extend the limitations period under Article 1116(2) or Article 1117(2).

* * * *

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement proceedings are available at *www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement*. The following discussion of a selection of WTO dispute settlement proceedings involving the United States in 2013 is drawn largely from Chapter II "The World Trade Organization" of the 2013 Annual Report of the President of the United States on the Trade Agreements Program ("2013 Annual Report"), available at *www.ustr.gov/about-us/press-office/reports-and-publications/2014-0*. WTO legal texts referred to below are available at *www.wto.org/english/docs_e/legal_e/legal_e.htm*.

a. Disputes brought by the United States

(1) China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (DS427)

As discussed in *Digest 2011* at 372-73, the United States requested the establishment of a panel to consider anti-dumping and countervailing duty measures imposed by China on imports of chicken broiler products from the United States. The panel issued its report on August 2, 2013, upholding most of the U.S. claims. As summarized in the 2013 Annual Report at 64, the panel "found MOFCOM's substantive determinations and procedural conduct in levying the duties was inconsistent with China's WTO obligations." China and the United States agreed to a period, ending on July 9, 2014, for implementation of the panel's findings.

(2) Indonesia – Import Restrictions on Horticultural Products, Animals, and Animal Products (DS455 and DS465)

As discussed in the 2013 Annual Report at 72-73, the United States and New Zealand each requested and held consultations with Indonesia in 2013 concerning its non-automatic import licensing requirements and quotas that impede trade in horticultural products, animals, and animal products. The affected products include fruits, vegetables, flowers, dried fruits and vegetables, juices, beef and other animal product imports. Consultations held in September 2013 failed to resolve concerns that the measures appear to be inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 4.2 of the Agreement on Agriculture.

The United States has not requested the establishment of a panel and continues to work with Indonesia to ensure compliance with WTO obligations.

b. Disputes brought against the United States

(1) Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (WT/DS381)

As discussed in *Digest 2011* at 375-76, the WTO panel in this case issued its report in 2011. Both Mexico and the United States appealed and the Appellate Body issued its report in 2012. See *Digest 2012* at 378-79. The 2013 Annual Report at 86 describes subsequent steps in 2013 in response to the recommendations and rulings of the WTO Dispute Settlement Body ("DSB"):

> On July 23, 2013, the Unites States announced that it had fully complied with the DSB's recommendations and rulings through a final rule of the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) that came into effect on July 13, 2013. The final rule enhances the documentary requirements for certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught outside the Eastern Tropical Pacific.
>
> On November 25, 2013, Mexico requested that the DSB establish a panel to determine whether the U.S. dolphin-safe labeling provisions, as amended by the new final rule, are consistent with U.S. WTO obligations. Mexico's request makes claims under Articles 2.1 and 2.2 of the TBT Agreement and Articles III:4 and XXIII:1(b) of the GATT 1994.

(2) Zeroing

As discussed in *Digest 2011* at 377, a DSB panel report issued in 2011 in *Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil (DS382)* found the use of "zeroing" in antidumping reviews by the United States to be inconsistent with WTO obligations. As reported in the 2013 Annual Report at 87, the U.S. Department of Commerce issued notices in the Federal Register in 2012 modifying its procedures in accordance with DSB recommendations regarding "zeroing" and revoked the antidumping duty on the orange juice products from Brazil at issue in this dispute. Accordingly, the United States and Brazil notified the DSB that on February 14, 2013, they had reached a settlement in the dispute.

The United States also informed the DSB in 2013 of U.S. compliance with DSB recommendations in another dispute concerning zeroing: *Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China (DS422)*. See 2013 Annual Report at 93.

(3) Certain Country of Origin Labeling (COOL) Requirements (Canada) (DS384) and (Mexico) (DS386)

As discussed in *Digest 2011* at 376-77, a panel issued its report on disputes brought separately by Canada and Mexico challenging U.S. country of origin labeling ("COOL") requirements. The Appellate Body issued its findings in 2012. See *Digest 2012* at 379. The 2013 Annual Report at 88-89 describes implementation of the DSB's recommendations:

> On May 24, 2013, the United States announced that it had fully implemented the DSB's recommendations and rulings through a new final rule issued by USDA on May 23, 2013. The final rule modifies the labeling provisions for muscle cut covered commodities to require the origin designations to include information about where each of the production steps (i.e., born, raised, slaughtered) occurred and removes the allowance for commingling.

On September 25, 2013, at the request of both Canada and Mexico, the DSB referred the matter to a compliance panel to determine whether the amendments made by the United States are consistent with WTO obligations.

(4) Measures Affecting the Production and Sale of Clove Cigarettes (DS406)

See *Digest 2012* at 381 for a discussion of the Appellate Body's findings in this case. As discussed in the 2013 Annual Report at 91-92, Indonesia continued to challenge U.S. actions with regard to the sale of clove cigarettes in 2013:

> At the DSB meeting on July 23, 2013, the United States stated that it had fully implemented the DSB's recommendations and rulings…, but Indonesia did not agree. On August 12, 2013, Indonesia filed a request for authorization to suspend concessions or other obligations under Article 22.2 of the DSU. In a communication dated August 22, 2013, the United States objected to Indonesia's request, thereby referring the matter to arbitration. The Arbitrator is composed of the members of the original Panel: Mr. Ronald Saborío, Chair; and Mr. Ichiro Araki and Mr. Hugo Cayrús (Uruguay), members. The Arbitrator is expected to issue its award in 2014.

2. WTO Trade Facilitation Agreement

On December 7, 2013, the Ministerial Conference of the WTO in Bali concluded a Trade Facilitation Agreement. The text of the agreement is available at *www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm*. The new agreement was reached after nine years of negotiations and at the end of a five-day ministerial that addressed development of smaller countries, trade streamlining, and food security improvement. The agreement provides for faster and more efficient customs

procedures and for technical assistance and capacity building in this area. See the Office of the U.S. Trade Representative ("USTR") press office blog post on the agreement, available at *www.ustr.gov/about-us/press-office/blog/2013/December/what-theyre-saying-WTO-trade-facilitation-agreement*.

President Obama welcomed the new deal, which he said, "will eliminate red tape and bureaucratic delay for goods shipped around the globe. Small businesses will be among the biggest winners, since they encounter the greatest difficulties in navigating the current system. By some estimates, the global economic value of the new WTO deal could be worth hundreds of billions of dollar." President Obama's statement is available in full at *www.whitehouse.gov/the-press-office/2013/12/08/statement-president-world-trade-organization-trade-agreement*.

D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Free Trade Agreements

a. Trans-Pacific Partnership

On December 10, 2013, a four-day ministerial meeting of the Trans-Pacific Partnership ("TPP") countries concluded with substantial progress being made toward the conclusion of a trade and investment agreement. The statement issued by the ministers and heads of delegation for the TPP countries at the conclusion of their meetings in Singapore on December 10 appears below and is available at *www.ustr.gov/tpp*, along with other information including a briefing by U.S. Trade Representative Michael Froman on December 10, 2013 on the progress made in Singapore on the TPP agreement.

---

* * * *

We, the Ministers and Heads of Delegation for Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam, have just completed a four-day Ministerial meeting in Singapore where we have made substantial progress toward completing the Trans-Pacific Partnership agreement.

Over the course of this meeting, we identified potential "landing zones" for the majority of key outstanding issues in the text. We will continue to work with flexibility to finalize these text issues as well as market access issues.

For all TPP countries, an ambitious, comprehensive and high-standard agreement that achieves the goals established in Honolulu in 2011 is critical for creating jobs and promoting growth, providing opportunity for our citizens and contributing to regional integration and the strengthening of the multilateral trading system.

Therefore, we have decided to continue our intensive work in the coming weeks toward such an agreement. We will also further our consultations with stakeholders and engage in our respective political processes.

Following additional work by negotiators, we intend to meet again next month.

* * * *

b. Trans-Atlantic Trade and Investment Partnership

On March 20, 2013, the Obama administration notified the U.S. Congress of its intent to enter into negotiations on a comprehensive trade and investment agreement with the European Union. The notification letter to Congress is available at *www.ustr.gov/sites/default/files/03202013%20TTIP%20Notification%20Letter.PDF*. On February 13, 2013, President Obama and European Union leaders announced their intent to pursue talks toward a Transatlantic Trade and Investment Partnership ("T-TIP" or "TTIP"). The joint statement from President Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso is available at *www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents*. Three rounds of negotiations were concluded in 2013 on the proposed agreement. A USTR fact sheet issued in June and available at *www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip*, lists key aspects of the agreement:

> T-TIP will be an ambitious, comprehensive, and high-standard trade and investment agreement that offers significant benefits in terms of promoting U.S. international competitiveness, jobs, and growth.
>
> T-TIP will aim to boost economic growth in the United States and the EU and add to the more than 13 million American and EU jobs already supported by transatlantic trade and investment.
>
> In particular, T-TIP will aim to:
>
> - Further open EU markets, increasing the $458 billion in goods and private services the United States exported in 2012 to the EU, our largest export market.
> - Strengthen rules-based investment to grow the world's largest investment relationship. The United States and the EU already maintain a total of nearly $3.7 trillion in investment in each other's economies (as of 2011).
> - Eliminate all tariffs on trade.
> - Tackle costly "behind the border" non-tariff barriers that impede the flow of goods, including agricultural goods.
> - Obtain improved market access on trade in services.
> - Significantly reduce the cost of differences in regulations and standards by promoting greater compatibility, transparency, and

cooperation, while maintaining our high levels of health, safety, and environmental protection.

- Develop rules, principles, and new modes of cooperation on issues of global concern, including intellectual property and market-based disciplines addressing state-owned enterprises and discriminatory localization barriers to trade.
- Promote the global competitiveness of small- and medium-sized enterprises.

On April 25, 2013, Under Secretary of State for Economic Growth, Energy, and the Environment Robert D. Hormats delivered remarks on TTIP at Johns Hopkins University's Nitze School of Advanced International Studies ("SAIS"). His remarks, excerpted below, are available at *http://iipdigital.usembassy.gov/st/english/texttrans/2013/04/20130425146420.html#axzz2tuI3ybjB*.

---

* * * *

President Obama's announcement in the State of the Union address of the intention of the United States to negotiate a Transatlantic Trade and Investment Partnership, or TTIP, heralds a new era in the transatlantic relationship. The TTIP—if it works—will be a challenge, but one worth undertaking.

TTIP has the potential to be an historic agreement on many levels. Its scope is considerable. The TTIP seeks to create a more open market for 800 million consumers encompassing both sides of the Atlantic. And it will be very different from any trade agreement we have ever negotiated.

It will seek to break new ground by addressing a multitude of heretofore unaddressed non-tariff barriers, setting the stage for convergence between the United States and the EU on key standards and regulations, and establishing high quality norms and practices that can spread to other markets. It is also an opportunity to reaffirm and reinforce the strong economic, political, social and values we share with Europe.

Much as NATO was the glue that tied the United States and Europe together during the Cold War, TTIP can reflect and promote shared transatlantic interests and values that will bind us together more closely in the coming decades of the 21st century.

* * * *

So, we are on the cusp of beginning negotiations with the European Union on the Transatlantic Trade and Investment Partnership. This is a historically important project. It is also one that many previously thought was not possible. Some even argued that it was not even worth trying for, given the political, economic, regulatory, and cultural challenges on both sides of the Atlantic. And, some questioned, given the increasing role of Asia, why we should spend the time and effort on major trade negotiations with Europe.

In this context, I'd like to discuss two key considerations.

First: the rebalancing, or "pivot," of U.S. foreign and economic policy to Asia has received much attention of late. But, as Vice President Biden remarked in Munich in February, our engagement with Asia does not come at Europe's expense. Indeed, the Vice President noted that it is profoundly in Europe's interest for the United States to engage more broadly with the world, and we should be doing many more of these things fully and actively together.

There is no denying the economic importance of Asia. It is an enormous economic priority for the United States—as it is for Europe. Indeed, I believe that both Europe and the United States will be in a stronger position to meet the competitive challenges of Asia if we have stronger economic ties with one another and if we agree on high common standards.

And second, strengthened economic ties between the United States and the European Union—and the benefits they produce for both of our economies—will enhance our ability to build stronger relationships with emerging economies in Asia and elsewhere around the world—relationships that support high quality norms and rules in the global economic system.

Why TTIP Can Succeed Now

As I noted a moment ago, TTIP is a mammoth undertaking. For decades there has been skepticism among Americans as to whether trade agreements benefitted the United States and whether the United States has the competitive strength to benefit from them. That said, however, Americans should approach both the TTIP and TransPacific Partnership—TPP—with a high degree of confidence.

- First, the Obama Administration has demonstrated that it can negotiate agreements that reflect the interests of a full range of American stakeholders. We have strengthened, and last year implemented, three major free trade agreements with Korea (KORUS), Columbia and Panama.
- Second, the administration has paid great attention to ensuring that our trading partners adhere to their commitments they make in these agreements. Moreover, we have strongly advocated for the interests of American companies when they encounter difficulties in any part of the world. We in the State Department have made advocacy in behalf of U.S. business and creating a level playing field for our companies a top priority.
- Third, the U.S. economy is growing steadily and creating private sector jobs here at home at a more rapid rate including, and importantly, in manufacturing—where jobs are beginning to return to the United States. March non-farm employment was up by 88,000, and we've enjoyed average monthly job growth of 169,000 over the past twelve months.
- Fourth, the oil and gas boom we are now enjoying has had profoundly positive economic and competitive effects. It improves our trade balance, puts more money in the hands of Americans to spend at home, improves our manufacturing capabilities, creates new export prospects, and makes the United States a more attractive place to invest.
- Fifth, we are finally seeing a real turnaround in American housing market, after a very difficult period—producing more stability for our overall economy and giving people more confidence about their own economic stability.
- Sixth, continued entrepreneurialism and innovation in the American economy is producing more and better goods and services—keeping our economy dynamic and highly competitive.
- Seventh, the President's successful National Export Initiative has helped American companies take better advantage of access to foreign markets.

We also have had experience in a wide range of cooperative activities with the European Union on regulation and standards that will inform our upcoming TTIP negotiations.

The Transatlantic Economic Council, or TEC, continues to work in areas such as e-vehicles, e-health, nanotechnology and raw materials, to name a few, that create deeper transatlantic economic ties, tackle impediments to commerce, and shape global standards.

Benefits of TTIP

With the Transatlantic Trade and Investment Partnership, and all the enthusiasm it engendered from leaders on both sides, we hope to build on the important progress of the TEC in a larger and more systematic approach.

We aim to address entrenched obstacles to U.S.-EU trade liberalization—concerns over agricultural market access, risk assessment, management of sanitary and phytosanitary measures, and technical barriers to trade, among others.

A significant portion of the benefit of a potential transatlantic agreement turns on the ability of the United States and the EU to pursue new and innovative approaches to non-tariff barriers, with the aim of moving toward a more integrated transatlantic marketplace. This larger and more systematic approach that we are undertaking now—if it continues to be enthusiastically supported by leaders on both sides of the Atlantic—can make a big difference. And here let me emphasize that—as with past trade negotiations—the success of TTIP will depend on full-throated, sustained and enthusiastic leadership of the President and of his counterparts in Europe. And I believe we have both. It will also depend on very close cooperation with the Congress and constituencies throughout the United States. The same types of coordination must take place within Europe utilizing Europe's institutional structures. I believe these are also well in train.

None of this will be easy. And both sides will have to be highly innovative. The U.S. and EU will need to explore new means of addressing "behind-the-border" obstacles to trade—through provisions to reduce unnecessary regulatory costs and administrative delays, while maintaining appropriate health, safety, and environmental protections.

A key shared objective should be to prevent non-tariff barriers from limiting the capacity of U.S. and EU firms to innovate and compete in global markets. The two sides should also seek to strengthen upstream cooperation by regulators and increase cooperation on standards-related issues.

Both we and the EU agree on the importance of promoting greater compatibility to resolve concerns and reduce burdens arising from existing regulations—possibly through such things as equivalence, mutual recognition, or other agreed means.

Importance of evidence-based regulations

Importantly, we seek regulatory compatibility that is based on transparent and evidence-based consultations and that will reduce burdens on both sides—while protecting consumer health, safety and the environment.

While sanitary and phyto-sanitary – or SPS — issues remain highly contentious, TTIP negotiations provide a real opportunity to break down some of the barriers that have kept us from taking full advantage of trade opportunities in the past. Our aim is for commitments to base SPS standards on science and international standards with an emphasis on scientific risk assessments. We also seek agreement to apply these only to the extent necessary to protect human, animal or plant life or health, to develop such measures in a transparent manner, and to establish an on-going mechanism for improved dialogue and cooperation addressing bilateral SPS issues.

It will be essential for us to make significant progress on these issues and other key matters to reach a TTIP outcome that earns support from key stakeholders in the United States and in the EU.

Role of the State Department

The State Department is committed to working closely with our colleagues in USTR, which has the lead negotiating role in this effort. I used to be Deputy USTR in an earlier incarnation in government, and I work closely with USTR on many issues today. I have great confidence in their negotiating skills and in their commitment to the success of TTIP. We at State aim to play a robust and supportive role in these negotiations.

We have a considerable number of people with expertise not only in the traditional trade issues that will be discussed, but also in key 21st century areas that will be high on the agenda such as IPR, the environment, labor, investment, and rules related to state owned enterprises. We also have extensive legal and political expertise, built up over decades, with respect to EU member states and EU institutions.

And we will use the unique on-the-ground resources we have at our Embassies in the EU member states, and our mission in Brussels, to engage the EU Commission and proactively reach out to EU member state governments, parliamentarians, and other stakeholders in Europe to discuss the mutual goals and the benefits we see in TTIP.

Impact on Emerging Economies and the Global Trading System

Our objective in pursuing the TTIP is not only to strengthen economic ties with Europe—although that is our central objective. We see this as a way to strengthen economic ties with the rest of the world as well. This is an important dimension of these negotiations. TTIP could contribute to rules and disciplines between the United States and the EU that—if more broadly adopted—could be a catalyst for other trade liberalization initiatives. It could help shape practices, and norms throughout the global economy, strengthening the rules-based trading system from which all economies benefit.

Indeed for businesses in many emerging countries, the benefits of common U.S.-EU standards resulting from the TTIP could be considerable. Instead of manufacturing to conform to both EU and U.S. standards, their production would have to conform to only one standard to the extent they want to export to these markets.

And—recognizing the costs of conforming with both Euro-American standards and their own national standards, many companies in these countries will see it in their interest to press their own governments to accept the Euro-American standards. If they do so, our own companies would benefit greatly—because that would create a more level playing field in those emerging markets.

But this will not come automatically. The United States and the EU need to build on our shared economic interests and values in order to collectively demonstrate our support for them. This will give us a stronger platform to seek support for global acceptance of the key rules, norms and practices that have been so important in the success of the global economy we have today—one that has benefitted our own economy and many emerging economies as well.

We generally think of regional preferential trade agreements as having trade diversion effects, but this is not a very useful way of thinking about this one. Here the thrust will be a desire for deeper integration.

Tariffs between the U.S. and EU are already very low. The majority of the subjects the U.S. and EU agreement would cover go well beyond tariff commitments to address non-trade barriers, and other policy areas that may not be covered by existing WTO agreements. These include competition policy and investment—that are essential to the effective functioning of integrated supply chains.

It follows that the U.S.-EU agreement will result in little trade diversion. In fact, it can complement and reinforce the multilateral system, and contribute to the development of global rules in areas where progress at the multilateral level has not been possible in the past. So down the road, the TTIP has the potential to create new international standards that could become the building blocks for future progress in the WTO.

* * * *

At the conclusion of the third round, United States Trade Representative Michael Froman issued the following statement, available at *www.ustr.gov/about-us/press-office/press-releases/2013/December/Statement-by-Ambassador-Froman-on-Third-Round-TTIP-Negotiations*:

> As 2013 comes to a close, I'm pleased with the progress we've made in these early months of the T-TIP negotiations. In addition to the three rounds of negotiations we have conducted since we launched the negotiations in June, our teams have been engaging with each other between rounds, and working hard back home to prepare for productive meetings. It is a measure of progress that we are firmly in the phase of discussing proposals on core elements of each of the main negotiating areas, as well as beginning to confront and reconcile our differences on many important issues. We have a lot of work to do in 2014, but I am optimistic about what we'll be able to accomplish in the coming year. There is strong conviction on both sides that we have the opportunity in T-TIP to make our trade relationship a substantially stronger driver of transatlantic jobs, growth, and competitiveness.

The fourth round of negotiations was planned for the first quarter of 2014, with further engagement beforehand. For information on T-TIP, see *www.ustr.gov/ttip*.

c. U.S.-Colombia Trade Promotion Agreement

(1) Environmental Cooperation Agreement

On April 19, 2013, the United States and Colombia signed the U.S.-Colombia Environmental Cooperation Agreement ("ECA"). The ECA complements the Environment Chapter of the U.S.-Colombia Trade Promotion Agreement ("TPA") which was signed into law in the United States in 2011 and entered into force in 2012. See *Digest 2011* at 392-93 and *Digest 2012* at 392-93. As explained in a State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/04/207757.htm*:

> …the ECA will strengthen the ties between the United States and Colombia by creating new opportunities to work together to protect the environment and conserve natural resources. The ECA establishes a framework for environmental

> cooperation and will help ensure that trade and environmental policies are mutually supportive.
>
> The ECA also provides for a new Environmental Cooperation Commission, a policy-level body that will oversee the implementation of the Agreement. The Commission will define a work program to establish specific goals, objectives, and areas for cooperation that are reflective of both countries' national environmental priorities.

(2) Implementing regulations

Effective October 31, 2013, the U.S. Customs and Border Protection regulations were amended to implement the preferential tariff treatment and other customs-related provisions of the United States-Colombia Trade Promotion Agreement. 78 Fed. Reg. 60,191 (Oct. 1, 2013).

d. Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR")

In the first labor case brought by the United States under a trade agreement, the United States and Guatemala reached an agreement to suspend their dispute on April 11, 2013. In 2010, the United States had requested consultations with Guatemala under article 16.6.1 of the CAFTA-DR regarding apparent violations of Guatemala's obligations on labor rights. See *Digest 2010* at 492-94. After consultations in 2010 and a meeting of the CAFTA-DR Free Trade Commission in 2011 failed to resolve the dispute, the United States filed its request for arbitration on August 9, 2011. See *Digest 2011* at 384.

The suspension agreed in 2013 is intended to permit Guatemala to implement an 18-point Enforcement Plan negotiated by the parties. An April 30, 2013 USTR blog post summarizes the Enforcement Plan as follows:

> It includes concrete actions with specific time frames that Guatemala will implement within six months to improve labor law enforcement. Under the Enforcement Plan, Guatemala has committed to strengthen labor inspections, expedite and streamline the process of sanctioning employers and ordering remediation of labor violations, increase labor law compliance by exporting companies, improve the monitoring and enforcement of labor court orders, publish labor law enforcement information, and establish mechanisms to ensure that workers are paid what they are owed when factories close.

More information about the dispute and terms of the agreement is available at *www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr*. USTR issued a fact sheet, excerpted below and available at

www.ustr.gov/about-us/press-office/fact-sheets/2013/april/guatemala-labor-enforcement, in which it lists key actions contained in the Enforcement Plan.

---

* * * *

STRENGTHENING THE MINISTRY OF LABOR TO ENFORCE LABOR LAWS

Sanctioning Employers and Ordering Remediation: Guatemala will pursue legislation to establish an expedited process for labor courts to adopt fines recommended by the Ministry of Labor and Social Protection for labor law violations, and to order employers to remediate such violations. The legislation, when enacted, will reduce the time allowed for the Labor Ministry to transfer cases to the courts from six months to five days, and will require the courts to adopt and impose the Labor Ministry's fine recommendation, unless unreasonable.

Additional Resources for Inspections: Guatemala, on an ongoing basis, will provide the resources necessary for the Labor Ministry's effective enforcement of labor laws. In 2012, the Government of Guatemala provided additional resources to the Labor Ministry, including hiring 100 new inspectors and five additional attorneys, and acquiring 20 new vehicles for labor inspectors to conduct inspections throughout Guatemala.

Ensuring Access to Worksites for Labor Inspectors: Guatemala will issue an agreement between the Ministry of Labor and the Ministry of Interior ensuring police assistance to facilitate labor inspector access to worksites.

ENSURING PAYMENT TO WORKERS WHEN FACTORIES SUDDENLY CLOSE

Early Warning System: Guatemala will provide relevant agencies with direct access to each other's databases so that they may immediately share new information related to a company's operating status or indicators of impending company closure.

Rapid Response Team to Prevent Factory Closures: Guatemala has established a Rapid Response Team comprised of the Ministry of Economy, Ministry of Interior, the Tax Authority, the Social Security Institute, and the Judiciary to oversee export companies that receive special tax benefits. The Rapid Response Team will verify the imminent closure of a company and work with the employer to attempt to prevent closure and ensure payments owed to workers if the closure cannot be prevented.

Ensuring Workers Get Paid: Guatemala will issue a Ministerial Accord requiring the Labor Ministry to proactively intervene upon receiving information or indicators of a potential closure and take the necessary steps to obtain the payments owed to workers if that company closes, including by petitioning the relevant labor court to embargo or seize assets. This applies to all sectors.

IMPROVING ENFORCEMENT OF COURT ORDERS

Verifying Employer Compliance: Through the newly created "Verification Unit" within the Judiciary, Guatemala will verify timely compliance by employers with labor court orders. The Verification Unit will place particular emphasis on court orders to reinstate illegally fired workers.

Ensuring Criminal Prosecution for Employers who Fail to Comply: Guatemala will train labor court judges and other court personnel and develop the legal procedures necessary to help ensure effective criminal prosecution of employers who fail to comply with labor court orders related to the protection of workers' rights of association, right to organize, and right to bargain collectively.

Monitoring Enforcement of Labor Court Orders: Guatemala will conduct a systematic review of all labor courts and will apply disciplinary procedures to judges who fail to take measures required by law to enforce court orders.

ENSURING EXPORT COMPANIES COMPLY WITH LABOR LAWS

Monitoring Export Companies: The Labor Ministry will conduct annual inspections of all companies that receive tax and tariff benefits under special provisions of Guatemalan law (Decree 29-89) to confirm compliance with labor laws and reject new applications for benefits received from labor law violators.

Revoking Tax Benefits: Guatemala will issue a Government Accord requiring that the Ministry of Economy revoke tax and tariff benefits within five days of receiving notice from a labor court that an employer violated a labor law and failed to comply with the labor court's resolution.

Ensuring Worker Payments: With the help of an international institution, Guatemala will work to develop a contingency mechanism based on the extent of potential need to ensure payments owed to workers when Decree 29-89 companies close.

TRANSPARENCY AND COORDINATION

Stakeholder Input: Guatemala will publicize the Enforcement Plan and meet with the Tripartite Commission and other parties, as appropriate, to review its implementation.
Publication of Enforcement Statistics: Guatemala will publish data concerning labor complaints, inspections, violations, and court orders.

* * * *

2. Trade Legislation and Trade Preferences

a. Generalized System of Preferences

(1) Bangladesh

On June 27, 2013, President Obama issued a proclamation modifying duty-free treatment under the Generalized System of Preferences ("GSP") program for Bangladesh, as well as taking other actions related to trade preferences. 78 Fed. Reg. 39,949 (Jul. 2, 2013). Congress created the GSP program in the Trade Act of 1974, 19 U.S.C. 2461 et seq. ("the 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 Bangladesh's designation as a GSP beneficiary developing country should be suspended in accordance with sections 502(b)(2)(G) and 502(d)(2) of the Act, "because it has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country." The President took this step as part of an effort to address worker safety concerns in Bangladesh which became the subject of worldwide attention after two accidents in Bangladesh causing mass casualties: the

November 2012 Tazreen Fashions factory fire and the April 2013 Rana Plaza building collapse.

A July 19, 2013 State Department media note elaborates on the efforts by the United States—in conjunction with the suspension of GSP benefits—to work with the government of Bangladesh to ameliorate working conditions in the country. The media note, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2013/07/212209.htm*.

---

* * * *

At the time of the announcement [regarding GSP], the Administration provided the Government of Bangladesh with an action plan which, if implemented, could provide a basis for the President to consider the reinstatement of GSP trade benefits.

Today, the Administration is making this action plan public as a means to reinforce and support the efforts of all international stakeholders to promote improved worker rights and worker safety in Bangladesh. On the basis of this action plan, the United States looks forward to continuing to work with Bangladesh on the actions it needs to take in relation to potential reinstatement of GSP benefits.

The United States is also pleased to associate itself with the July 8, 2013 European Union (EU)-Bangladesh-International Labor Organization (ILO) *Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-made Garment and Knitwear Industry in Bangladesh* (Compact). The United States looks forward to working as a full partner with the EU, Bangladesh, and the ILO to implement the goals of the Compact, many of which are broadly consistent with the GSP action plan we are releasing today. At the same time, the United States will pursue additional concrete actions required under the GSP action plan, such as increasing sanctions for labor violations sufficient to deter future misconduct, publicly reporting on the outcome of union registration applications, establishing an effective complaint mechanism for labor violations, and ending violence and harassment of labor activists and unions.

In addition to these complementary, government-to-government efforts, the Administration recognizes the importance of efforts by retailers and brands to ensure that the factories from which they source are compliant with all fire and safety standards in Bangladesh. We urge the retailers and brands to take steps needed to help advance changes in the Bangladeshi garment sector and to work together and with other stakeholders to ensure that their efforts are coordinated and sustained.

The Administration looks forward to continuing its engagement with the Government of Bangladesh and all stakeholders in order to effect positive change for Bangladeshi workers and to help ensure that the recent tragedies we have witnessed do not recur.

BANGLADESH ACTION PLAN 2013

The United States Government encourages the Government of Bangladesh (GOB) to take significant actions to provide a basis for reinstating Bangladesh's Generalized System of Preferences (GSP) benefits, including by implementing commitments under the "National Tripartite Plan of Action on Fire Safety and Structural Integrity" and taking the following actions:

Government Inspections for Labor, Fire and Building Standards

- Develop, in consultation with the International Labor Organization (ILO), and implement in line with already agreed targets, a plan to increase the number of government labor, fire and building inspectors, improve their training, establish clear procedures for independent and credible inspections, and expand the resources at their disposal to conduct effective inspections in the readymade garment (RMG), knitwear, and shrimp sectors, including within Export Processing Zones (EPZs).
- Increase fines and other sanctions, including loss of import and export licenses, applied for failure to comply with labor, fire, or building standards to levels sufficient to deter future violations.
- Develop, in consultation with the ILO, and implement in line with already agreed targets, a plan to assess the structural building and fire safety of all active RMG/knitwear factories and initiate remedial actions, close or relocate inadequate factories, where appropriate.
- Create a publicly accessible database/matrix of all RMG/knitwear factories as a platform for reporting labor, fire, and building inspections, including information on the factories and locations, violations identified, fines and sanctions administered, factories closed or relocated, violations remediated, and the names of the lead inspectors.
- Establish directly or in consultation with civil society an effective complaint mechanism, including a hotline, for workers to confidentially and anonymously report fire, building safety, and worker rights violations.

Ready Made Garments (RMG)/Knitwear Sector

- Enact and implement, in consultation with the ILO, labor law reforms to address key concerns related to freedom of association and collective bargaining.
- Continue to expeditiously register unions that present applications that meet administrative requirements, and ensure protection of unions and their members from anti-union discrimination and reprisal.
- Publicly report information on the status and final outcomes of individual union registration applications, including the time taken to process the applications and the basis for denial if relevant, and information on collective bargaining agreements concluded.
- Register non-governmental labor organizations that meet administrative requirements, including the Bangladesh Center for Worker Solidarity (BCWS) and Social Activities for the Environment (SAFE). Drop or expeditiously resolve pending criminal charges against labor activists to ensure workers and their supporters do not face harassment or intimidation. Advance a transparent investigation into the murder of Aminul Islam and report on the findings of this investigation.
- Publicly report on the database/matrix identified above on anti-union discrimination or other unfair labor practice complaints received and labor inspections completed, including information on factories and locations, status of investigations, violations identified, fines and sanctions levied, remediation of violations, and the names of the lead inspectors.
- Develop and implement mechanisms, including a training program for industrial police officers who oversee the RMG sector on workers' freedom of association and assembly, in coordination with the ILO, to prevent harassment, intimidation and violence against labor activists and unions.

Export Processing Zones

- Repeal or commit to a timeline for expeditiously bringing the EPZ law into conformity with international standards so that workers within EPZ factories enjoy the same freedom of

association and collective bargaining rights as other workers in the country. Create a government-working group and begin the repeal or overhaul of the EPZ law, in coordination with the ILO.

- Issue regulations that, until the EPZ law has been repealed or overhauled, will ensure the protection of EPZ workers' freedom of association, including by prohibiting "blacklisting" and other forms of exclusion from the zones for labor activities.
- Issue regulations that, until the EPZ law is repealed or overhauled, will ensure transparency in the enforcement of the existing EPZ law and that require the same inspection standards and procedures as in the rest of the RMG sector.

Shrimp Processing Sector

- Actively support ILO and other worker-employer initiatives in the shrimp sector, such as the March 2013 Memorandum of Agreement, to ensure the strengthening of freedom of association, including addressing anti-union discrimination and unfair labor practices. Publicly report on anti-union discrimination or other unfair labor practice complaints received and labor inspections completed, including information on factories and locations, status of investigations, violations identified, fines and sanctions levied, remediation of violations, and the names of the lead inspectors.

* * * *

(2) Annual review

The decision to suspend GSP benefits for Bangladesh was one of several outcomes of the annual review of the GSP program, concluded in June 2013. See USTR press release, available at *www.ustr.gov/about-us/press-office/press-releases/2013/june/gsp-review-outcome*. Other outcomes include the determinations by President Obama: 1) to grant waivers of competitive need limitations ("CNLs") for over 100 products from 14 countries; and 2) that two products from two countries—a corn product from Brazil and passenger tires from Indonesia—should no longer be eligible for duty-free treatment under the GSP program because the relevant country is sufficiently competitive and exceeded CNLs for the product.

(3) Lapse of GSP

Legal authorization of the GSP program expired on July 31, 2013. The U.S. Congress considered extending the authorization of GSP but had not done so before the end of 2013. For more information, see USTR's GSP website, *www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp*.

b. AGOA

On December 23, 2013, President Obama issued a proclamation, designating Mali as a beneficiary sub-Saharan African country pursuant to the African Growth and Opportunity Act ("AGOA"). 78 Fed. Reg. 80,415 (Dec. 31, 2013). The President had terminated Mali's designation as a beneficiary sub-Saharan African country in 2012. See

Digest 2012 at 386. The determination to restore Mali's designation was based on actions Mali had taken over the past year.

3. Arbitration and Related Actions Arising from the Softwood Lumber Agreement

As discussed in *Digest 2012* at 386, the United States and Canada agreed to extend the 2006 Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada ("SLA"). However, a dispute arose between the parties as to whether Canada's obligation to collect the Compensatory Adjustments awarded by the Tribunal in London Court of Arbitration ("LCIA") Arbitration No. 81010 should cease upon the expiration of the original agreement. On September 30, 2013, Canada and the United States submitted a joint request for arbitration in the LCIA, seeking to have the original tribunal in LCIA Arbitration No. 81010 resolve the parties' dispute as to interpreting the Award. The joint request is available at *www.ustr.gov/sites/default/files/Joint%20Request%20for%20Arbitration.pdf*.*

E. INTELLECTUAL PROPERTY

1. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

On June 27, 2013 in Marrakesh, the United States along with other member states of the World Intellectual Property Organization ("WIPO") formally adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The Marrakesh Treaty was the outcome of a WIPO Diplomatic Conference hosted by the Kingdom of Morocco. The full text of the Treaty is available at *www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323*. The Marrakesh Treaty obliges nations to establish copyright exceptions for people with print disabilities and aims to increase the international exchange of accessible-format copies of published works. The U.S. Patent and Trademark Office issued a press release on the adoption of the Treaty, available at *www.uspto.gov/news/pr/2013/13-21.jsp*, as did the U.S. Copyright Office, available at *www.copyright.gov/newsnet/2013/510.html*. The White House statement on the adoption of the Marrakesh Treaty is available at *www.whitehouse.gov/blog/2013/06/28/landmark-treaty-visually-impaired*. The U.S. closing statement at the diplomatic conference is available at *http://geneva.usmission.gov/2013/06/27/wipo-marrakesh/* and includes the following:

* Editor's Note: On April 2, 2014, the tribunal issued its decision that the obligation to collect Compensatory Adjustments applied only until the expiration date of the SLA as it stood at the time of the original award (October 12, 2013). The award is available at *www.international.gc.ca/controls-controles/assets/pdfs/softwood/lc-05.pdf*.

> …We are proud to have participated in a Diplomatic Conference that has produced … an international agreement to significantly improve access to printed works for persons with print disabilities while preserving the integrity of the international copyright system.
>
> …[W]e have always said that crafting an international instrument on copyright exceptions for persons with print disabilities is just one step on the road to ensuring that the blind and others with print disabilities have a chance to get the information and education they need and to live independently as full citizens in their communities.
>
> …
>
> But our efforts today are really just the beginning of a new chapter in the struggle of the blind. Not only will Member States have to ratify this treaty, but scores of countries need to join the approximately 60 Member States that have clear exceptions in their national copyright laws for the blind; additional authorized entities will have to be established and capacity built; confidence in cross-border exchange of accessible format copies will have to increase as the new international legal framework sets in.

The United States signed the Marrakesh Treaty in Geneva on October 2, 2013.

2. Special 301 Report

In May 2013, the Office of the U.S. Trade Representative ("USTR") issued the 2013 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 2013 Report designates Ukraine a Priority Foreign Country ("PFC") under the Special 301 statute due to severe deterioration of enforcement in the areas of government use of pirated software and piracy over the Internet, as well as denial of fair and equitable market access through the authorization and operation of copyright collecting societies. The Report also conveys concerns about misappropriation of trade secrets in China, while recognizing incremental progress on a few of China's many other significant IPR and market access challenges. In 2013, USTR added Barbados, Bulgaria, Paraguay, and Trinidad and Tobago to the Watch List due to specific problems identified in the Report. And USTR announced that although El Salvador and Spain are not listed in the Report, USTR will conduct out-of-cycle reviews to assess progress on IPR challenges identified in this year's reviews of those countries. Canada moved off the Special 301 Priority Watch List to the Watch List in recognition of significant progress on copyright issues, while USTR continues to work with Canada to address several remaining IPR concerns. And Brunei Darussalam and Norway also were removed from the Special 301 Watch List. A total of ten countries—Algeria, Argentina,

Chile, China, India, Indonesia, Pakistan, Russia, Thailand, and Venezuela—are on the Priority Watch List and 30 are on the Watch List. USTR will seek to engage intensively with these countries, as appropriate, during the coming year. See *Digest 2007* at 605–7 for additional background on the watch lists.

The full text of the Report is available at *www.ustr.gov/about-us/press-office/reports-and-publications/2013/2013-special-301-report*. For a list of the countries identified in the 2013 Report, see USTR's press release, available at *www.ustr.gov/about-us/press-office/press-releases/2013/may/ustr-releases-annual-special-301-report*.

3. U.S. Joins Patent Law Treaty as a Contracting Party

On September 18, 2013, U.S. Ambassador to the UN in Geneva Betty King deposited the U.S. instrument of ratification for the Patent Law Treaty ("PLT") with the Director General of the World Intellectual Property Organization ("WIPO"), Dr. Francis Gurry. On December 18, 2013, the United States became a Contracting Party, bringing the total number of Contracting Parties to the PLT to 36. "The Treaty will benefit not only U.S. patent applicants and patentees but those of all PLT Contracting Parties looking to protect their inventions, efficiently and cost-effectively," said Ambassador King. The announcement of the U.S. joining the PLT is available on the website of the U.S. Mission to Geneva at *http://geneva.usmission.gov/2013/09/18/patent-law-treaty-wipo/*. As explained in that announcement, "[t]he PLT harmonizes certain patent application procedures in order to reduce or eliminate formalities and the potential for loss of rights." President Obama signed the Patent Law Treaties Implementation Act of 2012 on December 18, 2012, and it took effect on December 18, 2013.

4. U.S. Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons*

On March 19, 2013, the U.S. Supreme Court issued its decision in *Kirtsaeng v. John Wiley & Sons*, 133 S.Ct. 1351 (2013). Mr. Kirtsaeng, the petitioner, had resold in the United States copies of texts published abroad by respondent John Wiley & Sons, which had been purchased by his relatives in Thailand and sent to him while he studied in the United States. Wiley claimed copyright infringement based on the prohibition in Section 602(a)(1) of the Copyright Act on importation into the United States without the copyright owner's permission of works acquired outside of the United States. The district court and appeals court both agreed with Wiley. The United States filed an amicus brief in the Supreme Court in support of affirming the appeals court. The U.S. brief is available at *www.state.gov/s/l/c8183.htm*. The petitioner asserted that he was justified under the "first sale" doctrine, also codified in the Copyright Act in Section 109, which allows the owner of a copy "lawfully made under this title" to sell or otherwise dispose of that copy. Respondent argued, as did the U.S. amicus brief, that "under this title" restricts application of the first sale doctrine to copies made in the United States.

A majority of the Supreme Court disagreed, reversing and remanding. The introduction to the majority opinion of the Supreme Court appears below.

---

* * * *

Section 106 of the Copyright Act grants "the owner of copyright under this title" certain "exclusive rights," including the right "to distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership." 17 U.S.C. § 106(3). These rights are qualified, however, by the application of various limitations set forth in the next several sections of the Act, §§ 107 through 122. Those sections, typically entitled "Limitations on exclusive rights," include, for example, the principle of "fair use" (§ 107), permission for limited library archival reproduction, (§ 108), and the doctrine at issue here, the "first sale" doctrine (§ 109).

Section 109(a) sets forth the "first sale" doctrine as follows:

> "Notwithstanding the provisions of section 106(3) [the section that grants the owner exclusive distribution rights], the owner of a particular copy or phonorecord *lawfully made under this title* ... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." (Emphasis added.)

Thus, even though § 106(3) forbids distribution of a copy of, say, the copyrighted novel Herzog without the copyright owner's permission, § 109(a) adds that, once a copy of Herzog has been lawfully sold (or its ownership otherwise lawfully transferred), the buyer of that *copy* and subsequent owners are free to dispose of it as they wish. In copyright jargon, the "first sale" has "exhausted" the copyright owner's § 106(3) exclusive distribution right.

What, however, if the copy of Herzog was printed abroad and then initially sold with the copyright owner's permission? Does the "first sale" doctrine still apply? Is the buyer, like the buyer of a domestically manufactured copy, free to bring the copy into the United States and dispose of it as he or she wishes?

To put the matter technically, an "importation" provision, § 602(a)(1), says that

> "[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies ... of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies ... *under section 106*...." 17 U.S.C. § 602(a)(1) (2006 ed., Supp. V) (emphasis added).

Thus § 602(a)(1) makes clear that importing a copy without permission violates the owner's exclusive distribution right. But in doing so, § 602(a)(1) refers explicitly to the *§ 106(3)* exclusive distribution right. As we have just said, § 106 is by its terms "[s]ubject to" the various doctrines and principles contained in §§ 107 through 122, including § 109(a)'s "first sale" limitation. Do those same modifications apply—in particular, does the "first sale" modification apply—when considering whether § 602(a)(1) prohibits importing a copy?

In *Quality King Distributors, Inc. v. L'anza Research Int'l, Inc.,* 523 U.S. 135, 145, 118 S.Ct. 1125, 140 L.Ed.2d 254 (1998), we held that § 602(a)(1)'s reference to § 106(3)'s exclusive distribution right incorporates the later subsections' limitations, including, in particular, the "first sale" doctrine of § 109. Thus, it might seem that, § 602(a)(1) notwithstanding, one who buys a

copy abroad can freely import that copy into the United States and dispose of it, just as he could had he bought the copy in the United States.

But *Quality King* considered an instance in which the copy, though purchased abroad, was initially manufactured in the United States (and then sent abroad and sold). This case is like *Quality King* but for one important fact. The copies at issue here were manufactured abroad. That fact is important because § 109(a) says that the "first sale" doctrine applies to "a particular copy or phonorecord *lawfully made under this title*." And we must decide here whether the five words, "lawfully made under this title," make a critical legal difference.

Putting section numbers to the side, we ask whether the "first sale" doctrine applies to protect a buyer or other lawful owner of a copy (of a copyrighted work) lawfully manufactured abroad. Can that buyer bring that copy into the United States (and sell it or give it away) without obtaining permission to do so from the copyright owner? Can, for example, someone who purchases, say at a used bookstore, a book printed abroad subsequently resell it without the copyright owner's permission?

In our view, the answers to these questions are, yes. We hold that the "first sale" doctrine applies to copies of a copyrighted work lawfully made abroad.

* * * *

F. OTHER ISSUES

1. World Telecommunication/Information and Communication Technology Policy Forum

In May 2013, the United States sent a delegation to the World Telecommunication/Information and Communication Technology Policy Forum ("WTPF") in Geneva, Switzerland. As summarized in a May 17, 2013 State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/05/209591.htm*:

> Discussions were conducted by the International Telecommunication Union and focused on adoption of Internet Protocol version 6 (iPv6), promoting Internet Exchange Points to advance Internet connectivity, and supporting the multi-stakeholder model of Internet governance.
>
> The forum sought to adopt six consensus-based opinions on Internet issues, validating the multi-stakeholder process which brought together governments, the technical community, civil society, and academia. The six opinions form a common denominator for future discussions on Internet governance.

2. Issuance of Presidential Permit for New International Trade Crossing in Detroit

On April 12, 2013, the Department of State issued a Presidential Permit to the State of Michigan for the construction, connection, operation, and maintenance of a bridge linking Detroit, Michigan, and Windsor, Ontario. For discussion of litigation arising from

the issuance of the permit, see Chapter 5.A. A State Department media note issued that day explains the basis for granting the permit:

> Under Executive Order 11423, as amended, the Secretary of State may issue a Presidential permit for an international border crossing after finding that such a crossing will serve the national interest. After a thorough review of the Presidential Permit application for the New International Trade Crossing (NITC) that the Department of State received on June 21, 2012, and taking into account the public and inter-agency comments received on the matter, the Department of State determined that the issuance of a Presidential Permit for the NITC would serve the national interest. The Presidential Permit will be published in the Federal Register in the near future.
>
> Consistent with the bilateral Beyond the Border Initiative, this permit contributes to ensuring that our border infrastructure supports increased competitiveness, job creation, and broad-based prosperity in the United States and Canada. The NITC will help to meet future capacity requirements in a critical travel corridor, promote cross-border trade and commerce, and advance our vital bilateral relationship with Canada.

3. Committee on Foreign Investment in the United States

In 2012, as discussed in *Digest 2012* at 397-407, the Committee on Foreign Investment in the United States ("CFIUS") found national security implications in 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. President Obama issued an order pursuant to § 721 of the Defense Production Act of 1950 ("DPA"), 50 U.S.C. App. § 2170, (as amended by the Foreign Investment and National Security Act of 2007 ("FINSA"), Pub. L. No. 110-49, 121 Stat. 246, 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. Ralls Corporation challenged the actions of CFIUS and the President in federal court in the District of Columbia. On February 22, 2013, the district court granted the government's motion to dismiss all but one claim brought by Ralls. *Ralls Corp. v. Committee on Foreign Investment in the United States*, No. 12-1513 (D. D.C. 2013). Specifically, the court reasoned that the claim that the President acted *ultra vires* and the equal protection claim were both barred by the finality provision in the statute. The court also found that challenges to CFIUS actions that preceded the President's order were barred as moot. However, the district court allowed the challenge on due process grounds to proceed. Part I of the opinion's analysis, addressing challenges to the President's order, is excerpted below (with footnotes and citations to the record omitted).

---

* * * *

A. The Court lacks jurisdiction to review Ralls's *ultra vires* claim.

Count III alleges that certain provisions of the Presidential Order exceed the authority granted to the President under section 721. Ralls specifically challenges the provisions of the Presidential Order that:

- require Ralls to remove all items from the relevant properties and prohibit any access to the properties except to remove items;
- prohibit Ralls from selling or transferring any items made by Sany to any third party for use at the properties;
- prohibit Ralls from selling the Project Companies or their assets to any third party until it removes all items from the properties and ensures that CFIUS does not object to the proposed buyer; and
- authorize CFIUS to implement measures it deems necessary and appropriate to verify that operations of the Project Companies are carried out in such a manner as to ensure protection of the national security interests of the United States, such as by requiring the Companies and Project Companies to allow government employees to access their premises to inspect and copy books, accounts, documents; inspect any equipment and technical data, including software; and
- interview officers, or agents of the Companies or Project Companies, anywhere within the United States.

* * * *

2) *The finality provision under section 721 bars the Court's review of Ralls's* ultra vires *claim.*

…And here, the defense contends that the finality provision in section 721 expressly bars all judicial review, including review of the *ultra vires* claim.

The finality provision states, "The actions of the President under paragraph (1) of subsection (d) of this section and the findings of the President under paragraph (4) of subsection (d) of this section shall not be subject to judicial review." 50 U.S.C. app. § 2170(e). The government urges the Court to find the *ultra vires* claim barred from judicial review because "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." Ralls counters that the finality provision does not bar its *ultra vires* claim because the provision, by its express language, applies only to Presidential actions "under" the statute. Therefore, according to Ralls, the Court has jurisdiction to determine whether the actions of the President fell outside the statutory grant of authority. The Court's task is, therefore, to determine whether the finality provision extends so broadly as to eliminate judicial consideration of that question in this case.

The D.C. Circuit has provided some guidance for approaching this type of question. First, courts generally apply a presumption of judicial review when interpreting the language of a finality provision. *Dart v. United States*, 848 F.2d 217, 222 (D.C. Cir. 1988); *Amgen v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004). Under that presumption, a claim is only unreviewable if the government demonstrates "clear and convincing evidence" that Congress intended to restrict

access to judicial review. *Dart*, 848 F.2d at 221–23, citing *Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667, 671 (1986).

Courts next look to the language, structure, and legislative history of the statute to construe a finality provision's scope. *Amgen*, 357 F.3d at 112, citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 206 (1994). The D.C. Circuit has acknowledged that this analysis is "intertwined" with the merits determination. *Amgen*, 357 F.3d at 113. "If a no-review provision shields particular types of [executive] action, a court may not inquire whether a challenged [executive] decision is arbitrary, capricious, or procedurally defective, but it must determine whether the challenged . . . action is of the sort shielded from review." *Id.*

* * * *

…the finality clause in section 721 contains an inherent limitation: it only withdraws judicial review over the President's actions taken "under paragraph (1) of subsection (d) of this section." 50 U.S.C. app. § 2170(e). Paragraph (1) of subsection (d), in turn, authorizes the President, once he has made the requisite findings, 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." *Id.* § 2170(d)(1). On its face, this provision leaves open a category of Presidential actions—those which the President does not consider appropriate to suspend or prohibit a covered transaction, or for which the President has not found that the affected transaction will impair the national security of the United States—to potential judicial review.

But Ralls does not claim that the President failed to make the proper findings. Rather, it claims that in imposing restrictions on the sale of the projects or the disposition of the turbines, the President took actions that exceeded his statutory powers. The amended complaint alleges that no provision of section 721 "grants the President any powers beyond 'suspend[ing] or prohibit[ing]' a 'covered transaction.'" And Ralls repeatedly asserts that the President's actions exceeded his authority because they went beyond merely "suspending or prohibiting" the transaction. …

So plaintiff's entire *ultra vires* claim is premised upon the notion that the only thing the statute permits the President to do is to suspend or prohibit a transaction. But the statute doesn't say that. Section 721(d)(1) does not limit the President's authority to merely suspending or prohibiting a transaction; rather, it grants the President extremely broad authority to "*take such action for such time as the President considers appropriate* to suspend or prohibit" transactions. (emphasis added). In other words, the statute expressly authorizes the President to do what he deems necessary to accomplish or implement the prohibition—not merely to issue it. The use of the open-ended temporal phrase "for such time" reinforces this interpretation; if the President was permitted to do nothing more than make an up or down decision, he would not need an unlimited period of time.

It is important to note that in this case, Ralls did not seek CFIUS approval before it acquired the projects or began construction and installation of the turbines. Rather, CFIUS and the President were presented with a purchase that had already taken place and a project that was already under way. The Presidential Order declares the transaction that resulted in the acquisition to be prohibited and then states, "in order to effectuate this order," Ralls is required to divest. Presidential Order § 2(b). The order then goes on to call for the removal of the Chinese turbines, to bar their use in the future, and to restrict the foreign nationals' access to the premises, among

other things. *Id.* §§ 2(c)–(f). Since deciding to impose these sorts of requirements falls well within the scope of "taking such action . . . as the President considers appropriate . . . to prohibit" a transaction—particularly given the fact that the transaction had already taken place—their imposition was a Presidential action under subsection (d)(1) of the statute, and those actions have been declared to be unreviewable by Congress. Thus, in accordance with the instructions set out by the D.C. Circuit in *Amgen,* this Court finds that the challenged action "is of the sort shielded from review." 357 F.3d at 113.

* * * *

In this case, the jurisdictional question can be decided based upon a review of the plain language of the statutory grant of authority and the finality provision. But the D.C. Circuit has indicated that courts should also look to the statute's structure and legislative history as well. *Dart*, 848 F.2d at 226. And here, those inquiries reveal that Congress structured the process so that Presidential action would be a last resort, to be exercised only the face of an otherwise uncontrollable national security risk. The statute established a multi-agency committee charged with the responsibility of determining in the first instance whether a transaction poses a national security concern and provided it with the tools to address any such concerns before the President gets involved at all. For example, Congress granted CFIUS the authority to "negotiate, enter into or impose, and enforce any agreement or condition" in order to mitigate any threat to the national security that arises as a result of the covered transaction. 50 U.S.C. app. § 2170(*l*)(1). Only if CFIUS determines that the measure did not mitigate the threat does the President have an opportunity to act. *Id.* §§ 2170(b)(2)(B)(i)(I), (d)(2). Moreover, the President is only authorized to take action if he finds that there is no other way to protect the national security: he must make a finding that "provisions of law, other than [section 721] and the International Emergency Economic Powers Act, do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President." *Id.* § 2170(d)(4)(B). The legislative history reflects the fact that Congress anticipated that the President would only rarely be involved. *See* H.R. Rep. No. 110-24(I) (2007), *reprinted in* 2007 U.S.C.C.A.N. 102, 104, at 11 (using language such as: "Transactions that enter investigation may also be terminated before reaching the President," and "Presidential decisions are also avoided in cases where . . ."). So when Congress went on to foreclose judicial review of Presidential actions it did so in the context of a statutory scheme that limited the occasions for Presidential action in the first place.

In addition, to protect against abuse of authority in the absence of judicial review, Congress established itself as the monitor of the actions of both CFIUS and the President. In 2007, Congress expressed concern about CFIUS's "accountability to Congress and the public" given that the reviews and investigations "remain highly confidential." S. Rep. No. 110-80, at 3 (2007). The resulting amendments to the statute "enhance[d] Congress's ability to perform its necessary oversight of the CFIUS process." *Id.* at 7. This takes the form of "a system of briefings and annual reporting to Congress," and briefings to any member of Congress on request. *Id.* at 8–11; 50 U.S.C. app. § 2170(g), (m). Moreover, "[a]ny transaction that goes to the President must be reported to Congress." H.R. Rep. No. 110-24(I), at 11; *see* 50 U.S.C. app. § 2170(b)(3).

Finally, the legislative history reflects that Congress recognized that the authority it was conferring upon the President was to be executed in an area where the President already has broad authority to act. [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(I), at 12. So a review of the structure of the statute and its legislative history supports the Court's determination that the finality provision bars consideration of the particular *ultra vires* claim advanced in this case.

* * * *

Accordingly, the Court will dismiss Count III, Ralls's *ultra vires* claim against the President, for lack of jurisdiction.

B. The Court lacks jurisdiction to review Ralls's due process challenge to the Presidential Order, but not the equal protection challenge.

Counts IV and V raise constitutional challenges to the Presidential Order. Again, the government argues that the Court is barred from reviewing these claims by the finality provision. The Court agrees with respect to plaintiff's equal protection claim, but not with respect to the due process claim.

1. *Ralls's equal protection claim is barred by the finality provision.*

The equal protection challenge to the Presidential Order alleges that Ralls, its affiliates, and its executives have unfairly and unjustly been treated differently from others who are supposedly similarly situated. The government counters that review of this claim is barred by the finality provision in section 721. As noted above, the Court must begin with a presumption of judicial review, which requires a showing of "clear and convincing evidence of a contrary legislative intent." *Dart*, 848 F.2d at 221, quoting *Bowen*, 476 U.S. at 671. The Court finds that this showing has been satisfied. While Count V invokes the Constitution, at bottom it asks the Court to review the merits of the President's decision, and Congress has clearly embodied its views about that exercise in the finality provision.

Ralls does not allege discrimination against a suspect group. So, an analysis of the equal protection claim would require the Court to determine whether the alleged differential treatment is rationally related to a legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 320 (1993); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). This inquiry necessarily involves reviewing the particular factual record that was before the President when he issued the order and determining whether the actions he took were rational in light of that record. In other words, to adjudicate the equal protection claim, the Court would be required to review both the President's findings and his actions and to probe the reasons behind them. This is precisely the type of inquiry that Congress withdrew from the courts in the finality provision in section 721. 50 U.S.C. app. § 2170(e) (barring judicial review of "the *actions* of the President under paragraph (1) of subsection (d) of this section and the *findings* of the President under paragraph (4) of subsection (d) of this section") (emphasis added).

In addition, the same structural and historical factors that call for the application of the finality provision to the *ultra vires* claim provide convincing evidence of Congress's intent to withdraw judicial review over the equal protection claim.

Moreover, the same separation of powers concerns that support the dismissal of the *ultra vires* claim reinforce the need to dismiss the equal protection claim. In *El-Shifa*, the Court of Appeals distinguished claims challenging the wisdom of discretionary decisions from claims "presenting purely legal issues such as whether the government had legal authority to act." 607

F.3d at 842 (internal quotation marks omitted). Here, the equal protection claim is an as-applied challenge that essentially asks the Court to adjudicate the wisdom of the President's decision to prohibit the Terna-Ralls transaction. The question it presents is discretionary rather than purely legal because it requires an assessment of the rationality of the President's specific factual determination on a matter of national security—a determination committed solely to the President's discretion.

The fact that the challenge in this case is dressed in constitutional garb is inconsequential. In the political question context, the D.C. Circuit has found that judicial review of claims that present political questions is barred, "regardless of how they are styled, [so long as they] call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion." *El-Shifa*, 607 F.3d at 842.

It is true, as plaintiff points out, that there are cases in which the courts called for a higher burden of proof to show that a finality clause stripped them of jurisdiction over constitutional claims. In those cases, the courts sought to avoid an interpretation of the finality provision that would raise serious constitutional questions about Congress's power to prevent adjudication of the constitutionality of a statute. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988); *Bowen*, 476 U.S. at 667; *Johnson v. Robison*, 415 U.S. 361, 364–74 (1974); *Lepre v. Dep't of Labor*, 275 F.3d 59 (D.C. Cir. 2001). But the doctrine of constitutional avoidance is not implicated in this instance because the equal protection claim does not question the constitutionality of the statute—it simply questions the fairness of the President's decision. Thus, the Court's application of the finality provision to dismiss Count V does not raise any serious constitutional questions about Congress's power to remove jurisdiction from the courts. …

Ralls cites *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), and *Ungar v. Smith*, 667 F.2d 188 (D.C. Cir. 1981), for the proposition that this Circuit requires clear and convincing evidence of Congress's intent to preclude judicial review of any constitutional claims, even as-applied claims. But the cases do not go so far, and they do not require this Court to permit the equal protection claim to proceed. Both *Ralpho* and *Ungar* posed constitutional challenges to an administrative agency's implementation of a statute; they did not challenge particular actions of the President in the national security realm, where exercises of discretion are generally unreviewable. And in both cases, the plaintiffs were complaining about the process they had been afforded rather than the substance of the decisions that were rendered.

* * * *

But in support of its motion to dismiss Count V, the government is not arguing for such a broad "general proscription" of judicial review. It simply contends that the Court need not apply the doctrine of constitutional avoidance because: 1) the finality provision in section 721 bars judicial review of the President's discretionary actions and his reasons for taking such actions in an individual case; and 2) that is the only sort of review plaintiff is seeking here.While Ralls styles the claim as arising under the Constitution, plaintiff's fundamental grievance—that other foreign owned windfarms have been treated differently than this windfarm—falls squarely under the plain language of the finality provision. Since the Court has found clear and convincing evidence that Congress intended to withdraw jurisdiction over the equal protection claim, it will dismiss Count V for lack of jurisdiction.

2. *The Court is not barred from reviewing Ralls's due process challenge to the Presidential Order.*

But in light of these precedents, the Court cannot find that there is clear and convincing evidence to show that Congress intended to divest the courts of their ability to hear the due process challenge to the executive action in this case. Ralls alleges that the Presidential Order deprived it of its property without due process of law. According to the amended complaint, the Due Process Clause of the Fifth Amendment entitles Ralls to an opportunity to be heard and to the reasons for the President's decision. So, Ralls is asking the Court to determine what procedural protections were due, and whether it was denied those protections.

At the motions hearing in this case, the government argued that through the due process claim, Ralls is actually seeking a more detailed explanation of the President's findings so that Ralls can "attack and undermine" them. This, the government claimed, amounts to a demand for judicial review of the President's findings, which is expressly barred by the finality provision. It is true that the finality provision will bar the Court from hearing any attack on the President's findings. But there is a difference between asking a court to decide whether one was entitled to know what the President's reasons were and asking a court to assess the sufficiency of those reasons. And the fact that plaintiff may not be able to use the information in a certain way does not answer the question of whether it is entitled to have it. It may be that the Court will ultimately decide that in the context of a national security decision committed to the President's discretion, the opportunities provided to the plaintiff here comported with due process, or the plaintiff is not entitled to the reasons. Since the matter has not yet been fully briefed, the Court expresses no opinion on those issues. The sole question before the Court at this stage is whether the statute clearly bars any consideration of plaintiff's procedural concerns, and the Court finds that it does not.

In addition, judicial review of the due process claim presented here does not present the same separation of powers concerns that would be raised by consideration of the equal protection claim. Count IV raises a pure legal question that can be answered without second-guessing the President's determinations. *See El-Shifa*, 607 F.3d at 842 (finding that claims "[p]resenting purely legal issues such as whether the government had legal authority to act" do not pose the same separation of powers problems as claims seeking review of discretionary determinations made by the executive branch) (alteration in original) (internal quotation marks omitted). Since the Court finds no clear and convincing evidence that Congress intended to withdraw jurisdiction over the due process challenge to the Presidential Order, it will proceed to hear that claim on the merits, and the motion to dismiss Count IV for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) will be denied. The order accompanying this opinion will address the schedule for the filing of additional submissions.

* * * *

After the district court dismissed all but the due process claim in the case, the United States filed a second motion to dismiss that remaining claim on March 21, 2013. Excerpts follow from the U.S. brief in support of its motion to dismiss. The brief is available in full at *www.state.gov/s/l/c8183.htm*. The United States also filed a reply brief in support of its motion to dismiss (not excerpted herein), available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Ralls contends that the Due Process Clause of the Fifth Amendment obligates the President to disclose the information that he relied upon in determining that its acquisition of the Project Companies threatens to impair the national security of the United States, and to explain the reasoning that he used to determine that this threat to the national security warranted an order requiring Ralls to divest itself of the Project Companies. In order to state a claim for a violation of due process, a party must show both that it has been deprived of a protected interest, such as a property interest, and that the government did not afford it Constitutionally sufficient procedures. *See, e.g.*, *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). Ralls can make neither showing.

I. Ralls Does Not Hold a Constitutionally Cognizable Property Interest in the Project Companies, Because It Was on Notice that Its Acquisition of the Project Companies Was Subject to Suspension or Prohibition by the President

Ralls contends that it "possesses numerous valid property interests and property rights by virtue of its acquisition of the Project Companies, including but not limited to the Project Companies themselves," as well as easements and other contracts held by the Project Companies. (Am. Compl., ¶ 146.) It accordingly contends that the Presidential Order deprived it of these property interests by requiring it to divest the Project Companies and by imposing the conditions that the President determined necessary to effectuate the divestiture order. (Am. Compl., ¶ 148.) This claim misapprehends the nature of Ralls's interests. In acquiring the Project Companies, Ralls chose to forgo the process contemplated under the Defense Production Act, which anticipates that a foreign acquirer will first seek a review from CFIUS, and possibly the President, before proceeding with a transaction that could raise national security considerations. Because Ralls chose not to undergo this review before completing its transaction, it ran the risk that the President would later exercise his power to disapprove the transaction and require Ralls to divest its interests. Consequently, Ralls had nothing more than a unilateral expectation that it would be able to avoid a Presidential review, and that unilateral expectation (premised on the hope that its transaction would go unnoticed) cannot give rise to a due process claim.

If a foreign acquirer does not voluntarily file with CFIUS, any CFIUS member or his designee may file an "agency" notice with CFIUS and thereby initiate a CFIUS review process, *even if the transaction has already been completed*. 50 U.S.C. App. § 2170(b)(1)(D); 31 C.F.R. § 800.401(c). A party that does not initiate a review of its transaction remains subject, indefinitely, to the possibility of Presidential action. 31 C.F.R. § 800.601. And if the President's review then results in his order suspending or prohibiting the transaction, the parties would then bear the consequences of their choice to proceed before seeking review through the CFIUS process. *See* 50 U.S.C. App. § 2170(d)(3) (authorizing divestment relief). Thus, although the Defense Production Act does not directly require foreign acquirers to file voluntary notices,

> there are very, very strong incentives for those companies for which acquisitions could potentially affect national security to file. The potential negative ramifications of not filing are very, very severe. There is no statute of limitations, the transaction can be unwound at any time. There are very strong incentives and I think the voluntary filing system works . . . .

H.R. 5337, the Reform of National Security Reviews of Foreign Direct Investments Act: Hrg. Before the Subcomm. On Domestic & International Monetary Policy, Trade, & Technology, H. Comm. on Fin. Servs., 109th Cong. 31 (2005) (testimony of David Marchick, attorney, Covington& Burling).

As a Treasury official has explained the process, parties to covered transactions that raise national security considerations would be wise to file a notice voluntarily with CFIUS:

> [H]aving sat on boards of directors both at home and abroad, I cannot imagine in the post-Sarbanes-Oxley world . . . how any director could give the go-ahead on a transaction [that had not been filed], because the President's authority to unwind that transaction is without limit if the person has not received approval of the process. . . . [T]hat very powerful nonjudicially reviewable authority of the President to stop or unwind transactions acts as a real leavener on the process[.]

A Review of the CFIUS Process of Implementing the Exon-Florio Amendment: Hrgs. Before the S.Comm. on Banking, Housing, and Urban Affairs, 109th Cong. 114 (2005) (testimony of Robert M. Kimmitt, Deputy Secretary, U.S. Dep't of Treasury). In other words, "[t]here is no right to buy. You do not have to file, but by not filing, you do not immunize yourself from a finding that the transaction could be canceled on security grounds." *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing before H. Comm. on Fin. Servs.*, 110th Cong. 26 (2007) (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.).

` Ralls, nonetheless, elected to proceed with its acquisition of companies organized to develop wind farms in the vicinity of a military installation, without first seeking a review of the transaction by CFIUS. 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 could raise national security considerations, had no legitimate claim of entitlement to retain its acquisition without a determination by CFIUS or the President that the transaction did not pose a threat to national security. After all, "'[n]o one can be said to have a vested right to carry on foreign commerce with the United States.'" *Ganadera Indus., S.A. v. Block*, 727 F.2d 1156, 1160 (D.C. Cir. 1984) (quoting *The Abby Dodge*, 223 U.S. 166, 176 (1912)). Because Ralls was on notice that its transaction could be unwound at any time, it held no Constitutionally cognizable property interest in the results of that transaction.

Because Ralls chose not to avail itself of the CFIUS process, any interests that it gained in the Project Companies were "'revocable,' 'contingent,' and 'in every sense subordinate to the President's power under the [Defense Production Act],'" *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981). Ralls thus gained no property interests protectable by the Due Process Clause in those companies. …

* * * *

II. The Broad Discretion Afforded to the President under the Act Further Undercuts Any Property Interest Claimed by Ralls

Ralls lacks any Constitutionally cognizable property interest in the Project Companies for an additional reason. The Defense Production Act commits the decision whether to suspend or prohibit a foreign acquisition of a United States business entirely to the discretion of the President.

Ralls does not hold a property interest in any particular outcome from the President's deliberations as to how to exercise his discretion under the Act.

* * * *

It necessarily follows from the breadth of the President's discretion under the Defense Production Act that a foreign acquirer does not have any protected interest in how the President exercises that discretion. "[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). A protected interest could arise if a statute "establish[es] substantive predicates to govern official decision-making and, further, . . . mandat[es] the outcome to be reached upon a finding that the relevant criteria have been met." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. at 462 (internal citation omitted). But where a statute does not do so, then no due process rights accrue from the government's exercise of its discretion under that statute. *See Menkes v. Dep't of Homeland Security*, 637 F.3d 319, 338 (D.C. Cir. 2011); *Roth v. King*, 449 F.3d 1272, 1285 (D.C. Cir. 2006); *see also Omar v. McHugh*, 646 F.3d 13, 22 n.7 (D.C. Cir. 2011).

* * * *

III. Ralls Was Not Entitled to Receive the Evidence upon which the President Relied in Reaching the Decision Committed to His Discretion

Even assuming that the Presidential Order deprived Ralls of a property interest, and even assuming that Ralls has any procedural rights relating to a decision committed to the President's discretion, its claim still fails. Ralls asserts that, as a matter of due process, the President was required to disclose the evidence upon which he relied in finding that its acquisition of the Project Companies "threatens to impair the national security of the United States," 50 U.S.C. App. § 2170(d)(1). Ralls had no right to such participation in the President's decision-making.

In a case (unlike this one) where due process rights are implicated, the determination of what process is "due" requires a review of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Under this analysis, the Due Process Clause requires only that process which is due under the circumstances of the case. "[I]t is by now well established that 'due process,' unlike some legal rules, is not a technical conception with a fixed

content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotations omitted)). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In this particular situation where Congress has committed a decision implicating national security to the President's discretion, Ralls was not entitled to demand to participate directly in the President's decision-making.

A. The Government Has a Strong Interest Weighing against the Disclosure of Sensitive National Security Evidence to the Subject of a Presidential Order under the Defense Production Act

"[N]o governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). It is obvious that the Defense Production Act supports a governmental interest of the highest order. The President is charged with protecting the national security of the United States, and as part of that duty he has the authority to review whether the foreign acquisition of a United States business will threaten to impair the national security. The Defense Production Act is structured so that "interventions by the President would be extraordinary," H.R. Rep. No. 110-24, pt. 1, at 12 (2007); as this Court has recognized, "Congress structured the process so that Presidential action would be a last resort, to be exercised only [in] the face of an otherwise uncontrollable national security risk." (ECF 48 at 26.) In the rare cases where the President exercises this extraordinary authority, it is clear that he requires the ability to keep sensitive national security information confidential from the foreign acquirer. *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). Indeed, the foreign acquirer is the very focus of the President's finding of credible evidence of a threat to the national security. *See* 50 U.S.C. App. § 2170(d)(4)(A) (directing the President to find whether "there is credible evidence that leads the President to believe that the *foreign interest exercising control* might take action that threatens to impair the national security"). It would therefore be intolerable if foreign acquirers could gain access to the confidential national security bases for the President's determinations on this score. *See Waterman*, 333 U.S. at 111; *see also 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); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003) (same).

* * * *

B. Ralls's Private Interest Is Insubstantial Relative to the Government's Interests

In comparison to these compelling governmental interests, Ralls's interests are minimal. At noted, Ralls was on notice that, by proceeding with its acquisition without first submitting a notice to CFIUS, it ran the risk of a Presidential prohibition of the transaction at any time. For the reasons described above, Ralls therefore lacked any protected property interest in its acquisition. But even if Ralls could clear that threshold for a due process claim, it is apparent that any interest that it held in maintaining its transaction free from the President's oversight pales in comparison to the government's interests here.

* * * *

C. Ralls's Intrusion into the Presidential Decision-Making Process Would Add No Value to the President's Deliberations

Finally, no value would be added to the President's decision-making if he were required to disclose his evidence or his deliberations to Ralls. Again, as noted, the President may consider any factor that he deems appropriate in making his finding that a foreign acquisition threatens to impair the national security. Indeed, the President is not obligated to accept a recommendation from CFIUS, *see* 50 U.S.C. App. § 2170(d)(2) (reserving power to the President to decide whether or not to take action), and nothing in the statute limits the sources of information that the President may draw upon in assessing threats to the national security. Congress has specified the process that it deemed warranted, and a federal court should not specify additional procedures for the President to follow. …

* * * *

In light of the foregoing, due process did not require the President to engage Ralls in his decision-making. It is notable that Ralls did, once prompted, submit a notice to CFIUS in which it availed itself of the invitation extended to all filers under CFIUS's regulations to state its views as to why national security was not implicated by its transaction. (ECF 7-7 at 5-6.) It is also notable that Ralls requested and received the opportunity to meet and discuss the matter with CFIUS several times to discuss the matter. (*See supra*, pp. 4-7.) The question at hand, however, is Ralls's claim that the President was required to afford it particular procedures before arriving at the decision committed to his discretion. There is no basis to conclude that the President's exercise of his discretionary authority should be cabined by mandating that he directly engage Ralls in his decision-making process.

* * * *

On October 9, 2013, the district court issued its opinion, granting the U.S. motion to dismiss the due process claim, and thereby, the case in its entirety. The court's opinion is excerpted below (with footnotes omitted). On October 16, 2013, Ralls filed a notice of appeal.

---

* * * *

I. Ralls has not alleged a protected interest.

The threshold requirement in a due process claim is that plaintiff must plead "that the government has interfered with a cognizable liberty or property interest." *Hettinga v. United States*, 677 F.3d 471, 479–80 (D.C. Cir. 2012) (per curiam); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Fifth Amendment's] protection of liberty and property."). While the underlying substantive interest may derive from an independent source such as state law, one looks to federal constitutional law to determine "whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978), quoting *Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

Count IV of the amended complaint asserts that Ralls possesses property interests and property rights that it obtained by virtue of its acquisition of the Project Companies, including, but not limited to:

> the Project Companies themselves; easements with local landowners to access their property and construct windfarm turbines; power purchase agreements with the local utility, PacifiCorp; generator interconnection agreements permitting connection to PacifiCorp's grid; transmission interconnection agreements and agreements for the management and use of shared facilities with other nearby windfarms; and necessary government permits and approvals to construct windfarm turbines at particular locations.

Am. Compl. ¶ 146. Plaintiff goes on to allege under the same count that the President's Order has "eviscerated these property rights," without due process. Am. Compl. ¶¶ 148–150.

* * * *

But Ralls undertook the transaction and voluntarily acquired those state property rights subject to the known risk of a Presidential veto. And Ralls's claim cannot be squared with the fact that Ralls waived the opportunity—provided by the very statute that it claims lacks the necessary process—to obtain a determination from CFIUS and the President before it entered into the transaction.

* * * *

Despite the availability of this pre-acquisition review, Ralls did not choose to submit written notice of its transaction to CFIUS before embarking on the transaction. That pre-acquisition review would have enabled Ralls to obtain, before it acquired the Project Companies and any corresponding property rights under state law, either a determination that the transaction threatened the national security of the United States and would be prohibited, or a determination that no threat existed, coupled with the assurance that CFIUS and the President could not prohibit the transaction later. So under those circumstances, it is inappropriate to apply the same due process analysis that would have applied if Ralls had acquired the Project Companies without this opportunity for pre-acquisition review. Because Ralls had the ability to obtain a determination about whether the transaction would have been prohibited before it acquired the property rights allegedly at stake, but it chose not to avail itself of that opportunity, Ralls cannot predicate a due process claim now on the state law rights it acquired when it went ahead and assumed that risk. *Parker v. Bd. of Regents of Tulsa Junior College*, 981 F.2d 1159, 1163 (10th Cir. 1992) (finding that the defendant had not violated the plaintiff's due process rights because plaintiff chose not to avail herself of the available due process procedures embodied in the termination proceedings); *cf. Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) ("If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants.").

* * * *

In addition, Ralls's argument that it had an expectation interest in acquiring the property fails because the President's determination about whether to prohibit the transaction is entirely discretionary. Section 721 vests broad, unreviewable authority in the President to prohibit a transaction. The statute as a whole puts foreign-owned companies on notice that they do not have an entitlement to engage in mergers, acquisitions, or takeovers in the United States: they are subject to Presidential review.

* * * *

II. Ralls received sufficient process.

Even if the Court were to find that the President's Order deprived Ralls of some protected interest, based on either the state law property rights or the *Roth* theory, plaintiff's due process claim fails because Ralls received sufficient process.

All that is required before the deprivation of a protected interest is "notice and opportunity for hearing *appropriate to the nature of the case*." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis added). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The process that is due is determined by balancing three criteria: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation of such interest and the probable value of additional procedural safeguards; and (3) the government's interest in the existing procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The balance of these factors shows that plaintiff was provided the process that was due.

* * * *

In light of the process that Ralls already received, and the limited nature of the additional process that Ralls seeks, the *Mathews* factors in this case weigh overwhelmingly in favor of the government. Even if the Court were to find that Ralls was deprived of some kind of property interest, that property interest is relatively weak in the face of the strong governmental interest in protecting the national security. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."). And while Ralls argues that the national security interest is speculative, the Court emphasizes that the only additional process Ralls is seeking here is to be informed of the grounds for the President's finding that, in his belief, Ralls might take action that threatens national security through exercising control over the Project Companies.

In this case, involving the application of this particular statutory scheme, the President has a valid interest, grounded in the national security of the United States, to withhold the particular evidence that gave rise to his concern about a national security threat from the entity that he believes might pose the threat. And that conclusion is bolstered by the fact that Congress specified that the President's determination would not be subject to review. *See People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 21 (D.C. Cir. 1999) (finding that the Secretary of State's finding that "the terrorist activity of [an] organization threatens the security of United States nationals or the national security of the United States" is not reviewable).

Ralls cites *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), but that case involved weighing the governmental interest against an individual's liberty interest in freedom from bodily detention. See *Hamdi*, 542 U.S. at 529–30 (describing the interest in "being free from physical detention from one's own government" as "the most elemental of liberty interests" and is "at the core of the liberty protected by the Due Process Clause"). The property interests allegedly at stake here are much less compelling. This is also why counsel's attempt to equate the Ralls meeting with CFIUS to the situation of a hypothetical criminal defendant facing a trial without any notice of the charges against him, see Tr. at 39:22–25, is not an apt comparison. A criminal defendant risks deprivation of the strongest possible private interest—his liberty interest in freedom from detention—and the government interest being advanced during a criminal proceeding is not as strong as the interest advanced in section 721. This Court is bound to follow the decisions of the D.C. Circuit, and in the same line of cases that Ralls relies upon in its pleadings, that court has specifically rejected the notion that the level of due process required in a criminal trial should be the model for the national security context. See *Nat'l Council of Resistance of Iran v. Dep't of State* ("NCRI I"), 251 F.3d 192, 209 (D.C. Cir. 2001); and *Nat'l Council of Resistance of Iran v. Dep't of State* ("NCRI II"), 373 F.3d 152, 159–60 (D.C. Cir. 2004).

Moreover, the probable added value of providing Ralls with the reasons for the President's proposed determination would be minimal in this case. Ralls was afforded an opportunity to present all of the reasons why it believed its involvement in the Project Companies did not pose a threat to the national security at a meeting with representatives from CFIUS. And, the statute expressly bars the courts from reviewing the actions and the findings of the President, which can be based on any factor that he deems appropriate. So even if Ralls had an opportunity to respond to the President's specific concerns, the President still retained full discretion to make his decision based on any evidence that he considered credible, whether or not a neutral third-party would be persuaded by Ralls's rebuttal.

And, the statute expressly bars the courts from reviewing the actions and the findings of the President, which can be based on any factor that he deems appropriate. So even if Ralls had an opportunity to respond to the President's specific concerns, the President still retained full discretion to make his decision based on any evidence that he considered credible, whether or not a neutral third-party would be persuaded by Ralls's rebuttal.

In the end, Ralls's claim that it was denied due process on these grounds is predicated almost entirely on the line of cases involving the designation of organizations as "foreign terrorist organizations" under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 8 U.S.C. § 1189 (2012). But a close reading of those cases does not support Ralls's contention that due process necessarily requires the executive to disclose the reasons for his decision.

* * * *

4. Voluntary Principles on Security and Human Rights

On March 13 and 14, 2013, the United States participated in the annual plenary meeting of the Voluntary Principles on Security and Human Rights Initiative in The Hague. On the opening day of the plenary, the United States released its first public report on U.S. efforts to implement the Voluntary Principles, available at *www.state.gov/j/drl/rls/vprpt/2012/206029.htm*. The State Department explained the

outcome of the meeting in a March 20, 2013 media note, available at *www.state.gov/r/pa/prs/ps/2013/03/206458.htm*:

> As a result of the meeting last week, participants will move ahead with an impact study that will explore how the Voluntary Principles make a difference on the ground. Fourteen of the 22 participating companies also led a conversation on the status of their pilot project on developing and integrating a set of key performance indicators into their systems. These indicators guide and assist in validating the ways that companies fulfill the commitments they make under the Voluntary Principles, to maintain high standards while they do business in difficult parts of the world. At the end of the meeting, Participants welcomed the Swiss chairmanship of the Initiative for the upcoming year.

The Voluntary Principles Initiative began in 2000 when governments, multinational corporations, and non-governmental organizations endorsed principles to guide private companies in the extractive industries in an effort to make sure that when companies extract resources in difficult places, they take tangible steps to minimize the risk of human rights abuses in the surrounding communities. See *Digest 2000* at 364-68. As of the 2013 plenary, the Voluntary Principles Initiative included 22 oil, mining, and gas companies; eight governments; and 13 non-governmental organizations. In 2012, the participants approved the creation of an association under Dutch law to be based in The Hague to administer the initiative. See *Digest 2012* at 409-10.

5. SEC Rules Implementing Dodd-Frank

As discussed in *Digest 2012* at 410-12, the U.S. Securities and Exchange Commission ("SEC") adopted two final rules in 2012 that were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Rule 13p-1, 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. Rule 13q-1, 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. In 2013, the United States government defended these rules in multiple legal challenges brought in U.S. courts.

a. Challenge to Rule 13p-1 implementing Section 1502

In *National Association of Manufacturers et al v. SEC*, No. 13-5252 (D.C. Cir. 2013), plaintiffs-appellants challenged the rule implementing Section 1502 under the Administrative Procedure Act ("APA"), the Exchange Act, and the First Amendment of

the U.S. Constitution. The district court rejected all plaintiffs' challenges to the rule. On appeal, the SEC brief filed on October 23, 2013 argues that the SEC acted reasonably in arriving at the regulatory approach it used to implement Section 1502 and that the rule does not violate the First Amendment. The section of the brief summarizing the argument appears below. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Appellants' disagreement with Congress's determination that Section 1502 will ameliorate the humanitarian crisis in the DRC animates their challenges to Rule 13p-1. But such a disagreement does not provide a basis for the Commission to undermine the scheme Congress envisioned. And the Commission reasonably determined that appellants' preferred regulatory approaches would do just that.

Far from thinking itself precluded from adopting the *de minimis* exception appellants advocated, the Commission requested comment on such an exception and analyzed whether it would be appropriate in light of Section 1502's purposes. After examining the language and structure of the statute, as well as evidence before it, the Commission reasonably concluded that creating a categorical exception for small uses of conflict minerals would thwart, rather than advance, those purposes. Indeed, it is undisputed that conflict minerals are frequently used in small amounts. And those small individual uses can have large cumulative effects.

Similarly, the Commission reasonably concluded that Congress included products "contracted to be manufactured" in the reporting requirement to prevent manufacturers from evading that requirement. And issuers would be able to do just that if those who contract to manufacture products were not included in the rule. Recognizing that the statute is silent as to how issuers determine whether their necessary conflict minerals originated in the Covered Countries, the Commission reasonably interpreted Section 1502 to require issuers to conduct due diligence when they encounter red flags in their reasonable country of origin inquiry. Without such a requirement, issuers would have an incentive to avoid learning the source of their minerals, thus undermining one of the fundamental requirements of Section 1502.

And the Commission's provision of a longer transition period for smaller issuers than for larger issuers was far from arbitrary. That larger issuers will have greater leverage over their suppliers, and should therefore be better equipped to determine whether their products are DRC conflict free more quickly, is both intuitive and supported by comment. And because some smaller suppliers in larger issuers' supply chains may not even be covered by the rule, and those that are will still be required to trace their minerals, there is no reason this accommodation for smaller issuers imposes an unreasonable burden on others.

In conducting its economic analysis, the Commission reasonably chose not to re-evaluate Congress's determination of benefits. Rather, the Commission designed Rule 13p-1 "to help achieve the intended humanitarian benefits in the way that Congress directed" (Adopting Release, JA0781/2), measuring the effects of its choices on issuers and users of the required disclosures. Nor was a re-evaluation of benefits in the DRC required for the Commission to reasonably conclude that the rule does not impose burdens on competition not necessary or appropriate in the furtherance of the Exchange Act. The Commission took numerous steps to

lessen the burdens imposed by the rule. And where it did not do so, it reasonably concluded that the suggested alternatives would undermine the scheme Congress envisioned. In this circumstance, no more was required.

The Commission also provided an extensive qualitative analysis of the costs and benefits of its discretionary choices and a thorough quantitative analysis of the costs of the final rule. In the context of a mandatory rule where quantitative data was not available, this analysis was sufficient.

Finally, Section 1502 and Rule 13p-1 do not violate the First Amendment because they compel disclosure of factual information.

* * * *

b. Challenge to Rule 13q-1 implementing Section 1504

On July 2, 2013, a district court judge vacated Rule 13q-1 implementing Section 1504 of Dodd-Frank, finding that the SEC's interpretation of the statute as requiring *public* disclosure of payments to governments was unreasonable under the APA. *American Petroleum Inst. et al. v. SEC*, No. 12-1668 (D.D.C. 2013). The court also found that the SEC acted unreasonably in refusing to allow an exemption from the disclosure requirement in the case of payments to governments whose domestic law forbids such disclosures. The SEC brief defending its approach to implementing Section 1504 is available at *www.state.gov/s/l/c8183.htm*. Several members of the U.S. Senate—including Senators Cardin and Lugar who authored the provision—urged the SEC to engage in additional rulemaking to reinstate the rule, suggesting that with further elaboration of its rationale, the SEC could properly maintain the public disclosure requirement, without any exemption for payments to governments prohibiting such disclosures, and still satisfy the district court's concerns. The letter from these U.S. senators to the SEC is available at *www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-2.pdf*. The SEC declined to appeal the district court's decision vacating the rule and will instead promulgate a revised rule.

6. Extractive Industries Transparency Initiative ("EITI")

On December 19, 2013, the United States submitted its application as a candidate for the Extractive Industries Transparency Initiative ("EITI") Board. See *Digest 2012* at 412 regarding previous U.S. commitment to the EITI. The U.S. Department of the Interior issued a press release announcing the submission of the candidacy application, available at *www.doi.gov/eiti/FACA/upload/USEITI-Application-Background.pdf* and excerpted below. The application is available at *www.doi.gov/eiti/upload/USEITI-Candidacy-Application-MSG-Approved-2.pdf*.

---

* * * *

The EITI is a voluntary, global effort designed to increase transparency, strengthen the accountability of natural resource revenue reporting, and build public trust for the governance of these vital activities. Participating countries publicly disclose revenues received by the government for oil, gas, and mining development, while companies make corresponding disclosures regarding these same payments to the government, and both sets of data are reviewed and reconciled by a mutually agreed upon independent third party. Results are then released in a public report.

The design of each nation's EITI framework is country-specific and developed jointly by a Multi-Stakeholder Group comprised of members of the public, government and industry through a multi-year, consensus-based process. In addition to increased transparency, EITI strengthens accountability, empowers citizens, and adds another tool in the fight against corruption. …

* * * *

7. Tax Treaties

As discussed in *Digest 2012* at 413, the United States has been actively engaging with countries around the world to improve international tax compliance and implement the Foreign Account Tax Compliance Act ("FATCA"). In 2013, the United States concluded bilateral agreements or signed joint statements to implement FATCA with France, Japan, Germany, Spain, Norway, Switzerland, and Ireland. The texts of the joint statements and signed agreements are available at *www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx*.

Cross References

Detroit International Bridge, **Chapter 5.A.**
Business and human rights, **Chapter 6.F.**
ILC's work on topic of most-favored-nation clauses, **Chapter 7.D.3.**
Organization for Economic Cooperation and Development, **Chapter 7.E.2.**
ICAO and Taiwan, **Chapter 7.E.5.**
UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitrations, **Chapter 15.A.**
BG Group PLC v. Argentina *(challenge to award in BIT arbitration)*, **Chapter 15.E.1.**
UN Group of Government Experts in Information and Telecom, **Chapter 18.A.4.b.**

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

a. Meeting of States Parties to the Law of the Sea Convention

The United States participated as an observer to the 23rd meeting of States Parties to the Law of the Sea Convention ("SPLOS") at the United Nations June 10 to 12, 2013. Delegations to SPLOS discussed the work of the bodies established under the Convention and other issues that have arisen with respect to the Convention. One item on the agenda was a new request to the International Tribunal for the Law of the Sea ("ITLOS") from an African regional fisheries management organization for an advisory opinion on fisheries-related rights and obligations. The United States expressed concern that the request seeks advice beyond the scope of the regional agreement under which it was brought. Excerpts follow from the U.S. statement responding to the ITLOS report at the 23rd meeting of SPLOS.

* * * *

…[W]e would like to comment briefly on the report from the President of the Tribunal regarding the request it received for an advisory opinion from the Sub-Regional Fisheries Commission.

As we are all aware, the Seabed Disputes Chamber of ITLOS has authority to issue advisory opinions pursuant to Law of the Sea Convention, as set forth in paragraph 10 of Article 159 and Article 191. The Law of the Sea Convention, including its Annex VI setting forth the Statute of the Tribunal, does not provide for any additional advisory opinion jurisdiction. While the Tribunal's statute does recognize that agreements other than the Law of the Sea Convention may confer certain jurisdiction upon ITLOS to render decisions relevant to those other

agreements, that jurisdiction cannot extend to general matters beyond the scope of those other agreements.

In this instance, the request concerns broad fisheries-related rights and obligations of coastal States and flag States under the Law of the Sea. The questions posed to the Tribunal contain no references to the agreement from which the request originated, namely the agreement establishing the Sub-Regional Fisheries Commission. Indeed, the documentation accompanying the request states that the intention of the request is to improve implementation of the 2009 Port State Measures Agreement—a separate agreement that itself confers no such jurisdiction on the Tribunal. Thus, we are not persuaded that this particular request is permissible and will continue to follow this matter closely.

* * * *

b. International Tribunal for the Law of the Sea

On November 27, 2013, the United States submitted a written statement to the International Tribunal for the Law of the Sea ("ITLOS," or "Tribunal") regarding Case No. 21, "Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission ("SRFC")." In March 2013, the Conference of Ministers of the SRFC adopted a resolution in which it authorized the Permanent Secretary of the SRFC to obtain an advisory opinion from ITLOS on a range of fisheries-related questions. The request is the first ever submitted to the full Tribunal for an advisory opinion. The United States submitted the statement in response to the invitation of the Tribunal for written statements on the issues presented in the request for an advisory opinion. While recognizing the legitimacy of the concerns which motivated SRFC's request for an advisory opinion, the U.S. written statement presents its view that the full Tribunal lacks jurisdiction in this instance and that ITLOS should deny the request, either on legal or prudential grounds. The U.S. statement is excerpted below (with footnotes omitted) and available in full at *www.state.gov/s/l/c8183.htm*.

* * * *

4. With this being the first advisory opinion request to the full Tribunal, ITLOS is presented with a unique and important opportunity to consider the scope of its jurisdiction and the exercise of its related discretionary powers.

* * * *

7. While recognizing the legitimacy of the concerns which motivated SRFC's request for an advisory opinion, the United States believes that there are important legal and prudential considerations outlined in this written statement that militate against the Tribunal granting an advisory opinion in response to the SRFC request. **Section I** of this statement addresses jurisdictional considerations and explains why jurisdiction is lacking or, at a minimum, is limited

to matters of interpretation or application of any agreement that confers jurisdiction upon ITLOS. **Section II** considers the discretionary authority of the Tribunal, including the concern of the United States that the SRFC's request invites the Tribunal to interpret and apply customary international law and other international agreements under which other States have not consented to advisory jurisdiction. Accordingly, the United States concludes that the request should not be granted, either on legal or prudential grounds.

I. Jurisdictional Considerations

* * * *

1. Advisory Jurisdiction of the Full Tribunal

9. The LOS Convention contains only two provisions that refer to the advisory jurisdiction of ITLOS: Article 159(10) and Article 191. These provisions appear in Part XI of the Convention and expressly establish advisory opinion jurisdiction with respect to the Seabed Disputes Chamber of the Tribunal on matters relating to deep seabed mining. The Statute of ITLOS, contained in Annex VI of the Convention, contains just one provision referencing advisory opinions. This provision, like those in Part XI of the Convention, refers only to the Seabed Disputes Chamber.

10. Article 21 of the ITLOS Statute also contains a more general description of the Tribunal's jurisdiction. While not referring to advisory jurisdiction expressly, Article 21 states: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention *and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.*" (Emphasis added.)

11. Article 138 of the Tribunal's Rules of Procedure (Rules) partially tracks the second part of Article 21 of the Statute and addresses the issue of advisory opinions. Specifically, Article 138 of the Rules states: "The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion." Thus, according to the Tribunal's Rules, the *full Tribunal* has advisory jurisdiction, under the circumstances described in Article 138. Because the Rules cannot confer broader jurisdiction upon the Tribunal than does the Convention, the validity of Article 138 depends on whether it is consistent with the powers conferred upon the Tribunal by the Convention, including the ITLOS Statute.

12. In deciding how broadly to interpret and apply Article 21 of the Tribunal's Statute, the Tribunal should consider the overall content and purpose of the Convention's dispute settlement provisions as well as the intent of the Convention's drafters. It may likewise be helpful to consider the governing legal documents of other international courts and tribunals. When these factors are considered, the United States believes that the best reading of Article 21 of the ITLOS Statute is that this provision does not provide for an advisory opinion function for the full Tribunal pursuant to other international agreements.

* * * *

2. Jurisdictional Limitations of Article 288

21. If ITLOS decides that the LOS Convention and its Statute authorize the full Tribunal to issue an advisory opinion pursuant to another agreement, that jurisdiction is nevertheless limited by Article 288 of the Convention, which requires the jurisdiction conferred must concern

the interpretation or application of the international agreement that is conferring the advisory jurisdiction upon the Tribunal. In this instance, the request made by the SRFC does not call for an interpretation or application of the MCA Convention, which would be the instrument conferring advisory jurisdiction upon the Tribunal in this case. Accordingly, there is no advisory jurisdiction with respect to this specific request.

22. Requests to ITLOS for advisory opinions are authorized by Article 33 of the MCA Convention, as follows: "The Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal of the Law of the Sea for advisory opinion." The record before the Tribunal indicates that the Conference of Ministers adopted a resolution during its fourteenth session in March 2013 authorizing the SRFC Permanent Secretary to "seize" ITLOS to obtain an advisory opinion on the questions reproduced in paragraph 1 of this written statement.

23. The questions submitted by the SRFC, however, do not call for an interpretation or application of the MCA Convention. Instead, the request invites the Tribunal to interpret and apply other international agreements and customary international law. This goes beyond what is contemplated in the LOS Convention and the ITLOS Statute.

24. Although Article 21 of the ITLOS Statute is worded broadly (referring to "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."), to the extent it is read to encompass advisory jurisdiction, it should still be read in light of Article 288 of the LOS Convention, which provides that the jurisdiction conferred upon ITLOS by another agreement must pertain to that agreement. Specifically, Article 288(2) of the LOS Convention provides that ITLOS (as well as other relevant courts and tribunals) have "jurisdiction over any dispute *concerning the interpretation or application of an international agreement* related to the purposes of this Convention, *which is submitted to it in accordance with the agreement*" (emphases added). Thus, the jurisdiction conferred upon ITLOS must "concern the interpretation or application" of the *agreement conferring jurisdiction.*

* * * *

II. Discretionary Considerations

29. If the Tribunal nevertheless decides that the LOS Convention and its Statute authorize it to issue an advisory opinion pursuant to another agreement, and that the Tribunal has jurisdiction in this specific instance, the United States believes that the Tribunal should exercise its discretionary powers to decline the request. The ICJ, the PCIJ, and other courts and tribunals have emphasized that, even where they have jurisdiction to render an advisory opinion, they will consider the judicial propriety of doing so. Without prejudice to the considerations discussed in Section I, the United States suggests that several considerations weigh in favor of not taking up the request. Most notably, relevant coastal and flag States have not consented to the Tribunal's exercise of advisory jurisdiction under the international instruments that the Tribunal would apparently need to interpret and apply in fashioning a response to the SRFC request. …

1. The Principle of Consent

30. The jurisprudence of the ICJ and its predecessor, the PCIJ, indicates the importance of State consent in the context of advisory as well as contentious proceedings. In the *Western Sahara* proceeding, the ICJ stated:

> In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An

instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.

* * * *

2. Additional Discretionary Considerations

38. Finally, the United States requests that the Tribunal consider several additional prudential reasons for refraining from exercising jurisdiction in this instance even if it finds the legal authority to do so. Exercising jurisdiction in this case might invite controversy and confusion about the ability of States Parties to control the interpretation and application of the agreements they negotiate. Likewise, a response to the questions posed to the Tribunal could prejudice the positions of the Parties to the instruments referred to above with respect to existing State-to-State disputes that may exist, but that have not yet been submitted to the jurisdiction of an international court or tribunal. Finally, responding substantively to the questions posed might encourage States to enter into new international agreements, the sole purpose of which is to confer advisory jurisdiction to the tribunal over a matter under another agreement that does not confer such jurisdiction.

* * * *

2. Other Boundary or Territorial Issues

a. U.S.-Kiribati maritime boundary treaty

On September 6, 2013, the United States and the Republic of Kiribati signed a boundary treaty delimiting the waters between their two countries. The treaty was signed in Majuro, Marshall Islands, in connection with the Pacific Islands Forum. The treaty represents the first treaty to delimit a maritime boundary that the United States has signed since 2000. Using three separate boundary lines, the treaty divides the maritime space between the U.S. islands of Palmyra Atoll, Kingman Reef, Jarvis Island and Baker Island and the Kiribati Line and Phoenix island groups. The treaty, with appropriate technical adjustments, formalizes boundaries that had been informally adhered to by the two countries previously on the basis of the principle of equidistance, such that the lines are equal in distance from each country. The three boundaries, taken together, approximate 1,260 nautical miles in length and form the second longest among all U.S. maritime boundaries. The treaty will enter into force upon ratification by both countries.

b. South China Sea

On October 10, 2013, at the 2013 East Asia Summit ("EAS") in Bandar Seri Begawan, Brunei, Secretary Kerry spoke about U.S. policy with respect to the South China Sea. Excerpts from Secretary's remarks appear below. The remarks are available at *www.state.gov/s/l/c8183.htm*.

* * * *

To demonstrate our continued commitment to the region, the United States is increasing its investments in Asia through new programs to support ASEAN's political and economic integration.

Within the EAS, every nation, large and small, has a role to play. Every nation has a voice that should be heard. Each of us also has an obligation to meet the founding principles of this organization: to foster mutual respect for independence and sovereignty; to promote peaceful resolution of disputes and adherence to international law. It is by honoring those principles that we promote predictability and partnership . . . .

A Code of Conduct is a necessity for the long term, but nations can also reduce the risk of miscommunication and miscalculation by taking steps today. All claimants have a responsibility to clarify and align their claims with international law. They can engage in arbitration and other means of peaceful negotiation.

Freedom of navigation and overflight is a linchpin of security in the Pacific. It is a right we all share...the right to safe and unimpeded commerce, freedom of navigation, and respect for international law must be maintained. The rights of all nations, large and small, must be respected.

* * * *

On October 3, 2013, at the Expanded ASEAN Maritime Forum ("EAMF"), in Kuala Lumpur, Malaysia, Kevin Baumert of the Department of State's Office of the Legal Adviser spoke on behalf of the United States delegation on the subject of "Freedom of navigation, military and law enforcement, as well as other activities in the EEZ." An excerpt follows from Mr. Baumert's remarks. The remarks are available at *www.state.gov/s/l/c8183.htm*.

* * * *

…The well-documented views of the United States on matters such as freedom of navigation and military activities in the [exclusive economic zone] have remained unchanged in the 30 years since the advent of the regime of the EEZ and remain consistent with international law. Our positions are also consistent across the globe. We take a principled and uniform approach,

whether in this region of the world or others, whether with allies and friendly neighbors, or with other States.

We would like to take this opportunity to emphasize several points, and also to reflect upon the importance of the EEZ in the Asia-Pacific region.

First, what is the EEZ, and where did it come from? In the long history of the law of the sea, the exclusive economic zone is a relatively recent innovation.

The EEZ is a unique maritime zone forged from compromises made by States during the Third Law of the Sea Conference in the 1970s, compromises between those coastal States that wished to extend their full sovereignty out to 200 nautical miles and those States that, conversely, wished to confine all coastal State authority to the territorial sea. The resulting maritime zone—the EEZ—is a combination of high seas law and territorial sea law that has created a unique maritime space, the rules for which are set out in the 1982 United Nations Law of the Sea Convention.

And the EEZ is an innovation in the law of the sea that can only be characterized as a success in light of the acceptance of this regime by nearly all States. Indeed, today the EEZ—extending up to 200 nautical miles from the shores of coastal States—represents more than one third of the world's ocean space, ocean space which is vitally important for trade, commerce and other uses of the sea.

Second, the legal regime of the EEZ reflects a balance of interests. On the one hand, coastal States have exclusive sovereign rights over resource-related activities—such as fishing and hydrocarbon exploitation. On the other hand, the extent of a coastal State's sovereign rights and jurisdiction is limited in the EEZ; it is not a zone of sovereignty. Important high seas freedoms are retained for the international community within the EEZ, and indeed much of the law of the high seas applies in this zone.

This includes of course the freedoms of navigation and overflight and of the laying of submarine cables and pipelines. As reflected in Article 58 of the Convention, other internationally lawful uses of the sea related to these freedoms are likewise preserved for all States in the EEZ. Of course, dating back to the era long predating the EEZ, the United States has always considered a traditional and lawful use of the seas to include military activities.

Third, the United States believes that we need to work collectively to maintain and strengthen this rules-based system that fairly balances the interests of States and is reflected in the Law of the Sea Convention. We must avoid what one eminent scholar has called the "territorial temptation"—that is, the tendency of States to territorialize the EEZ, to turn the EEZ into a security zone or to attempt to impose requirements on foreign vessels or entities that might be appropriate if the EEZ were the territorial sea.

We say this not to diminish the importance of coastal State security; that interest cannot be doubted. Indeed because of geography, the United States has the largest EEZ of any country. While mindful of these coastal State interests, we are at the same time aware that the EEZ is not a zone in which the coastal State may simply restrict the access of others according to its wishes. Any short-term advantages gained by trying to expand coastal State authority in the EEZ are more than offset, we believe, by the long-term risks posed to global mobility, trade, and access to the world's seas.

Preserving this international law regime is so important to the United States that we continue to peacefully oppose—both through diplomatic channels and operationally with naval vessels—the maritime claims of other States that impinge on our rights and the rights of all States as users of EEZ maritime space.

Fourth, we would like to say a few words about the importance of the EEZ in this region of the world. With its vital sea lanes, countless islands, semi-enclosed seas, and numerous unresolved maritime boundaries, Southeast Asia is a case study on the need to preserve the balance of interests reflected in the Law of the Sea Convention. Indeed, the EEZ comprises most of the waters of East and Southeast Asia, and the geography of the region leads to a proliferation of overlapping EEZ claims. In some areas, as many as four States may claim waters as their own EEZ, waters that are increasingly congested by different uses and activities of different actors from different States. . . .

Fortunately, the diplomats and experts who crafted the current international legal regime for the EEZ wisely created rules that took into account the economic and related rights of the coastal State while at the same time preserving freedoms of navigation, overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. It is in our collective interest to maintain this balanced, rules-based regime that is rooted in international law, where coastal State rights and jurisdiction are robust but limited, and navigation, overflight and other lawful uses of the sea remain open to all.

To conclude, we would like to take this opportunity to elaborate on two points that we frequently make in the context of disputes in the South China Sea.

The first point we would like to elaborate on is the idea that "maritime claims in the South China Sea must derive from land features." This is a fundamental concept in the law of the sea, and it applies strictly in the South China Sea, as elsewhere. As we lawyers say, "land dominates water."

- What does this mean? To be valid under the law of the sea, EEZ claims, and indeed any maritime claim in the South China Sea, must derive from—and be measured from—claimed land features.
- What do we mean by "land features"? There are two categories—continental (or mainland) territory and islands. Islands are a legal concept under the law of the sea. To be an island, the feature must be naturally formed, surrounded by water, and above water at high tide.
- As elsewhere, the maritime features in the South China Sea that fail to meet this test cannot generate EEZ.

The second point we would like to elaborate on is our urging of States to "clarify their claims in a manner consistent with international law." Why is this important? Clarification of maritime claims will help reduce the potential for conflict and misunderstanding in the South China Sea. Neighboring countries must know the nature and extent of one another's claims, even if they do not agree on those claims. How can States clarify their claims? We offer two suggestions.

- First, States can clarify which of their claimed land features—particularly the small islands in the South China Sea—they claim EEZ from. Under the law of islands, reflected in Article 121 of the Law of the Sea Convention, some small islands may be too small to generate EEZ. Likewise, under the law of maritime boundaries, countries often accord very small islands less maritime space when those islands are on the opposite side of other States with long territorial coastlines. So, whether based on the law relating to islands or the law relating to boundaries, States can clarify which of their claimed islands they consider to generate EEZ and which do not. Those that do not would be limited to a territorial sea extending a maximum of 12 nautical miles.

- A second way States can clarify their claims is to specify the geographic limits of their maritime claims. For instance, even where a State cannot agree with a neighbor on a boundary, it can consider taking the step of specifying the locations for the outer limits of its claim. The United States has some relevant experience here. Even where the United States and one of our neighbors have not agreed on a boundary line, the United States publishes the geographic coordinates of our EEZ limit line; this is the line that governs where the U.S. assertion of EEZ rights and jurisdiction ends. This transparency reduces the scope for conflict and misunderstanding with our neighbors. It likewise illuminates and clarifies which areas are disputed between neighbors, and which are not, helping to promote good order of the seas and peaceful relations. We think this kind of an approach—where States specify the geographic limits of their maritime claims—could similarly help promote peace and good order in the South China Sea and more broadly throughout the Asia-Pacific region.
-

* * * *

3. Piracy

See Chapter 3.B.6.

4. Freedoms of Navigation and Overflight

a. Freedom of overflight—Ecuador

On February 15, 2013, the Embassy of the United States of America in Quito, Ecuador delivered a diplomatic note to the Ministry of Foreign Affairs, Commerce, and Integration of the Republic of Ecuador regarding frequent denials from Ecuadorian civil aviation authorities of U.S. military flight plans beyond 12 nautical miles of the Ecuadorian coast. Excerpts from the U.S. diplomatic note follow.

_____

* * * *

…[O]n December 11, 2012, a U.S. military aircraft planned to depart Lima enroute to Central America. Its planned route of flight was more than 50 nautical miles from Ecuador's coastline. Following this route, the United States intended to enjoy the freedoms of navigation and overflight provided for under international law. Air traffic controllers in Peru denied the aircraft's departures stating that Guayaquil Air Traffic Controllers cited a need for a diplomatic clearance from Ecuador.

In this regard, and also in light of the Government of Ecuador's ratification of the 1982 United Nations Convention on the Law of the Sea ("the Convention") in 2012, the United States reminds Ecuador of the Embassy's previous communications concerning the operation of U.S. military aircraft in international airspace and notes that, as reflected in the Convention, the maximum breadth of the territorial sea and the air space over it is 12 nautical miles, beyond

which all States enjoy the freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms.

The United States calls upon Ecuador to facilitate the use of international airspace by state aircraft, whether within or outside a flight information region (FIR). To that end, the United States requests that Ecuadorian civil aviation authorities, including Guayaquil air traffic controllers, be reminded that state aircraft in international airspace are free to operate without notice to or clearance from coastal national authorities, and are not subject to the jurisdiction or control of civil air traffic control authorities of those nations. State aircraft of the United States comply with the international law requirement to navigate with due regard for civil aviation safety.

* * * *

On April 23, 2013, the United States delivered another diplomatic note to the Ministry of Foreign Affairs, Commerce, and Integration regarding overflight denials, including two new denials that occurred since February 15. Excerpts from the U.S. diplomatic note of April 23 follow.

---

* * * *

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs, Commerce and Integration of the Republic of Ecuador and has the honor to refer the Ministry to diplomatic note POL 028/2013 dated February 15, 2013, which regards frequent denials from Ecuador's civil aviation authorities of U.S. military flight plans and flights in international airspace beyond 12 nautical miles of Ecuador's coast. Since that note was sent, two new denials occurred in the interim. The Embassy reiterates its request for a response to its February 15, 2013 note.

In the most recent examples, on March 25, U.S. military aircraft (RCH 501) en route and following a flight plan from Mexico to Peru received a request from Guayaquil air traffic control to divert to a course that would have changed the flight's entry point into Peru. As RCH 501 was flying in international airspace, it proceeded on its filed flight plan. Also on March 25, another U.S. military aircraft (CONVOY 9407) was denied permission to depart from Lima due to an objection from Guayaquil air traffic control that the flight needed diplomatic clearance from Ecuador. The originally planned routes of both flights were well outside Ecuador's national airspace. Following the planned routes, the United States intended to enjoy the freedoms of navigation and overflight provided for under international law, including as reflected in the 1982 United Nations Convention on the Law of the Sea ("the Convention"), to which Ecuador acceded in 2012. In this regard, the United States reminds Ecuador of the Embassy's previous communications concerning the operation of U.S. military aircraft in international airspace and notes that, as reflected in the Convention, the maximum breadth of the territorial sea and the air space over it is 12 nautical miles, beyond which all States enjoy freedom of navigation and overflight and other internationally lawful uses of the sea related to these freedoms, without interference from coastal State authorities.

The United States calls upon Ecuador to facilitate the use of international airspace by State aircraft, whether within or outside a flight information region (FIR), consistent with

international law. To that end, the United States requests that Ecuador's civil aviation authorities, including Guayaquil air traffic controllers, be reminded that State aircraft in international airspace are free to operate without clearance from coastal State authorities, and are not subject to the jurisdiction or control of civil air traffic control authorities of those coastal States. State aircraft of the United States comply with the international law requirement to navigate with due regard for civil aviation safety.

The Embassy would appreciate clarification of Ecuador's adherence to the international law referred to above and reflected in the Convention. The Embassy would welcome the opportunity to discuss the issue further. The United States requests that the Government of Ecuador review this matter in order to prevent a recurrence and to ensure that the rights, freedoms, and uses of the sea and airspace reflected in international law are respected.

* * * *

On June 4, 2013, the Ministry of Foreign Affairs, Commerce, and Integration of the Republic of Ecuador responded to the U.S. diplomatic notes of February 15 and April 23, stating, in part, that "in the exclusive economic zone of Ecuador there is freedom of navigation and overflight for ships and aircrafts of other States, in accordance with the provisions of the [UN Convention on the Law of the Sea] and the statement made by Ecuador when it adhered to the Convention in October 2012." The diplomatic note stated further that ". . . appropriate arrangements . . . have been made in order to comply with the provisions of the UN Convention on the Law of the Sea."

b. China's claimed baselines of the territorial sea of the Senkaku Islands

On March 7, 2013, the United States sent a diplomatic note to the Ministry of Foreign Affairs of the People's Republic of China regarding a "Statement of the Government of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands," dated September 10, 2012 ("Statement"). The U.S. diplomatic note protests the establishment by China of straight baselines around the Senkaku Islands, contrary to customary international law as reflected in the UN Convention on the Law of the Sea. The baseline rules in international law distinguish between "normal baselines" (following the low-water mark along the coast at low tide) and "straight baselines," which may only be employed in certain limited geographic situations. The United States has lodged diplomatic protests regarding excessive straight baseline claims of many countries, including a previous protest to China regarding its assertion of straight baselines around mainland China (including Hainan Island) and the Paracel Islands. Excerpts follow from the March 7, 2013 U.S. diplomatic note to China.

* * * *

The Government of the United States notes that the Statement lists 17 base points that connect to create two straight baseline systems around two groups of islands known collectively in the United States as the Senkaku Islands (China refers to the islands as the Daioyu Islands). The first system of straight baselines consists of 12 segments enclosing Uotsuri Shima (Diaoyu Dao), Kuba Shima (Huangwei Yu), Minami Kojima (Nanxiao Dao), and certain other features. The second system of straight baselines consists of 5 segments surrounding one island, Taisho To (Chiwei Yu) and its surrounding features.

The United States recalls that, as recognized in customary international law and as reflected in Part II of the 1982 United Nations Convention on the Law of the Sea, except where otherwise provided in the Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast, as marked on large-scale charts officially recognized by the coastal State. As provided for in Article 7 of the Convention, only in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, may the coastal State elect to use the method of straight baselines joining appropriate points in drawing the baseline from which the breadth of the territorial sea is measured.

The Senkaku Islands comprise several small features spread over an area of approximately 46 square nautical miles. The United States takes no position on the ultimate sovereignty of the Senkaku Islands. Irrespective of sovereignty claims, international law does not permit the drawing of straight baselines around these features. The Senkaku Islands do not meet the specific geographic requirements for the drawing of straight baselines because their coastline is not deeply indented and cut into and they do not constitute a fringe of islands along the coast in its immediate vicinity.

To the extent that the Statement might be intended to suggest that archipelagic baselines may be drawn around the Senkaku Islands, this also would be inconsistent with international law. Under customary international law, as reflected in Part IV of the Law of the Sea Convention, only "archipelagic States" may draw archipelagic baselines joining the outermost points of an archipelago. Coastal States, such as China and the United States, do not meet the definition of an "archipelagic State" reflected in Part IV of the Convention. China, therefore, may not draw archipelagic baselines enclosing offshore islands and waters, and the proper baseline for such features is the low-water line of the islands.

Accordingly, with regard to the Statement and baselines set forth therein, the United States is obliged to reserve its rights and those of its nationals. These baselines, as asserted, impinge on the rights, freedoms, and uses of the sea by all nations by expanding the seaward limit of maritime zones and enclosing as internal waters areas that were previously territorial sea.

The United States requests that the Government of China review its current practice on baselines, explain its justification under international law when defining its maritime claims, and make appropriate modifications to bring these claims into accordance with international law as reflected in the Law of the Sea Convention. The United States is ready to discuss this and other related issues with China in order to maintain consistent dialogue on law of the sea issues.

* * * *

c. Vietnam's national law of the sea

On June 21, 2012, the Socialist Republic of Vietnam adopted the Law of the Sea of Vietnam, which took effect in January 2013. The United States has protested prior versions of Vietnam's maritime law as contrary to the international law of the sea. Additionally, U.S. Navy warships have challenged these excessive maritime claims as part of the U.S. Freedom of Navigation Program. The new Law of the Sea of Vietnam addresses some past concerns conveyed by the United States, but other impermissible restrictions relating to the rights, freedoms, and lawful uses of the sea remain in the new law. Accordingly, the United States conveyed its ongoing concerns with Vietnam's maritime law in an October 7, 2013 diplomatic note, excerpted below.

---

* * * *

The United States compliments Vietnam's earnest efforts to harmonize its maritime law with international law as reflected in the U.N. Convention on the Law of the Sea ("Convention") and notes the many positive aspects of the Law in this regard. In particular, the United States notes that the Law does not require prior permission for foreign warships to conduct innocent passage in the territorial sea nor is prior notification or permission required for foreign warships to operate in the contiguous zone. Further, the Law provides that the Convention will prevail in the event of differences between the Law and treaties to which Vietnam is a Party. The United States welcomes these developments and congratulates Vietnam on the general alignment of the structure of the Law with the structure of the Convention.

The United States wishes to provide additional observations on the consistency of the Law with the Convention. Regrettably, the Law contains provisions that are not consistent with the Convention. To the extent that similar provisions in Vietnam law were the subject of previous communications, the United States wishes to remind Vietnam of those communications and restates them in the context of the Law.

In this regard, the United States notes in particular that Article 8 of the Law provides for the use of straight baselines from which to measure maritime zones; Article 12 conditions innocent passage of foreign military vessels in the territorial sea on the provision of prior notification; and Article 37 forbids in the exclusive economic zone acts against the sovereignty, defense, and security of Vietnam. The United States recalls its previous communications with Vietnam on the establishment of baselines, the rights and freedoms of foreign military vessels, and the limits of coastal State authority in the exclusive economic zone and notes that the views stated in those communications apply to the same extent with respect to the Law.

Additionally, the Law contains other provisions that are inconsistent with international law as reflected in the Convention. Among these provisions, Article 12 asserts sovereignty over archeological and historical objects in the territorial sea, the application of which to sunken foreign military ships and aircraft is uncertain. The United States views such ships and aircraft as remaining the property of the foreign flag State unless expressly abandoned or transferred and that disturbance or recovery of such ships and aircraft should not occur without the express permission of the foreign flag State. The Law also conditions the laying of submarine cables in

the exclusive economic zone and on the continental shelf on written consent of Vietnam (Article 16); and provides that the threat or use of force against other countries renders passage in the territorial sea not innocent (Article 23). The United States notes further that Article 24 of the Law addresses obligations of nuclear-powered vessels or vessels transporting radioactive, noxious, or dangerous substances, and states its understanding that Article 24.2 of the Law is to be read in conjunction with and limited by Article 23 of the Convention.

The United States thus reserves its rights and those of its nationals with respect to those provisions of the Law that are not consistent with the Convention. The United States requests that the Government of Vietnam review these provisions of the Law and provide assurances that the Law will be implemented in a manner consistent with international law as reflected in the Convention.

* * * *

d. China's Announced Air Defense Identification Zone in the East China Sea

On November 23, 2013, the Ministry of National Defense of the Republic of China announced the establishment of an air defense identification zone ("ADIZ") over the East China Sea, purportedly requiring that noncommercial aircraft entering the ADIZ identify themselves to Beijing or risk possible defensive emergency measures by Chinese armed forces. The United States government responded negatively to the announcement. In a November 23, 2013 press statement available at *www.state.gov/secretary/remarks/2013/11/218013.*htm, Secretary Kerry said:

> The United States is deeply concerned about China's announcement that they've established an "East China Sea Air Defense Identification Zone." This unilateral action constitutes an attempt to change the status quo in the East China Sea. Escalatory action will only increase tensions in the region and create risks of an incident.
>
> Freedom of overflight and other internationally lawful uses of sea and airspace are essential to prosperity, stability, and security in the Pacific. We don't support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace. The United States does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. national airspace. We urge China not to implement its threat to take action against aircraft that do not identify themselves or obey orders from Beijing.
>
> We have urged China to exercise caution and restraint, and we are consulting with Japan and other affected parties, throughout the region. We remain steadfastly committed to our allies and partners, and hope to see a more collaborative and less confrontational future in the Pacific.

Secretary of Defense Chuck Hagel issued a similar statement on November 23, available at *www.defense.gov/news/newsarticle.aspx?id=121223*:

> The United States is deeply concerned by the People's Republic of China announcement today that it is establishing an air defense identification zone in the East China Sea. We view this development as a destabilizing attempt to alter the status quo in the region. This unilateral action increases the risk of misunderstanding and miscalculations.
>
> This announcement by the People's Republic of China will not in any way change how the United States conducts military operations in the region.
>
> The United States is conveying these concerns to China through diplomatic and military channels, and we are in close consultation with our allies and partners in the region, including Japan.
>
> We remain steadfast in our commitments to our allies and partners. The United States reaffirms its longstanding policy that Article V of the U.S.-Japan Mutual Defense Treaty applies to the Senkaku Islands.

At the November 26, 2013 State Department press briefing, State Department spokesperson Jen Psaki explained further the U.S. policy regarding ADIZ procedures:

> [W]e don't support efforts by any state to apply its air defense identification zone procedures to foreign aircrafts not intending to enter its national airspace. We don't apply—the United States does not apply that procedure to foreign aircraft, so it certainly is one we don't think others should apply.

Shortly after China announced the ADIZ, the United States flew two unarmed B-52 bombers on a training mission through the area purportedly covered by China's claimed ADIZ without notifying Beijing.

5. Maritime Security and Law Enforcement

a. Agreement with Palau

On August 15, 2013, the United States and the Republic of Palau signed a bilateral maritime law enforcement agreement. The agreement, which entered into force upon signature, supersedes the Cooperative Shiprider Agreement between the Government of the United States of America and the Government of the Republic of Palau by exchange of notes at Koror and Melekeok on March 5 and March 20, 2008. The new agreement will facilitate law enforcement cooperation between Palau and the United States on fisheries and counter-narcotics. As provided 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 Palau's Division of Marine Law Enforcement to embark on U.S. law enforcement vessels or aircraft to conduct joint operations. These vessels or aircraft carrying "embarked law enforcement officials" may be authorized on

a case-by-case basis to enter the territorial sea of Palau to assist in stopping, boarding, and searching vessels suspected of violating Palau'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 Palau's exclusive economic zone. For operations without an embarked Palauan law enforcement official, the agreement further authorizes the United States to board and search suspect vessels claiming registry or nationality in Palau and located seaward of any State's territorial sea. The full text of the agreement is available at *www.state.gov/s/l/c8183.htm*.

b. Amendments to Agreements with Marshall Islands, Kiribati, and Micronesia

On March 19, the United States and the Republic of the Marshall Islands signed a Protocol to the Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation in Maritime Surveillance and Interdiction Activities. The Protocol amends the earlier Agreement, most notably, by adding to Article 1 a new definition, entitled "Law Enforcement Vessels," that covers "warships and other ships of the Parties. . . ." The original Agreement referred only to United States Coast Guard law enforcement vessels. Thus, the Protocol modifies the Agreement to allow for greater cooperation through the joint maritime surveillance program, including through the use of U.S. Navy vessels. The Protocol entered into force upon signature.

The United States similarly modified two other maritime law enforcement agreements with Pacific Island partner nations to permit cooperative activities aboard U.S. Navy vessels:

(1) On March 27, the United States and the Republic of Kiribati signed a Protocol to the Agreement between the Government of the United States of America and the Government of the Republic of Kiribati Concerning Cooperation in Joint Maritime Surveillance Operations. The Protocol entered into force upon signature.

(2) On April 5, the United States and the Federated States of Micronesia agreed, by exchange of diplomatic notes, to an amendment to the Cooperative Shiprider Agreement between the Government of the United States of America and the Government of the Federated States of Micronesia.

See *Digest 2008* at 649-50 for discussion of the original agreements with these Pacific island states.

6. Maritime Search and Rescue: Arctic SAR Entry into Force

On January 19, 2013, the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, done at Nuuk on May 12, 2011, entered into force. For background on this Arctic SAR agreement, see *Digest 2011* at 413. In accordance with

Article 19(2) of the agreement, entry into force occurred 30 days after receipt by Canada, serving as Depositary, of the last notification that the Parties had completed their internal procedures required for entry into force. The December 20, 2012 diplomatic note from Canada informing the parties that all necessary steps had been taken for entry into force is available at *www.state.gov/s/l/c8183.htm*.

B. OUTER SPACE

1. Space Security Conference

On April 2, 2013, Deputy Assistant Secretary of State for Space and Defense Policy Frank A. Rose addressed a panel on space security threats at the 2013 Space Security Conference convened in Geneva by the UN Institute for Disarmament Research. Mr. Rose's remarks are available at *http://geneva.usmission.gov/2013/04/02/protecting-space-for-future-generations-is-in-the-vital-interests-of-the-global-community/*, and are excerpted below.

---

* * * *

For over five and a half decades, nations around the globe have derived increasing benefits from the peaceful use of outer space. Satellites contribute to increased transparency and stability among nations and provide a vital communications path for avoiding potential conflicts. The utilization of space has helped save lives by improving our warning of natural disasters and making recovery efforts faster and more effective. Space systems have created new markets and new tools to monitor climate change and support sustainable development. In short, space systems allow people and governments around the world to see with clarity, communicate with certainty, navigate with accuracy, and operate with assurance.

* * * *

As more nations and non-state actors recognize these benefits and seek their own space or counterspace capabilities, we are faced with new challenges in the space domain.

Now there are approximately sixty nations and government consortia that own and operate satellites, in addition to numerous commercial and academic satellite operators. This increasing use—coupled with space debris resulting from past launches, space operations, orbital accidents, and testing of destructive ASATs which generated long-lived debris—has resulted in increased orbital congestion, complicating space operations for all those that seek to benefit from space. Another area of increasing congestion is the radiofrequency spectrum. As the demand for bandwidth increases and more transponders are placed in service, the greater the probability of radiofrequency interference and the strains on international processes to minimize that interference.

In addition to the challenges resulting from space debris and radiofrequency interference, space is also becoming increasingly contested. From the U.S. perspective, concerns about

threats were recently noted in an assessment issued last month by James Clapper, the U.S. Director of National Intelligence.

> "Space systems and their supporting infrastructures enable a wide range of services, including communication; position, navigation, and timing; intelligence, surveillance, and reconnaissance; and meteorology, which provide vital national, military, civil, scientific, and economic benefits. Other nations recognize these benefits to the United States and seek to counter the US strategic advantage by pursuing capabilities to deny or destroy our access to space services. Threats to vital US space services will increase during the next decade as disruptive and destructive counterspace capabilities are developed."

Responding through International Cooperation

In response to these challenges, the United States continues to be guided by the principles and goals of the National Space Policy that was signed by President Obama in June 2010. The policy places increased emphasis on international cooperation to deal with the challenges of the 21st Century.

To address the hazards of an increasingly congested space environment, the United States has expanded efforts to share space situational awareness services, including notifications to government and commercial satellite operators of close approaches that could result in satellite collisions. These and other "best practices" can form the basis for the development of a set of guidelines for the long-term sustainability of space activities. Long-term sustainability of space activities is a topic being addressed by a working group of the UN Committee on the Peaceful Uses of Outer Space, which will be discussed in greater detail by Dr. Peter Martinez, the working group chair, later today.

To address threats to space activities in the increasingly contested space environment, the United States continues to pursue a range of measures to strengthen stability in space. In doing so, we expect to increase the security and resilience of space capabilities, continue to conduct Space Security Dialogues with our friends and partners, and pursue transparency and confidence building measures, or TCBMs.

* * * *

In that vein, our Space Security Dialogues provide an opportunity for constructive exchanges on emerging threats to shared space interests, national security space policies and doctrine, and opportunities for further bilateral cooperation. …

…[Y]ou will be hearing later today from Ambassador Jacek Bylica and Victor Vasiliev on two of the most important efforts—an International Code of Conduct for Outer Space Activities, or "Code," and the UN Group of Governmental Experts (GGE) study of outer space TCBMs. While I will defer to them for specific details on these efforts, I will note that the United States is a strong supporter of both activities, as well as other multilateral efforts in specific regions—such as a workshop on space security that commenced last December within the framework of the ASEAN Regional Forum.

* * * *

As you will hear later today from Ambassador Bylica, the European Union is leading efforts to develop a text that would be open to participation by all States on a voluntary basis. The United States believes the EU's latest draft is a useful foundation and constructive starting point for developing a consensus on an International Code. We look forward to participating in the open-ended consultative meeting that the EU and Ukraine will be convening in Kiev next month. These consultations, to which all UN member states will be invited, will provide an opportunity to address all elements of the draft Code. Along with our partners in the EU, the United States' aim remains to find agreement on a text that is acceptable to all interested States and that can produce effective security benefits in a relatively short time.

* * * *

2. UN Group of Governmental Experts

On July 18, 2013, the State Department issued a press statement on the consensus reached by the UN Group of Governmental Experts on transparency and confidence-building measures ("TCBMs") for outer space activities at the Group's meetings in New York earlier in July. The U.S. statement welcoming the consensus is excerpted below and available at *http://www.state.gov/r/pa/prs/ps/2013/07/212095.htm*.

---

* * * *

Through these discussions, the United States sought to find solutions to common challenges and problems in an increasingly contested and congested space environment. The Group's study was a unique opportunity to establish consensus on the importance and priority of voluntary and pragmatic transparency and confidence-building measures to ensure the sustainability and safety of the space environment as well as to strengthen stability and security in space for all nations.

The Group recommended that States and international organizations consider and implement a range of measures to enhance the transparency of outer space activities, further international cooperation, consultations, and outreach, and promote international coordination to enhance safety and predictability in the uses of outer space.

Furthermore, the Group endorsed efforts to pursue political commitments—including a multilateral code of conduct—to encourage responsible actions in, and the peaceful use of, outer space. In this regard, the Group noted the efforts of the European Union to develop an International Code of Conduct for Outer Space Activities through open-ended consultations with the international community. Previously, on January 17, 2012, the Secretary of State announced that the United States has decided to join with the European Union and other nations to develop a Code of Conduct.

All UN member states share a common commitment to the pursuit of peace and security. We support the principle, solemnly declared by the United Nations General Assembly in December 1963, that the exploration and use of outer space shall be carried on in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.

In the half century since this principle—subsequently incorporated into the 1967 Outer Space Treaty—was recognized, all nations and peoples have seen a radical transformation in the way we live our daily lives, in many ways due to our use of space. The globe-spanning and interconnected nature of space capabilities and the world's growing dependence on them mean that irresponsible acts in space can have damaging consequences for all. As a result, all nations must work together to adopt approaches for responsible activity in space to preserve this right for the benefit of future generations.

The United States is pleased to join consensus to affirm the role of voluntary, non-legally binding transparency and confidence-building measures to strengthen stability in space. This consensus sends a strong signal: States must remain committed to enhance the welfare of humankind by cooperating with others to maintain the long-term sustainability, safety, security, and stability of the space environment.

The United States looks forward to the official issuance of the Group of Governmental Experts' study and our future dialogues on these issues with the international community, including all relevant entities and organizations of the United Nations system.

* * * *

3. UN General Assembly First Committee Discussion on Outer Space

On October 25, 2013, Jeffrey L. Eberhardt, Alternate Representative for the U.S. delegation, delivered remarks at the 68th UN General Assembly First Committee thematic discussion on outer space. Mr. Eberhardt's remarks are excerpted below and available at *www.state.gov/t/avc/rls/2013/215881.htm*.

---

* * * *

We will soon observe the 50th anniversary of General Assembly's adoption of the "Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space." Resolution 1962 (XVIII), which was adopted by consensus on December 13, 1963, laid out the key principle that outer space is free for exploration and use by all States on a basis of equality and in accordance with international law. Just over three years later, these and other elements of the Principles Declaration formed the core for the 1967 Outer Space Treaty, which remains the foundation of the international legal framework for space activities.

In the half century since the Principles Declaration was adopted, all nations and peoples have seen a radical transformation in the way we live our daily lives, in many ways due to our use of space. Over the past three decades, the space environment, especially key Earth orbits, has become increasingly utilized as more and more States are becoming space-faring and space-benefiting nations. As a consequence, the outer space environment is becoming increasingly congested, contested, and competitive—with threats to vital space services potentially increasing during the next decade as disruptive and destructive counterspace capabilities are developed.

* * * *

Given the importance of international cooperation, the United States welcomes the achievement of consensus of the UN Group of Governmental Experts (GGE) on Transparency and Confidence-Building Measures (TCBMs) in Outer Space Activities. Under the able chairmanship of Victor Vasiliev of Russia, the GGE study[4] provides this body with a unique opportunity to advance consensus on the importance and priority of voluntary and pragmatic measures to ensure the sustainability and safety of the space environment as well as to strengthen stability and security in space for all nations.

The GGE study recommended that States and international organizations consider and implement a range of measures to enhance the transparency of outer space activities, further international cooperation, consultations, and outreach, and promote coordination to enhance safety and predictability in the uses of outer space. Reflecting the extensive technical expertise within the Group, the study provides an analytically rigorous set of criteria for evaluating proposed TCBMs. These criteria can help inform future discussions in this Committee and in other fora regarding the implementation, demonstration, and validation of specific measures.

The Group also endorsed efforts to pursue political commitments—including a multilateral code of conduct—to encourage responsible actions in, and the peaceful use of, outer space. In particular, the Group noted the efforts of the European Union (EU) to develop an International Code of Conduct for Outer Space Activities through open-ended consultations with the international community. In this regard, the United States continues to participate actively in this initiative and looks forward to the next round of Open-ended Consultations to take place in November, 2013 in Bangkok, Thailand. The United States joins the EU in calling on all interested States to continue to engage in this process.

* * * *

As the GGE study noted, international space cooperation should be based upon the 1996 Benefits Declaration endorsed in UN General Assembly Resolution 51/122, with each State free to determine the nature of its participation on an equitable and mutually acceptable basis with regard to appropriate technology safeguard arrangements, multilateral commitments, and relevant standards and practices.

Bilateral TCBMs also include discussions on space security policy, such as those that the United States has been conducting with a number of space-faring nations around the globe. Along with U.S. efforts to develop mechanisms for improved warning of potential hazards to spaceflight safety, these discussions constitute significant measures to clarify intent and build confidence.

The United Nations itself can play an important role in fostering cooperation on space TCBMs among States. The United States looks forward to discussions next year in the Committee on the Peaceful Uses of Outer Space, the Disarmament Commission, and the Conference on Disarmament on how the specific recommendations of the GGE study can be considered by each of these bodies within the scope of their respective mandates and programs of work. The United States also looks forward to similar consideration on the relevant aspects of the Group's recommendations in other UN bodies as well as in regional and multilateral fora.

As the international community moves forward on space TCBMs, there also will need to be greater coordination among relevant UN entities to facilitate the implementation of the

[4] A/68/189*.

transparency and confidence-building measures and promote their further development. In this regard, the United States believes that all relevant entities and organizations of the United Nations system should coordinate, as appropriate, on matters related to the recommendations contained within the Secretary General's report on the GGE study.

The GGE study's endorsement of voluntary, non-legally binding transparency and confidence-building measures to strengthen stability in space is a landmark development. The United States will continue to take a leadership role in international efforts which translate results from this consensus study into action. We are therefore pleased to join in co-sponsorship of a resolution on "Transparency and confidence-building measures in outer space activities" at this session of the General Assembly. We hope this resolution can be adopted by consensus.

All nations are increasingly reliant on space, not only when disasters strike, but also for our day-to-day life. We need to protect and preserve our long-term interests by considering the risks that could harm the space environment and disrupt services on which the international community depends. For this reason, we must all work together and take action now to establish measures that will strengthen transparency and stability in outer space. This work toward TCBMs will enhance the long-term sustainability, stability, safety, and security of the space environment. It is in the vital interests of the entire global community to protect the space environment for future generations.

* * * *

4. Space Debris Mitigation Measures

On April 11, 2013, Brian Israel, U.S. Representative to the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space("COPUOS"), delivered the statement for the United States at a general exchange of information on space debris mitigation measures during the COPUOS Legal Subcommittee's 52nd Session. Mr. Israel's remarks appear below.

* * * *

Mr. Chairman, we are pleased that this subcommittee is continuing to exchange information regarding national mechanisms relating to space debris mitigation measures, as well as international mechanisms such as ESA's *Administrative Instruction on Space Debris Mitigation for Agency Projects* and debris mitigation mechanisms employed by other international organizations. The United States has long recognized the importance of managing the creation and effects of space debris, and those U.S. Government agencies that participate in and license outer space activities have a robust framework of statutes, regulations, and internal policies that take into account space debris mitigation from the design stage of a satellite or space launch system to its end-of-life disposal. We provided a detailed overview of U.S. mechanisms during the 49th Session of the Legal Subcommittee, and I would like to provide an update.

Central to the debris mitigation efforts in U.S. Government missions are the United States Government Orbital Debris Mitigation Standard Practices, which many will recall served as the basis for the space debris mitigation guidelines developed and adopted by the Inter-Agency Space Debris Coordination Committee (IADC) in 2002, and the UNCOPUOS Space Debris

Mitigation Guideline approved by the UN General Assembly in 2007. The 2010 National Space Policy directs U.S. Government agencies to "continue to follow the United States Government Orbital Debris Mitigation Standard Practices, consistent with mission requirements and cost effectiveness, in the procurement and operation of spacecraft, launch services, and the conduct of tests and experiments in space." Notably, the National Space Policy requires that the head of the sponsoring department or agency approve any exceptions to the U.S. Government Orbital Debris Mitigation Standard Practices, and notify the Secretary of State. NASA, the Department of Defense, and NOAA all carry out this guidance through internal regulatory mechanisms.

In addition, those agencies that license commercial satellites also have requirements in their licensing procedures that are intended to limit the creation and impact of space debris, and these requirements are often complementary.

Mr. Chairman, I would like to offer some observations about why we and others invest so much in debris mitigation measures.

The United States is proud of its pioneering role and leadership in orbital debris mitigation. In 1995, NASA became the first space agency in the world to issue a comprehensive set of orbital debris mitigation guidelines. NASA is a founding member of the Inter-Agency Space Debris Coordination Committee (IADC) and has played a leading role in discussions of space debris mitigation in the IADC, and in the Scientific and Technical Subcommittee of COPUOS since the topic became a standing agenda item in 1994. In the IADC, NASA continues to play a lead role in researching and developing relevant technical standards – this work will continue to inform the STSC so that the U.N. Space Debris Mitigation Guidelines can be updated as appropriate.

We are encouraged that a number of States and Intergovernmental Organizations have developed debris guidelines, and believe that the implementation by even more spacecraft operators is vital to the safety and long-term sustainability of space flight.

But let me explain why the United States takes these measures and makes these investments in debris mitigation. We do not do so out of a sense that they are legally required. Rather, we do so because of our strong interest in the safety and long-term sustainability of space activities, and our judgment that these practices represent sound approaches to debris mitigation.

This distinction is important because we sometimes hear the view expressed that the solution to the debris challenge is to elaborate technical debris mitigation guidelines into international legal obligations. Based on our experience, we believe States are motivated first and foremost by enlightened self-interest in the safety and sustainability of space activities. We do not believe that the force of legal obligation is necessary for States to take measures to mitigate debris.

As delegations are no doubt aware, approaches to mitigating debris are linked to evolving technologies. As technologies change so do the available methods for debris mitigation, as well as the cost-benefit tradeoffs of doing so. Given the evolving technical aspects of debris mitigation, and the practical, economic reality that existing platforms cannot be replaced overnight, we do not see the wisdom in ossifying debris mitigation standards into international law at this time.

Safety and sustainability in space are of paramount importance for the United States, and we will continue to wholeheartedly support international cooperation to further debris mitigation technology and techniques.

Finally, Mr. Chairman, let me describe one more U.S. legal mechanism relating to space debris mitigation. The Department of Defense is authorized by statute (10 U.S.C. § 2274) to

share space situational awareness (SSA) information and services with governmental, intergovernmental, and commercial entities to improve the safety and sustainability for space flight. SSA services are critical to avoiding collisions in outer space that can degrade the space environment for all States. To date, the United States has concluded agreements to facilitate the provision of SSA information and services with 35 commercial entities, and negotiation of agreements with a number of governments is underway. We encourage all space-faring nations to explore entering into an SSA-sharing agreement with the United States so that we can continue to improve the safety and sustainability of space flight.

Thank you, Mr. Chairman, and we look forward to continued discussions on this issue.

* * * *

Cross References

Piracy, **Chapter 3.B.6.**
Proliferation Security Initiative, **Chapter 19.E.**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

a. General

On October 22, 2013, U.S. Special Envoy for Climate Change Todd Stern addressed a conference on climate change at Chatham House in London. Mr. Stern's remarks on a new global climate agreement are excerpted below and available at *http://iipdigital.usembassy.gov/st/english/texttrans/2013/10/20131022284984.html#axzz2uHN1JDWI*.

_____

* * * *

We should … be well aware that an international agreement is by no means the whole answer. The most important drivers of climate action are countries acting at home. After all, the essential task before us is to transform the energy base of our economies from high to low carbon. Most of this transformation will take place in the private sector, where energy is produced and consumed, but governments need to set the rules of the road, provide the incentives, remove the barriers, fund the R&D, and spur the investment needed to hasten this transformation.

In the United States, President Obama has put his shoulder to the wheel with his new Climate Action Plan, which builds on aggressive measures from the past few years. Last month, for example, EPA issued draft regulations to control carbon pollution for new power plants, and is hard at work preparing regulations for existing plants. The President has also issued landmark rules to double the miles-per-gallon of our vehicle sector. These two sectors—power and transportation—account for some two-thirds of our national emissions. And the President has also issued strong efficiency standards for building appliances, has doubled our use of wind and solar power, and is pursuing a suite of other actions.

But national action will only rise to the level of ambition we need if it takes place within a strong and effective international system. Effective international climate agreements serve three vital purposes. First, they supply the essential confidence countries need to assure them that if they take ambitious action, their partners and competitors will do the same. Second, they send a potent signal to other important actors—sub-national governments, the private sector, civil society, research institutions, international organizations—that the world's leaders are committed to containing climate change. Third, they prompt countries to take aggressive climate action at home to meet their national pledges.

We have, now, an historic opportunity created by the Durban Platform's new call for a climate agreement "applicable to all Parties." Some have said those four words in the Durban negotiating mandate are nothing new in climate diplomacy, but make no mistake, they represented a breakthrough because they mean that we agreed to build a climate regime whose obligations and expectations would apply to everyone. We have had a system, the Kyoto Protocol, where the reverse was true, where real obligations applied only to developed countries, listed in the Framework Convention's Annex 1. The point of "applicable to all" in the Durban Platform was to say, in effect, that this new agreement would not be Kyoto; that its obligations and expectations would apply to all of us.

What Durban recognized was that Kyoto could not point the way forward in a world where Non-Annex 1 countries (developing countries as listed in 1992) already account for a majority of greenhouse gas emissions and will account for two-thirds of those emissions by 2030.

Our task now is to fashion a new agreement that will be ambitious, effective and durable. And the only way to do that is to make it broadly inclusive, sensitive to the needs and constraints of parties with a wide range of national circumstances and capabilities, and designed to promote increasingly robust action.

Let me talk about certain core elements of such an agreement. First, it will need a supple architecture that integrates flexibility with strength. Some see flexibility as a signal of weakness, but I think just the opposite. We know the agreement must be ambitious; to be ambitious it will have to be inclusive; and to be inclusive it will have to balance the needs and circumstances of a broad range of countries. For such an agreement, a rigid approach is the enemy.

We see flexibility in the new agreement in at least three ways. First, rather than negotiated targets and timetables, we support a structure of nationally determined mitigation commitments, which allow countries to "self-differentiate" by determining the right kind and level of commitment, consistent with their own circumstances and capabilities. We would complement that structure with ideas meant to promote ambition—a consultative or assessment period between an initial and final commitment in which all Parties as well as civil society and analytic bodies would have an opportunity to review and comment on proposed commitments; "clarity" requirements (or expectations) so that commitments can be transparently understood by others; and a requirement (or invitation) to countries to include a short explanation of why they believe their proposed commitment is fair and adequate. This nationally determined structure will only work if countries understand that all have to do their part; that strong action is a favor we do ourselves because we are all profoundly vulnerable to climate change; and that the world will be watching how we measure up.

Second, we need to focus much more on the real power of creating norms and expectations as distinguished from rigid rules. There is certainly a role for rules, standards and

obligations in this agreement. But an agreement that is animated by the progressive development of norms and expectations rather than by the hard edge of law, compliance and penalty has a much better chance of working, being effective and building inclusive, real world ambition.

* * * *

Third, we will need to be creative and flexible as we think about the legal character of the agreement. Again, rigidity is a potential roadblock. We all agreed in Durban to develop a new legal agreement, but left open the precise ways in which it would be legal; recall the famous phrase "protocol, another legal instrument, or an agreed outcome with legal force." Parties are discussing a variety of ideas with regard to which elements of a new agreement would be legally binding and the role that both international and domestic bindingness might play. This discussion is still in its early stages, and I don't have much to add here. What I would say, though, is to keep our eyes on the prize of creating an ambitious, effective and durable agreement. Insisting that only one way can work, such as an agreement that is internationally legally binding in all respects, could put that prize out of reach.

Now let's move beyond flexibility. The new agreement will also need to come to terms with differentiation, the issue that has bedeviled climate negotiations more than any other in the past 20 years. I believe there is a way through this thicket, but only if all Parties recognize both what is actually essential in their own position and what is genuinely reasonable in the position of the other side.

Nearly all Parties to the Convention share a conviction that climate change is a serious threat that has to be addressed with vigor and commitment. The difficulty lies in deciding who has to do what and the phrase at the heart of this debate is CBDR—common but differentiated responsibilities and respective capabilities.

In one sense, this phrase has come to embody an ideological narrative of fault and blame, but it also serves a more pragmatic purpose. It is seen as the principle that shields developing countries from climate requirements they fear could constrain their capacity to grow, develop and alleviate poverty.

While we don't accept the narrative of blame, we do see the concerns that underlie the developing country attachment to CBDR as entirely legitimate. Countries in the midst of the historic project of developing, industrializing and alleviating poverty cannot fairly be asked to embrace obligations that would jeopardize those hopes.

The nationally determined structure of commitments we have already discussed should satisfy this pragmatic purpose, since countries would make their own decisions about what kind of mitigation commitments were appropriate given their own circumstances and capabilities. Moreover, the idea of relying more on norms and expectations should also ease developing country concerns.

The difficulty comes when we consider the Annex 1 and Non-Annex 1 categories created in 1992—in particular, whether those original categories should define the operational content of the agreement. Put another way, are we negotiating a new agreement that has a single operational system differentiated across the spectrum of countries or that has two different systems on relevant issues like mitigation, transparency, accounting – one for developed countries, one for developing.

* * * *

In short, there is no real substantive defense for asserting that membership in the 1992 annexes should both (a) define obligations and expectations, and (b) be immutable in a rapidly changing world.

Some nonetheless argue that this result is required because the Durban platform says the new agreement is to be "under the Convention." Since the annexes were created as part of the Convention, it is alleged that they must never change their composition or their operational character in defining what Parties are supposed to do. But this is specious, since "under the Convention" plainly had no such meaning in the Durban Platform negotiations, and if it had, there never would have been a Durban Platform.

Some also argue that the annexes must be fixed and retain their operational character because Annex 1 countries bear historical responsibility for our climate problem and history doesn't change. But this claim makes no sense either. First, it misconceives the facts of historical emissions since, based on the well-known MATCH study, commissioned by the UNFCCC, cumulative emissions from developing countries will surpass those of developed countries by 2020. Second, it ignores the fact that history is changing continually in dynamic ways. China, for example, is already the world's second largest historic emitter. And the world is now emitting as much every decade as all the cumulative emissions that occurred before 1970. Third, it is unwarranted to assign blame to developed countries for emissions before the point at which people realized that those emissions caused harm to the climate system.

So let me sum up on differentiation. Developing country concerns about avoiding climate obligations that could constrain their capacity to develop are entirely legitimate. CBDR is an enduring principle of the Convention and, read properly, should address these developing country concerns. A new agreement must be structured and drafted in a way consistent with those concerns. The annexes can be left alone in their current composition. But they cannot have an operational role of defining obligations and expectations, because doing so is unjustifiable in a rapidly evolving world and would defeat our effort to produce the ambitious, effective and durable agreement that is our mission.

The third broad issue that will profoundly affect our negotiations is financial assistance in its various forms. Here we need a paradigm shift in our thinking, based on a combination of hard realities and enormous opportunity.

To state the obvious, there is no question that we need to provide assistance to many countries that are working to build low-carbon economies and to many countries seeking to build resilience and to adapt to climate impacts. Since 2010, the United States has been providing some $2.5 billion a year, more than six times more than we provided before the Obama Administration. And we are continuing our vigorous push within the U.S. government for climate funding.

Now the hard reality: no step change in overall levels of public funding from developed countries is likely to come anytime soon. The fiscal reality of the United States and other developed countries is not going to allow it. This is not just a matter of the recent financial crisis; it is structural, based on the huge obligations we face from aging populations and other pressing needs for infrastructure, education, health care and the like. We must and will strive to keep increasing our climate finance, but it is important that all of us see the world as it is.

However, there is also enormous opportunity, if we can take advantage of it. Because a genuine step change in funding can occur in the flow of private capital leveraged by public money or public policy. Some leveraged private investment is already flowing into developing

countries, but we can do so much more to unlock much larger flows. The well of private capital is deep, but we need hard work by developed and developing governments to tap into it.

Once again, to make real progress, we need to elevate practical problem solving above rhetoric and ideology. Lectures about compensation, reparations and the like will produce nothing but antipathy among developed country policy makers and their publics. But we can succeed on this front if we work together.

* * * *

b. UN Framework Convention on Climate Change

A U.S. delegation participated in the 19th Conference of the Parties ("COP-19") of the UN Framework Convention on Climate Change ("FCCC") in Warsaw, Poland, November 11 to 22, 2013. The primary objective at COP-19 was to lay the groundwork for negotiating a new agreement on climate change that would be applicable to all parties and would be concluded by 2015, as agreed at the COP in Durban in 2011. The work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action ("ADP") in Warsaw, November 12-23, 2013 is reflected in the agenda, reports, submissions (including the U.S. submission), and other documents available at *http://unfccc.int/meetings/warsaw_nov_2013/session/7730.php.* The U.S. Submission to the ADP includes the following summary description of the type of agreement envisioned by the United States:

> Structurally, we see the agreement as being part of a larger package:
>
> - The agreement itself will contain core provisions that are designed to stand the test of time. The agreement should, all things being equal, be concise. The more concise the agreement is, the easier it will be to negotiate and complete, and the more understandable it will be for domestic decision makers and constituencies.
> - We would see somewhat more detail on mitigation and transparency, given their specific nature.
> - Like the FCCC, the agreement is likely to contain a mix of provisions that are legally binding and non-legally binding.
> - We should not need to revisit the basic structure of the agreement to account for changing circumstances, or when Parties make new mitigation commitments in the future. Therefore, the structure will need to be sufficiently flexible to account for changing circumstances.
>
> Parties' specific mitigation commitments, contained in a side document (such as a "schedule"), would also be part of the package. Such commitments would be nationally determined by Parties and would have gone through the consultative process that we have outlined (and which we further elaborate below).
>
> The package will also include various COP decisions that either implement elements of the agreement in greater detail, or address issues more

appropriately dealt with through decisions.

COP-19 resulted in the creation of the Warsaw international mechanism for loss and damage associated with climate change impacts. U.N. Doc. FCCC/CP/2013/L.15. The Warsaw international mechanism was established under the Cancun Adaptation Framework and is intended to address loss and damage associated with impacts of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change. Establishing the Warsaw international mechanism on loss and damage under the Cancun Adaptation framework is consistent with the United States view that as a legal and technical matter, loss and damage is a part of adaptation efforts under the Convention, rather than a standalone pillar.

c. Green Climate Fund

At COP-19, the Parties to the FCCC took several steps toward full operation of the Green Climate Fund ("GCF"), a financial mechanism to support projects and programs in developing countries. An independent GCF secretariat was established and the GCF Board selected an executive director of the GCF. Parties provided initial guidance to the GCF. Arrangements between the COP and the GCF were elaborated in an annex to the report of the COP. U.N. Doc. FCCC/CP/2013/10/Add.1. Further information on the GCF is available at *http://unfccc.int/cooperation_and_support/financial_mechanism/green_climate_fund/items/5869.php*.

On October 24, 2013, the U.S. Department of State issued a press statement on efforts to mobilize global climate finance generally, available at *www.state.gov/e/oes/rls/other/2013/215831.htm*, making particular mention of the GCF:

> Multilateral development banks (MDBs) and multilateral climate funds are already playing a transformative role in the transition to a low-emission economy and have the potential to do much more. A series of new activities in 2013 has aimed at sharpening the response of the MDBs to the climate finance challenge. High-level representatives of MDBs and donor countries met twice, in April and October, to advance the agenda on leveraging private investment in climate action. The MDBs reported on work in three important areas: (1) the development of guidelines for offering concessional loans; (2) efforts to better engage the private sector; and (3) progress on tracking of their climate finance, especially on measuring private funds leveraged. More structured exchanges among the MDBs, the private sector, and policymakers to advance the climate finance agenda are planned. Meanwhile, the ongoing development of the Green Climate Fund, including its Private Sector Facility, provides an opportunity to promote a paradigm shift and to test new approaches to catalyzing private investment for mitigation and adaptation in developing countries.

d. U.S. Action on Climate Change

(1) U.S. Climate Action Plan

On June 25, 2013, President Obama announced the U.S. Climate Action Plan. See White House Fact Sheet, available at *www.whitehouse.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan*. The plan includes a commitment to lead international efforts to address global climate change by, for example, expanding bilateral initiatives with China, India, and other major emitting countries. Secretary Kerry issued a press statement on June 25, 2013 in response to the announcement of the President's Climate Action Plan, available at *www.state.gov/secretary/remarks/2013/06/211124.htm*. Secretary Kerry said:

> The President's historic announcement today will send ripples internationally about the United States' commitment to meeting the climate change challenge. Leading the world as the "indispensable nation" demands that we must be the indispensable stewards of the planet. Decisive action at home empowers us to make more progress internationally on a shared challenge.
>
> …
>
> Climate change cannot be solved by one nation alone. The global community must step up. I raise this issue everywhere I travel, in every meeting, and we have already broken new ground by creating the U.S.-China Working Group, where we recently agreed to work together to phase down a class of potent greenhouse gases. Just this past weekend, we launched a Climate Working Group with India that can lead to similar advances. And we are working with partners around the world to craft an ambitious, fair, and durable international climate agreement. Continued pressure and high-level engagement is vital to reduce emissions, transform global energy economies, and help the most vulnerable cope with the effects of climate change. We must use every day to find and take tangible, collaborative steps forward.

(2) E.O. 13653: Preparing the U.S. for impacts of climate change

On November 6, 2013, President Obama issued Executive Order 13653, "Preparing the United States for the Impacts of Climate Change." 78 Fed. Reg. 66,819 (Nov. 6, 2013). Among other things, the Order establishes an interagency Council on Climate Preparedness and Resilience and a State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience. The Executive Order directs federal agencies to take a series of steps to make it easier for decision makers at all levels of federal, state, and local government to strengthen resilience to extreme weather events and prepare for other impacts of climate change.

e. Launch of Initiative for Sustainable Forest Landscapes

On November 20, 2013, in Warsaw, Poland, the United States joined in the launch of a new partnership, the Initiative for Sustainable Forest Landscapes ("ISFL"). U.S. Special Envoy for Climate Change Todd Stern delivered remarks at the launch, available at *www.state.gov/e/oes/rls/remarks/2013/217781.htm*, and excerpted below.

* * * *

…[W]e're proud to be part of the new Initiative for Sustainable Forest Landscapes ("ISFL"). This new partnership between governments and the private sector will help create long-term and lasting incentive structures for more sustainable development. The $25 million that the United States plans to provide, as part of the more than $250 million in planned total commitments being announced today. This complements the more than $1billion in financing for REDD+ the United States has provided since the beginning of the fast start period.

Beyond financing though, we are proud to have been part of a brain trust of partners including the U.K., Norway, and the World Bank, to design this initiative. In fact, many of you will recognize this as the Funding Avoided Deforestation concept we have talked so much about. And of course the Initiative is one of our key contributions to the Tropical Forest Alliance 2020, a key public-private partnership with the goal of reducing deforestation associated with the production of key tropical commodities.

We're fortunate to have a Secretary of State—and a President—who both feel strongly about the need to act on climate change. The President's Climate Action Plan highlights the importance of taking action to halt deforestation as one of the priority areas for U.S. engagement internationally, and sustainable landscapes are one of three focal areas for U.S. climate finance.

Secretary Kerry pointed out how important forests, and indeed the whole land sector, are for our atmosphere, for plant and animal biodiversity, and for our collective future. This is true for the United States too—forests cover one-third of our land and supply 80 percent of our fresh water. We share many of the same trade-offs facing developing countries: a growing population places additional demands on resources, and potential economic trade-offs between forest protection and other land uses.

As was the case in the U.S., agricultural expansion continues to be one of the leading drivers of deforestation in developing countries. The challenge is that agriculture is also a major force for economic growth. Over a billion people worldwide work in agriculture, and agricultural markets provide a major source of income for farmers and communities. As demand for food, feed, fiber and fuels continues to grow, the importance of the agricultural sector will only continue to expand. We need to find ways to foster increased agricultural production while continuing to protect standing forests and reducing greenhouse gas emissions.

We very much hope this new Initiative can help break down the myth that we must choose between either development or the environment. The ISFL will help ambitious developing countries move forward toward their climate goals by providing them with resources to implement smarter, more productive forest preservation strategies, and create alternative options.

The combination of public and private sector cooperation in this initiative is new and unique, and recognizes the importance of engaging the private sector as partners, not adversaries,

in the fight against climate change. We know that public sector funding alone is not sufficient to change the structural drivers of deforestation. We must also change the signals provided by the private sector to forest communities.

The ISFL will support the groundwork necessary to implement REDD+ and support sustainable agricultural production through its grants, technical assistance, and purchases of emissions reductions. At the same time, the private sector will create demand for forest-friendly products through their commitments to purchase more sustainable commodities from sustainably managed landscapes. This combination of incentives creates a powerful dynamic, where there is both upfront support for forest stewardship and demand-side pull for forest-friendly products.

* * * *

2. Minamata Convention on Mercury

On January 19, 2013, after four years of negotiations, the United States and more than one hundred other governments adopted the Minamata Convention, a global agreement to reduce mercury pollution. A January 31, 2013 press statement issued by the State Department's Bureau of Oceans and International Environmental and Scientific Affairs, available at *www.state.gov/e/oes/rls/pr/2013/203651.htm*, is excerpted below.

* * * *

… Mercury warrants global attention due to its long-range atmospheric transport, its persistence in the environment, and its significant negative effect on human health and the environment. Mercury exposure is a major public health threat, particularly for children and women of child-bearing age. Mercury can damage or impair the functioning of nerve tissue and even permanently damage the brain, kidneys, and developing fetus. According to most estimates, global sources contribute at least 70 percent of total U.S. mercury deposition.

The agreement, known as the Minamata Convention on Mercury, calls for the reduction of mercury emissions to the air and a decrease in the use of mercury in products and industrial processes. It will help reduce the supply of mercury by, among other things, ending primary mercury mining. The Convention will ensure environmentally sound storage of mercury and disposal of waste. The agreement also calls on governments to address the use of mercury in small-scale gold mining, which uses and releases large amounts of mercury.

"We are very pleased with the outcome of these negotiations. Transboundary air emissions are a significant global challenge that no single country can solve on its own," said Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Kerri-Ann Jones. "This agreement is an enormous success that will allow us to work together in coming years with countries around the world to make a meaningful difference in addressing mercury pollution."

The convention will be open for signature at a Diplomatic Conference in Japan in October. The name of the convention pays respect to Minamata, the Japanese city that experienced severe mercury pollution in the mid-20th century. Many local citizens of Minamata

suffered from a neurological syndrome caused by mercury poisoning, which became known as Minamata disease, from consuming contaminated fish and shellfish from Minamata Bay.

* * * *

On November 6, 2013, the United States formally joined the Minamata Convention on Mercury, depositing its instrument of acceptance to enable it to become a party to the Convention. A Department of State media note, available at *www.state.gov/r/pa/prs/ps/2013/11/217295.htm*, provides U.S. views on the significance of the Minamata Convention:

> The Minamata Convention represents a global step forward to reduce exposure to mercury, a toxic chemical with significant health effects on the brain and nervous system. The United States has already taken significant steps to reduce the amount of mercury we generate and release to the environment, and can implement Convention obligations under existing legislative and regulatory authority. The Minamata Convention complements domestic measures by addressing the transnational nature of the problem.

3. UNEP

In December 2012, the UN General Assembly adopted resolution 67/213, establishing universal membership in the UN Environment Programme ("UNEP") Governing Council and taking other steps to strengthen UNEP. U.N. Doc. A/RES/67/213. Strengthening UNEP was one of the commitments in the outcome document from the UN Conference on Sustainable Development ("Rio+20 ") held in 2012. See *Digest 2011* at 422-25 for a discussion of the U.S. submission contributing to the draft outcome document for Rio+20 conveying U.S. views on strengthening UNEP. The United States participated in the first universal session of the UNEP Governing Council in Nairobi, Kenya in February 2013, at which the Governing Council took a decision (27/2) implementing resolution 67/213 and reforming the governance of UNEP in several key ways: mandating a subsidiary body to exercise greater member state control over UNEP agendas and budget; creating a high-level political segment at each meeting; eliminating the Global Ministerial Environmental Forum; and expanding stakeholder participation in UNEP. Judy Garber, Principal Deputy Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, delivered remarks at the session in Nairobi on February 18, 2013, when decision 27/2 was under negotiation. Ms. Garber's remarks are excerpted below and available at *www.state.gov/e/oes/rls/remarks/2013/205109.htm*. On March 13, 2013, the UN General Assembly adopted resolution 67/251, renaming the UNEP Governing Council as the UN Environment Assembly of the UNEP. U.N. Doc. A/RES/67/251.

---

* * * *

The United States has long supported a stronger, more effective UNEP, and we are pleased with the reforms reflected in paragraph 88 of the Rio+20 outcome, which it is now our responsibility to implement. We believe it is essential to UNEP's future that the structural governance issues pertaining to universal membership be resolved at this meeting. Our deliberations on governance are complete, and ongoing governance processes will not contribute to UNEP's essential programmatic work.

We recognize that there are some substantive issues that Member States will need to discuss over the longer-term. These include a more robust substantive agenda for UNEP, the science-policy interface, and capacity building for environment in the context of development. Conversations on these items can take place in the context of UNEP's Strategic Framework and Programme of Work discussions in future years. To ensure transparency and accountability, and to increase the voice of governments in setting UNEP's environmental agenda, we support some key institutional reforms to be decided at this meeting.

First, we believe it vital that UNEP's universal body approve—review and approve—UNEP's Strategic Framework before that framework is transmitted to New York for review. The Strategic Framework is the document that sets UNEP's strategic direction, and forms the foundation for UNEP's Programme of Work. Historically, governments have had limited opportunity to engage in the preparation of this critical document. With a view toward responsiveness to Member States, we believe this needs to change.

Second, we support the creation of a regionally-representative working body, subsidiary to the universal body that will meet once annually to undertake performance and financial reviews and report to the main body on its findings.

This will be an audit body of sorts, which we anticipate will provide final approval for the Programme of Work and Budget before these documents are transmitted to New York in the fall. The main, universal body would also have the opportunity for a final stamp of approval on the Programme of Work, as the GC currently does.

Third, we want a clearer, more defined role for the Committee of Permanent Representatives (CPR) based in Nairobi. The CPR should be empowered to take intersessional decisions at the request of the universal body, and should develop both UNEP's Strategic Framework and Programme of Work and Budget for approval. The CPR's presence in Nairobi and its ongoing work on programmatic issues are essential to inform consideration of the Strategic Framework by the main body and of the Programme of Work and Budget by the subsidiary working body.

UNEP needs to be more efficient and effective. As a part of this, we need to look at the frequency of meetings and their scheduling. To avoid overloading the agenda and increase both meeting impact and Member State input, UNEP main body meetings should take place every two years, as they are currently meant to, with less frequent ministerial sessions.

A fourth key piece is the participation of stakeholders. Their more integral participation is indispensible to increasing UNEP's effectiveness and impact on the ground. We support a mechanism for stakeholder inclusion in UNEP meetings, as well as a portion of the ministerial segments devoted to stakeholder-government dialogue.

* * * *

4. Ozone Depletion

As discussed in *Digest 2012* at 434, a discussion group was formed at the Twenty-Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer to consider the proposal to phase down hydrofluorocarbons ("HFCs") that has been presented by the United States and other governments at several successive meetings of the parties. The discussion group met three times at the Twenty-Fifth Meeting of the Parties, held in Bangkok from October 21-25, 2013. The parties agreed to request the Protocol's Technology and Economic Assessment Panel to assess alternatives to HFCs and other ozone-depleting substances. The report of the Technology and Economic Assessment Panel on the proposed phase down of HFCs was considered. The Report of the Twenty-Fifth Meeting of the Parties is available at *http://conf.montreal-protocol.org/meeting/mop/mop-25/report/default.aspx*. The October 22, 2013 remarks at the Meeting of the Parties by Daniel A. Reifsnyder, Deputy Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs, are excerpted below and available at *www.state.gov/e/oes/rls/remarks/2013/215855.htm*.

_____

* * * *

…I am speaking this morning on behalf of Canada, Mexico, and the United States of America. With our colleagues from Canada and Mexico, we have proposed to amend the Montreal Protocol to:

- Phase down the production and consumption of hydrofluorocarbons (HFCs) in all Parties
- Control byproduct emissions of HFC-23
- Address trade in HFCs, and
- Require licensing systems and reporting on HFCs

The environmental benefits of this proposal would be considerable, amounting to more than 90 gigatons (gt) of carbon dioxide-equivalent (CO2-e) through 2050. This equates to about two years of current emissions of greenhouse gases from human sources.

Why do we propose to phase down—under the Montreal Protocol—consumption and production of substances that have no ozone depleting potential? Aren't these substances now included in the basket of gases under the UN Framework Convention on Climate Change?

We propose to phase down HFC consumption and production here because it is our own efforts under the Montreal Protocol—as we seek to phase out hydrochlorofluorocarbons (HCFCs)—that are leading Parties increasingly to consume and produce them. Article 2.2b of the Vienna Convention calls on Parties to "harmonize" appropriate policies in the phaseout of ozone depleting substances. Because HFCs are replacements for chlorofluorocarbons (CFCs) and HCFCs that have been and are being phased out under the Protocol we have the authority and responsibility under the Protocol to address HFCs.

Not only that, Mr. Co-chairman. We have a track record of success under the Montreal Protocol that is the rival of many other international instruments. The Montreal Protocol remains

the only "universal" instrument that has been ratified by all countries of the world. Under it, we have the expertise and the institutions—including importantly the Montreal Protocol Multilateral Fund—as well as the "band-width" if you will to undertake this effort.

Yes, it is true that HFCs are included in the basket of gases under the UN Framework Convention on Climate Change, and our proposed amendment would not change that. We have been very clear that we will continue to include HFCs within the scope of the UNFCCC and its Kyoto Protocol for accounting and reporting of emissions.

I restate these essential points here, even though they are by now well known to most of the delegates in this hall. This is not the first time we have submitted such an amendment proposal, nor is it the first time that this issue has been considered at a meeting of the Parties. This is the fourth year that our three countries have submitted an amendment proposal. It is the fifth year that we have discussed this issue at the MOP.

We have been greatly encouraged since our meeting last year in Geneva by developments related to HFCs, and in particular by the growing awareness around the world of the threat they pose to the climate system and by the growing realization of the opportunity we have here to take action.

A number of these developments were noted yesterday by our Executive Secretary speaking on behalf of UNEP Executive Director Achim Steiner. Among them, he noted that in June 2012 the outcome document from the Rio+20 Conference in Brazil, "The Future We Want" had the following provision:

"We recognize that the phase-out of ozone-depleting substances is resulting in a rapid increase in the use and release of high global-warming potential hydrofluorocarbons to the environment. We support a gradual phase-down in the consumption and production of hydrofluorocarbons."

Of course, production and consumption are the control mechanisms we use under the Montreal Protocol—meaning that the Rio+20 language expresses support not only for minimizing HFCs as we phase out HCFCs, but also for implementing a comprehensive phase down using the very same tools we use here.

Also noted yesterday was the language just last month adopted by G-20 leaders. We recall that they said:

"We also support complementary initiatives, through multilateral approaches that include using the expertise and the institutions of the Montreal Protocol to phase down the production and consumption of hydrofluorocarbons (HFCs), based on the examination of economically viable and technically feasible alternatives. We will continue to include HFCs within the scope of the UNFCCC and its Kyoto Protocol for accounting and reporting of emissions."

Similar support for action using the institutions and expertise of the Montreal Protocol have been expressed by a number of our leaders in important bilateral meetings as well. For example, last month on the margins of the G-20 in St. Petersburg, President Obama and President Xi of China said:

"We emphasize the importance of the Montreal Protocol, including as a next step through the establishment of an open-ended contact group to consider all relevant issues, including financial and technology support to Article 5 developing countries, cost effectiveness, safety of substitutes, environmental benefits, and an amendment."

We think it is time for us, the Parties to the Montreal Protocol, to move forward as we have been broadly encouraged to do in multiple fora and as we have been specifically encouraged to do by many of our leaders.

Mr. Co-Chair, it is time to establish an open-ended contact group on an amendment to phase down the production and consumption of HFCs, based on the examination of economically viable and technically feasible alternatives. The contact group should consider an amendment and all relevant issues, including financial and technology support to Article 5 developing countries, cost effectiveness, safety of substitutes, and environmental benefits.

* * * *

5. Sustainable Development

The Millenium Development Goals ("MDGs"), established by nearly 200 countries in 2000, have a target date of 2015. As that year approaches, discussion has turned to establishing an agenda for post-2015 development. Secretary Kerry addressed the Millennium Development Goals High-Level Meeting on September 25, 2013 in New York on the subject of the post-2015 development agenda. His remarks are available at *www.state.gov/secretary/remarks/2013/09/214723.htm*. On December 3, 2013, Dr. Kerri-Ann Jones, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, addressed the UNEP North American Major Groups and Stakeholders consultation in Washington, D.C. on the subject of the global post-2015 development agenda. Her remarks, excerpted below, are available in full at *www.state.gov/e/oes/rls/remarks/2013/218680.htm*.

* * * *

…Today, we are on the other side of Rio+20 and the discussion is all about the post-2015 agenda. "The Future We Want," the negotiated outcome document from the Rio conference, is a very important piece of that discussion. Also important is the effort underway by governments, organizations, and individuals to review the progress made on the Millennium Development Goals (MDGs) and where progress has been uneven. The world has met two MDGs — reducing poverty by 50 percent and halving the proportion of people with no safe drinking water — well ahead of the 2015 deadline. Progress on many MDGs, however, is lagging, and fragile and post-conflict states are unlikely to achieve any MDGs. A lot of the goals in these states were not met.

So we are at a crossroads. Actually, not just a crossroads, but a convergence. We have the MDGs and all the work to date now converging with the [Sustainable Development Goals or] SDG discussion. Ensuring that the global post-2015 development agenda reflects our existing goals of eradicating extreme poverty and hunger, combating disease, achieving gender equality, and environmental sustainability. The agenda ahead is a large and important one and is going to require extensive civil society participation.

We should take full advantage of the time from now to 2015 to achieve the MDGs. As we look forward, the United States envisions a future agenda where eradicating extreme poverty is central; an agenda that genuinely integrates the three aspects of sustainable development—economic, social, and environmental; and an agenda that recognizes that environment is critical to sustainable development—and to lasting poverty reduction. We would like to see a truly integrated agenda.

This is an exciting time, but it is very challenging to integrate perspectives. We know that this is an ambitious undertaking. It is a very important undertaking and meetings like this are foundational. Efforts to end extreme poverty must be at the core of the post-2015 development agenda. President Obama embraced this vision in his 2013 State of the Union speech when he said that "the United States will join with our allies to eradicate such extreme poverty in the next two decades." (*http://www.whitehouse.gov/speech/sotu-2013*)

The U.S. was active at Rio+20 and the "Future We Want" echoes what President Obama said in his speech. As Diallo was saying, integrating the specificity of each group's interests will not be easy. We have to remember how concerned people were going into Rio+20 about how groups might come together. Good progress was made then, and now we have a chance to take this to the next level. Having talked a bit about our aspirations in the post-2015 development agenda context, I'd like to switch gears and talk about the practical side. First, the post-2015 development agenda process; second, the U.S. government process for post-2015, and third, civil society and private sector engagement—across all different interests and sectors.

First, let me briefly describe some of the post-2015 process so far. There are many different processes and initiatives that are underway as inputs to post-2015, some of which resulted from the Rio+20 outcome. I will discuss two: 1) UN Secretary General's High-Level Panel of Eminent Persons (HLP); and 2) Open Working Group on Sustainable Development Goals (OWG-SDGs).

In May, the High-Level Panel came out with its report on the post-2015 development agenda, which included 12 illustrative universal goals and targets. For the U.S., John Podesta served on the panel. The report is comprehensive. From the U.S. perspective, we feel it's a pretty good report and is a good starting point. We support many of the report's key themes including, focusing on finishing the work of the MDGs, keeping poverty at the front and center while integrating economic growth and environmental sustainability. Also, we support the report's emphasis on making sure that members of historically marginalized and at-risk groups, such as persons with disabilities and indigenous persons are not left behind. There's been a lot of discussion so far, but the report pulls it all together in a positive way and provides good insight into how to do it.

The Open Working Group on SDGs has met five times since its first session in March 2013. The November meeting took place last week. There are 30 member seats, each seat shared by groups of countries. So many countries wanted to join the OWG so they had to share seats. This is a good sign as it shows the incredible amount of interest in the process, but it also shows the complexity. The United States shares a seat with Canada and Israel. Ambassador Elizabeth Cousens up in New York is the lead U.S. representative on the group.

During their meetings, member states are stock taking and generating ideas on potential SDGs. The remaining three Open Working Group meetings—in December, January and February—will include issues important to many of us—including my Bureau. Issues include climate, oceans, the Small Island Developing States, biodiversity, forests, sustainable cities, and sustainable consumption and production. Earlier this year, the Open Working Group discussed water and sanitation, desertification, land degradation and drought, food security and nutrition, and health.

The Open Working Group on SDGs has a few remaining meetings. These are not official negotiations, but it is an important formative period for all of us. The Group will produce a report before next September. The Secretary General is expected to produce a synthesis report (taking into account the OWG-SDGs synthesis report, the Expert Committee on Financing

Report, the results of global consultations, and the HLP report) for the 69th Session of the UN General Assembly. There will be a UN intergovernmental negotiation process for post-2015 beginning officially in late 2014. Negotiations will conclude with a summit of Heads of State in September 2015—where countries will adopt the post-2015 development agenda.

There are other formal and informal efforts. And, between now and then, there are a lot of discussions to have. The UN, through country and thematic consultations and the My World Survey web site, is striving to make the post-2015 process open and consultative. The My World Survey asks citizens from around the world to identify which six of sixteen possible issues they think would make the most difference to their lives. High on the U.S. list are some of the issues included such as protecting forests, rivers, oceans, and access to clean water and sanitation. Responses will be gathered until 2015.

To feed into the UN process, the U.S. government has established a post-2015 interagency process—post-2015 cuts across many agencies. We have set up interagency working groups focusing on different topics. Ranging from cross-cutting issues such as rights and inclusiveness and governance to specific topics on energy, health, and the environment. I chair the working group on Environment and Oceans. While we recognize this is a formative period, it is also an important period.

We have begun formulating our approach to these and other issues. One of the things we are trying to do—and would encourage others to do as well—is to use the HLP report as a starting point. It is something we can react to going forward. We are also working to build on past discussions and accomplishments, working to gather and generate innovative approaches on the whole range of possible post-2015 topics and cross-cutting issues. This involves hearing from the much broader community—at meetings such as this one. It's time to think about how to be creative and we want to know what's happening at NGOs and in the private sector.

* * * *

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Arctic Council

On May 15, 2013, the Arctic Council convened its eighth annual ministerial meeting in Kiruna, Sweden. The Arctic Council includes eight member states: Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States. Secretary Kerry attended and delivered opening remarks, available at *www.state.gov/secretary/remarks/2013/05/209403.htm*. Two key outcomes of the ministerial were the conclusion of a legally binding agreement on cooperation in the event of an oil spill or related emergency and a political declaration on overall cooperation to address issues of concern regarding the Arctic. The agreement and the political declaration are discussed below.

a. Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic

On May 15, 2013, the governments of the member states of the Arctic Council ("the Parties") concluded the "Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic." The full text of the agreement is available at *www.state.gov/r/pa/prs/ps/2013/05/209406.htm*.

Article 1 states the objective of the Agreement, "to strengthen cooperation, coordination and mutual assistance among the Parties on oil pollution preparedness and response in the Arctic in order to protect the marine environment from pollution by oil." Article 3 specifies the scope of the agreement, which applies with respect to oil pollution incidents that occur in or may pose a threat to any marine area over which a Party exercises sovereignty, sovereign rights or jurisdiction, including its internal waters, territorial sea, exclusive economic zone and continental shelf, consistent with international law and above a defined southern limit. The agreement also applies in areas north of the southern limit and beyond the jurisdiction of any State, to the extent consistent with international law. Article 4 requires each Party to "maintain a national system for responding promptly and effectively to oil pollution incidents." Article 5 stipulates that each Party's national system must include designated national authorities and contact points responsible for oil pollution preparedness, response, and assistance. Article 6 relates to notification to Parties and other States in the event of an oil pollution incident. Article 7 addresses monitoring to identify and respond to oil pollution incidents. Article 8 provides that Parties may request assistance in addressing oil pollution incidents. The agreement also addresses the allocation of costs among Parties for their response actions, and allows general or case-by-base arrangements between Parties to allocate costs otherwise. The agreement also encourages joint exercises and other forms of cooperation, and requires the Parties to develop and maintain operational guidelines and other information to be contained in non-binding "Appendices." Article 14 provides for regular meetings of the Parties:

> The Parties shall meet no later than one year after the entry into force of this Agreement, as convened by the depositary, and from then on as decided by the Parties. At these meetings, the Parties shall review issues related to the implementation of this Agreement, adopt Appendices to this Agreement or modifications to the Appendices as provided in Article 20 of this Agreement, as appropriate, and consider any other issues as decided by the Parties. Parties may elect to convene such meetings in conjunction with meetings of the Arctic Council.

In accordance with Article 22, the Agreement will enter into force "30 days after the date of receipt by the depositary of the last written notification through diplomatic

channels that the Parties have completed the internal procedures required for its entry into force."

b. Kiruna Declaration and "Vision for the Arctic" Statement

Also on May 15, 2013 at the Arctic Council ministerial, representatives of the Arctic Council member states signed the Kiruna Declaration, available at *www.state.gov/r/pa/prs/ps/2013/05/209405.htm*. The Kiruna Declaration is excerpted below.

_____

* * * *

We, the Ministers representing the eight Arctic States, joined by the representatives of the six Permanent Participant organizations of the Arctic Council…

* * * *

Expressing concern that global emissions of greenhouse gases are resulting in rapid changes in the climate and physical environment of the Arctic with widespread effects for societies and ecosystems and repercussions around the world, reiterating the urgent need for increased national and global actions to mitigate and adapt to climate change,

Noting the substantial progress we have made to strengthen our cooperation and acknowledging the leadership of the Arctic Council in taking concrete action to respond to new challenges and opportunities,

Hereby:

IMPROVING ECONOMIC AND SOCIAL CONDITIONS

Recognize the central role of business in the development of the Arctic, and decide to increase cooperation and interaction with the business community to advance sustainable development in the Arctic,

Welcome the Arctic Council's work on corporate social responsibility and sustainable business, and encourage enterprises operating in the Arctic to respect international guidelines and principles,

Recognize that Arctic economic endeavors are integral to sustainable development for peoples and communities in the region, desire to further enhance the work of the Arctic Council to promote dynamic and sustainable Arctic economies and best practices, and decide to establish a Task Force to facilitate the creation of a circumpolar business forum,

Welcome the Arctic Maritime and Aviation Transportation Infrastructure Initiative and its comparative analysis of seaport and airport infrastructure in the Arctic States, and encourage continued efforts to identify opportunities for complementary infrastructure development and use,

Appreciate that the first legally binding agreement negotiated under the auspices of the Arctic Council, the Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic, has come into force, recognize its important role for safe transport and enhancing cooperation in assisting people in distress in the Arctic, and acknowledge the importance of continued operational exercises in support of its implementation,

Acknowledge that Arctic peoples are experiencing challenges associated with rapid socio-economic and environmental changes, note the previous work of the Arctic Council to promote mental health in Arctic communities, and decide to undertake further work to improve and develop mental wellness promotion strategies,

Recognize that the use of traditional and local knowledge is essential to a sustainable future in the Arctic, and decide to develop recommendations to integrate traditional and local knowledge in the work of the Arctic Council,

Acknowledge the importance of indigenous peoples' traditional ways of life to their economic well-being, culture and health, and request Senior Arctic Officials to recommend ways to increase awareness regionally and globally on traditional ways of life of the Arctic indigenous peoples and to present a report on this work at the next Ministerial meeting in 2015,

ACTING ON CLIMATE CHANGE

Recognize that climate change in the Arctic causes significant changes in water, snow, ice and permafrost conditions, with cascading effects on biodiversity, ecosystems, economic and human living conditions in the Arctic with repercussions around the world, and that substantial cuts in emissions of carbon dioxide and other long-lived greenhouse gases are necessary for any meaningful global climate change mitigation efforts, and commit to strengthen our efforts to find solutions,

Recognize that Arctic States, along with other major emitters, substantially contribute to global greenhouse gas emissions, and confirm the commitment of all Arctic States to work together and with other countries under the United Nations Framework Convention on Climate Change (UNFCCC) to conclude a protocol, another legal instrument or an agreed outcome with legal force no later than 2015, and urge all Parties to the Convention to continue to take urgent action to meet the long-term goal aimed at limiting the increase in global average temperature to below 2 degrees Celsius above pre-industrial levels,

Recognize that reduction of short-lived climate forcers, could slow Arctic and global climate change, and have positive effects on health, and welcome the report on short lived climate forcers, and support its recommendations including that national black carbon emission inventories for the Arctic should continue to be developed and reported as a matter of priority,

Urge the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer to take action as soon as possible, complementary to the UNFCCC, to phase-down the production and consumption of hydrofluorocarbons, which contribute to the warming of the Arctic region,

Decide to establish a Task Force to develop arrangements on actions to achieve enhanced black carbon and methane emission reductions in the Arctic, and report at the next Ministerial meeting in 2015,

Welcome the on-going work on the Arctic Resilience Report, and emphasize the need for forward-looking cooperation with a view to increase Arctic capacity to adequately address rapid change and resilience,

Recognize that adaptation to the impacts of climate change is a challenge for the Arctic, and the need for strengthened collaboration with Arctic indigenous peoples and other residents, governments and industry, welcome the reports, key findings and on-going work on the

Adaptation Actions for a Changing Arctic initiative, and decide to continue the work on enhancing the capacity of decision-makers to manage climate risks including through an on-line information portal and through improved predictions of combined effects,

PROTECTING THE ARCTIC ENVIRONMENT

Announce the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, the second legally binding agreement negotiated under the auspices of the Arctic Council, and encourage future national, bi-national and multinational contingency plans, training and exercises, to develop effective response measures,

Recognize that effective prevention, including related containment practices, is critical to ensuring the protection of the Arctic marine environment from oil pollution incidents, welcome the Recommended Practices in the Prevention of Arctic Marine Oil Pollution Project reports and recommendations to Ministers, and encourage Arctic States to pursue further work in the recommended areas,

Decide to establish a Task Force to develop an Arctic Council action plan or other arrangement on oil pollution prevention, and to present the outcomes of its work and any recommendations for further action at the next Ministerial meeting in 2015,

Recognize the value of sustaining Arctic ecosystems and biodiversity and that the Arctic environment needs to be protected as a basis for sustainable development, prosperity, lifestyles and human well-being, and commit to pursue the conservation and sustainable use of Arctic biological resources,

Note with concern that Arctic biodiversity is being degraded and that climate change is the most serious threat, welcome the Arctic Biodiversity Assessment, the first Arctic-wide comprehensive assessment of status and emerging trends in Arctic biodiversity, approve its recommendations and encourage Arctic States to follow up on its recommendations, and instruct Senior Arctic Officials to ensure that a plan for further work under the Arctic Council to support and implement its recommendations is developed, and that a progress report is delivered to the next ministerial meeting,

Encourage Arctic States to take decisive action to help sustain Arctic biodiversity and implement internationally agreed biodiversity objectives, to cooperate on adaptive management strategies for vulnerable species and ecosystems, and to continue existing Arctic biodiversity research and monitoring efforts through the Circumpolar Biodiversity Monitoring Program,

Welcome the Arctic Ocean Acidification assessment, approve its recommendations, note with concern the potential impacts of acidification on marine life and people that are dependent on healthy marine ecosystems, recognize that carbon dioxide emission reductions are the only effective way to mitigate ocean acidification, and request the Arctic States to continue to take action on mitigation and adaptation and to monitor and assess the state of Arctic Ocean acidification,

Recognize the important ongoing work in the International Maritime Organization to develop a mandatory Polar Code on shipping and decide to strengthen our collaboration in that work toward its expeditious completion,

Welcome the Arctic Ocean Review report, undertaken to provide guidance to Arctic States on strengthening governance in the Arctic through a cooperative, coordinated and integrated approach to the management of the Arctic marine environment, approve its recommendations and request appropriate follow-up actions, and report on progress at subsequent ministerial meetings,

Recognize that there are further persistent organic pollutants to be addressed that pose threats to human health and the environment in the Arctic, encourage Arctic States to continue monitoring and assessment activities and enhance their efforts to meet the objectives of the Stockholm convention, and welcome the completion of the successful demonstration project

preventing the release of 7000 tons of obsolete pesticides into the Arctic environment, and look forward to further activities in this area,

Note the work of the Arctic Council in raising global awareness and understanding of the impacts of mercury on the health of people and wildlife in the Arctic, welcome the Minamata Convention on Mercury, appreciate the reference to the particular vulnerabilities of Arctic ecosystems and indigenous communities, encourage its swift entry into force along with robust use and emission reduction actions, and pledge to assist the evaluation of its effectiveness through continued monitoring and assessments,

Welcome the report on Ecosystem Based Management, approve the definition, principles and recommendations, encourage Arctic States to implement recommendations both within and across boundaries, and ensure coordination of approaches in the work of the Arctic Council's Working Groups,

Agree that cooperation in scientific research across the circumpolar Arctic is of great importance to the work of the Arctic Council, and establish a Task Force to work towards an arrangement on improved scientific research cooperation among the eight Arctic States,

STRENGTHENING THE ARCTIC COUNCIL

Adopt the statement "Vision for the Arctic",

Welcome the establishment of the Arctic Council Secretariat in Tromsø, Norway, note the Host Country Agreement signed between the Government of Norway and the Director of the Arctic Council Secretariat, approve its Terms of Reference, Staff rules, Financial rules, Roles and Responsibilities of the Director, and budget for 2013, and instruct Senior Arctic Officials to approve a budget for 2014-2015,

Approve the revised Arctic Council Rules of Procedure,

Note the Chair's conclusions from the Arctic Environment Ministers Meeting in February 2013, and welcome further high-level engagement and meetings,

Welcome China, India, Italy, Japan, Republic of Korea and Singapore as new Observer States, and take note of the adoption by Senior Arctic Officials of an Observer manual to guide the Council's subsidiary bodies in relation to meeting logistics and the roles played by Observers,

The Arctic Council receives the application of the EU for observer status affirmatively, but defers a final decision on implementation until the Council ministers are agreed by consensus that the concerns of Council members, addressed by the President of the European Commission in his letter of 8 May are resolved, with the understanding that the EU may observe Council proceedings until such time as the Council acts on the letter's proposal,

Acknowledge that the work of the Arctic Council continues to evolve to respond to new challenges and opportunities in the Arctic, request Senior Arctic Officials to recommend ways and means to strengthen how the work of the Arctic Council is carried out, including identifying opportunities for Arctic States to use the Council's work to influence and shape action in other regional and international fora as well as identifying approaches to support the active participation of Permanent Participants, and to present a report on their work at the next Ministerial meeting in 2015,

Acknowledge the decision of the Permanent Participants to relocate the Indigenous Peoples Secretariat to Tromsø, Norway,

Adopt the Senior Arctic Officials Report to Ministers, including its working group work plans, and instruct Senior Arctic Officials to review and adjust the mandates and work plans of

the Arctic Council working groups and other subsidiary bodies, and establish new ones, if appropriate, and to follow up on the recommendations agreed to by the Arctic Council,

Thank the Kingdom of Sweden for its Chairmanship of the Arctic Council during the period 2011-2013, concluding the first round of eight Arctic States chairmanships, and welcome the offer of Canada to chair the Arctic Council during the period 2013-2015 and to host the Ninth Ministerial meeting in 2015.

* * * *

As stated above in the Kiruna Declaration, the Arctic Council adopted the statement entitled, "Vision for the Arctic" on May 15, 2013 in Kiruna. That statement follows.

* * * *

We, the eight Arctic States together with the six Arctic Indigenous Peoples' Organizations, have met today at the end of the first round of eight successive chairmanships of the Arctic Council.

We have many accomplishments to celebrate since the signing of the Ottawa Declaration in 1996, and it is timely for us to set out a vision for the future of our region.

Guided by the Ottawa Declaration, the Arctic Council has become the pre-eminent high-level forum of the Arctic region and we have made this region into an area of unique international cooperation.

We have achieved mutual understanding and trust, addressed issues of common concern, strengthened our co-operation, influenced international action, established a standing secretariat and, under the auspices of the Council, Arctic States have concluded legally binding agreements. We have also demonstrated the importance of science and traditional knowledge for understanding our region and for informed decision-making in the Arctic.

The Arctic is changing and attracting global attention and as we look to the future, we will build on our achievements and will continue to cooperate to ensure that Arctic voices are heard and taken into account in the world.

A peaceful Arctic

The further development of the Arctic region as a zone of peace and stability is at the heart of our efforts. We are confident that there is no problem that we cannot solve together through our cooperative relationships on the basis of existing international law and good will. We remain committed to the framework of the Law of the Sea, and to the peaceful resolution of disputes generally.

The Arctic home

We are committed to demonstrating leadership in regional and global forums to address challenges affecting our home. The well-being of all Arctic people is fundamental as the region develops.

We will continue to exercise our responsibility for safeguarding indigenous peoples' rights, including by creating conditions for the preservation and development of social structures, cultural traditions, languages and means of subsistence.

A prosperous Arctic

The economic potential of the Arctic is enormous and its sustainable development is key to the region's resilience and prosperity. Transparent and predictable rules and continued cooperation between Arctic States will spur economic development, trade and investments.

We will continue to work cooperatively to support the development of sustainable Arctic economies to build self-sufficient, vibrant and healthy Arctic communities for present and future generations.

Economic cooperation will be on the top of our agenda.

A safe Arctic

To meet the needs of an ever-changing Arctic we will further strengthen our cooperation in the fields of environmental and civil security. Aware that maritime safety requires broad regional and international cooperation, we will continue to develop best practices and other measures for the Arctic region.

A healthy Arctic environment

We recognize the uniqueness and fragility of the Arctic environment, and the critical importance of healthy environments to sustainable communities. We are aware that the Arctic environment continues to be affected by events outside of the region, in particular climate change, and that resulting changes in the Arctic have global repercussions.

We are concerned with the growing effects of climate change, and the local and global impacts of large-scale melting of the Arctic snow, ice and permafrost. We will continue to take action to reduce emissions of greenhouse gases and short-lived climate pollutants, and support action that enables adaptation.

We will strengthen our work, both within the Arctic and globally, to address the environmental challenges facing the region. We remain committed to managing the region with an ecosystem-based approach which balances conservation and sustainable use of the environment.

Arctic knowledge

We will continue to deepen the knowledge and understanding of the Arctic, both inside and outside the region, and to strengthen Arctic research and transdisciplinary science, encourage cooperation between higher education institutions and society, and synergies between traditional knowledge and science.

A strong Arctic Council

Membership in the Arctic Council is and will remain for the Arctic States with the active participation and full consultation of the Arctic Indigenous Peoples Organizations. Decisions at all levels in the Arctic Council are the exclusive right and responsibility of the eight signatories to the Ottawa Declaration.

The Arctic Council is open to observers who can contribute to the work of the Arctic Council and share the commitment of the Arctic States to the peaceful resolution of disputes and abide by the criteria for observers established by the Arctic Council.

As we embark on the second round of chairmanships, we will continue our work to strengthen the Arctic Council to meet new challenges and opportunities for cooperation, and pursue opportunities to expand the Arctic Council's roles from policy-shaping into policy-making.

The founding values, objectives and commitments of the Arctic Council will continue to be the North Star that guides our cooperation.

* * * *

2. Antarctica

A key priority for the United States in 2013 was the establishment of a new marine protected area ("MPA") in Antarctica's Ross Sea. See *Digest 2012* at 441, discussing the joint proposal of the United States and New Zealand to establish the Ross Sea MPA. The United States sent a delegation of government scientists and other officials to a special meeting of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR"), the organization with jurisdiction over marine conservation in the Southern Ocean, held in Bremerhaven, Germany, July 15-16, 2013. A key goal of the special meeting, only the second in CCAMLR's history, was to take action on the proposal by the U.S. and New Zealand to create a MPA in the Ross Sea region and a second proposal by other parties to create a MPA in the East Antarctica region. As stated in a July 15 State Department media note, the primary U.S. objective at the meeting was advancing the Ross Sea proposal. The media note, available at *www.state.gov/r/pa/prs/ps/2013/07/211908.htm*, explains:

> The United States strongly supports the sustainable management of marine living resources, and urges members of the Commission to work with the United States and New Zealand to find consensus and take the historic step to protect this special marine ecosystem.
>
> The Ross Sea Region is one of the last and greatest ocean wilderness areas on the planet. It is home to a unique and productive ecosystem that supports vast numbers of whales, penguins, seals and a vast range of marine life. With limited human impact to-date and a long history of scientific exploration and discovery, the Ross Sea Region is also a natural laboratory for scientific study to better understand climate change, our oceans, and our world.

Unfortunately, the CCAMLR was unable to reach agreement on establishing marine protected areas, including in the Ross Sea, at its special meeting on July 16, 2013. Secretary Kerry's press statement on the failure to achieve this objective in July 2013 is available at *www.state.gov/secretary/remarks/2013/07/212063.htm*, and expresses hope for future opportunities:

> There's simply no comprehensive effort to protect earth's most critical resource that doesn't include an equally comprehensive effort to create marine protected areas (MPAs). That's why the United States and New Zealand proposed the creation of these areas in the Ross Sea Region. A tremendous amount of work has gone into developing the science that underpins our joint proposal, and to leverage action, we'll be doubling down on sharing the findings of our scientists who spend those critical months in the dead of winter at McMurdo Station researching and understanding the realties that face all of us.

> This is a longtime passion of mine and it's an imperative for me as Secretary of State. I've seen firsthand how acidification, pollution, and sea level rise tear at the fabric of our economies, our communities, even our security. But this isn't just a personal priority. The Ross Sea is a natural laboratory. Its ecosystem is as diverse as it is productive, and we have a responsibility to protect it as environmental stewards—just as we do the rest of the ocean.
>
> President Obama has put climate change and environmental conservation on the front burner where it belongs, and we have a responsibility to keep it there. Yes, the road has been harder than we hoped. But I am pleased that so many countries were willing to work together towards this crucial objective. While they were not able to reach full agreement at this meeting to designate MPAs for Antarctica, they came close. The majority of CCAMLR members were able to find common ground. We didn't agree on all of the specifics, but there's an emerging consensus that the Antarctic region requires protection.

On October 16, 2013, foreign ministers of Australia, France, and New Zealand; the U.S. Secretary of State; and the Commissioner for Maritime Affairs and Fisheries of the European Union issued a joint statement calling on CCAMLR to establish two new marine protected areas in Antarctica at its next session. The joint statement is available at *www.state.gov/r/pa/prs/ps/2013/10/215436.htm* and includes the following:

> The establishment of such MPAs follows through on the vision expressed by all nations at the World Summit on Sustainable Development in Johannesburg in 2002 and the Rio+20 conference in 2012.
>
> Since 2005, the Commission for the Conservation of Antarctic Marine Living Resources (the Commission, CCAMLR) has worked to complete the necessary groundwork for the designation of MPAs in CCAMLR, including the establishment of a legal framework agreed by all Members and extensive scientific research.
>
> The Ross Sea and East Antarctica regions are widely recognized for their remarkable ecological and scientific importance. The MPA proposals now before the Commission are based on sound and best available science, will provide a unique laboratory for continuation of marine research, and will have profound and lasting benefits for ocean conservation, including sustainable use of its resources.
>
> We call on all Members of the Commission to bring years of preparation to a successful conclusion by establishing these important, science-based MPAs at the next session of the Commission in October 2013 in Hobart, Australia.

At the meeting in Hobart, CCAMLR again failed to reach consensus on the Ross Sea and East Antarctica proposals. The Commission continues to consider them.

3. Informal Consultative Process on Oceans and Law of the Sea ("ICP")

The United States participated in the 14th meeting of the Informal Consultative Process on Oceans and Law of the Sea ("ICP") at the United Nations from June 17 to 20, 2013. Delegates and panelists at the ICP discussed the impact of ocean acidification on the marine environment. Excerpts follow from the U.S. statement at the general exchange of views at the ICP.

* * * *

Ocean acidification is one of the most important, urgent ocean issues facing society today. Ocean acidification is occurring because the world's oceans are absorbing increasing amounts of atmospheric carbon dioxide, leading to greater acidity in the ocean. This change in ocean chemistry is a growing global problem with the potential to have broad and significant impacts on the marine ecosystems on which we all depend. It affects every ocean, from the Arctic Ocean to the Southern Ocean.

Studies have shown that ocean acidification can have a dramatic effect on some calcifying species, including oysters, clams, sea urchins, shallow water corals, deep sea corals, and calcareous plankton. When these organisms are at risk, the ecosystem services that they provide and the entire food web may also be at risk. Today, more than a billion people worldwide rely on food from the ocean as their primary source of protein. Many jobs and economies around the world depend on the living marine resources in our oceans.

Scientists have been sounding the alarm on ocean acidification for several years and we are now seeing more attention to this important issue. For example, there will be significantly more coverage of ocean acidification in the upcoming 5th Assessment Report of the Intergovernmental Panel on Climate Change than there has been in years past. The World Ocean Assessment, to be published in 2014, will also provide the global community with important information about ocean acidification and its impact on the marine environment.

And our policy bodies are beginning to consider how to react to this issue. For example, in the recent Arctic Council Ministerial, Arctic nations welcomed the recent Arctic Ocean Acidification assessment—the first report detailing acidification in a specific ocean and perhaps a model for elsewhere—and committed to continue to monitor and assess the state of Arctic Ocean acidification.

During last year's Rio+20 Sustainable Development Conference, leaders agreed to strong language on ocean acidification, including the need for collective action to prevent it; the need to build resilience in marine ecosystems; and the need for more research, monitoring, and observations. The Rio+20 Conference was one of the first conferences of its kind to consider the issue of ocean acidification. We believe it is important to build on the commitments we made at Rio+20, and we look forward to conversations this week on the path forward.

In the United States, our National Ocean Policy prioritizes ocean acidification as an area of special emphasis. Many government agencies, as well as academic institutions, in the United States are conducting research to understand the impacts of ocean acidification.

For example, several laboratories of our National Oceanic and Atmospheric Administration (NOAA) are conducting experiments to determine how economically and

ecologically important species respond to ocean acidification. Researchers use these data to explore how aquaculture, wild fisheries, and food webs may change as ocean chemistry changes.

Along with the significant amount of activities we are conducting domestically to better understand and address the effects of ocean acidification on the marine environment, we believe it is critical to increase international collaboration on research, particularly with regard to the effects of acidification on shell-forming organisms, marine biodiversity, and food security. We are hopeful that this week we can consider questions such as: How can we work together to enhance the global community's research and observation efforts? How can we effectively share such information? How can we use information to determine how to address ocean acidification? How can capacity-building facilitate broader research and response efforts?

During last year's Rio+20 Conference, the United States announced in-kind contributions and financial support through the Peaceful Uses Initiative for the establishment of a new Ocean Acidification International Coordination Center based at the International Atomic Energy Agency's Environment Laboratories in Monaco. We believe that this Center will serve as an important means to develop a more comprehensive understanding of ocean acidification. We intend to continue our strong support of this Center and we encourage others to join this effort. Robust international engagement in the Center will contribute significantly to our understanding of ocean acidification.

The United States also believes that the establishment of a global ocean acidification observing network is an important step towards understanding ocean acidification on a global scale. This network, which will involve hundreds of scientists across the globe, will measure ocean acidification through ecological assessments and the deployment of instruments in key ocean areas. It is a new scientific effort with broad international cooperation and a commitment to build capacity in developing countries. We are working closely with partners to implement this network and to facilitate participation of developing countries. We have experts here with us who would be pleased to share more information on this effort and on upcoming scientific meetings on the network.

* * * *

One of the key ways to deal with the problem of ocean acidification will be through reduction of other significant stressors on the marine environment. Reduction of stressors such as marine pollution and overfishing likely will prove critical to withstanding ocean acidification and building resilience in the marine ecosystem. We understand, however, that ultimately the problem of ocean acidification will continue unless emissions of carbon dioxide are reduced.

In conclusion, we would like to reiterate our very strong interest in this exchange of information on ocean acidification this week. We believe ocean acidification is one of the most pressing ocean issues facing society today. We look forward this week to learning from expert panelists and other delegations and exchanging views on how to move forward.

* * * *

4. Marine Pollution

a. U.S. implementation of amendments to MARPOL Annex V

On January 1, 2013 a resolution adopted by the International Maritime Organization ("IMO") in 2011 entered into force, establishing a general prohibition on discharges of garbage at sea from ships. The resolution, adopted by parties acting through the IMO's Marine Environment Protection Committee ("MEPC"), formally amends Annex V of the International Convention for the Prevention of Pollution from Ships ("MARPOL"). Resolution MEPC.201(62). On February 26, 2013, the U.S. Coast Guard announced the availability of a policy letter, "Interim Guidance for Revised MARPOL Annex V Implementation," to assist U.S. flagged and foreign flagged oceangoing ships regarding compliance with the amendments in Resolution MEPC.201(62). 78 Fed. Reg. 13,073 (Feb. 26, 2013).

On February 28, 2013, the U.S. Coast Guard published an interim rule implementing the amendments to MARPOL Annex V. 78 Fed. Reg. 13,481 (Feb. 28, 2013). Excerpts follow from the notice in the Federal Register.

* * * *

The Coast Guard is issuing this interim rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex V (Garbage) restrictions on the discharge of garbage have already been implemented by the Act to Prevent Pollution from Ships (APPS). Publishing an NPRM and delaying the effective date of the change to 33 CFR part 151 is unnecessary because the change is a conforming amendment required by existing authority and because an opportunity for public comment has already been provided.

This rulemaking restates a legal responsibility already in effect under MARPOL and APPS (33 U.S.C. 1901, et seq.), which is the U.S. authority for implementing MARPOL. Through APPS, the United States accepts all modifications and amendments made to Annex V as domestic law upon the amendments' entry into force ((33 U.S.C. 1901(a)(5)); see also section 1907(a) (requiring compliance with MARPOL)). This rulemaking will revise domestic regulations at 33 CFR part 151 to accurately reflect U.S. requirements under MARPOL Annex V.

The public has had several opportunities to comment on the MARPOL Annex V amendments that will be incorporated in Coast Guard regulations under this rulemaking.

Beginning in 2006, the United States worked with the 170 member states of the International Maritime Organization (IMO) Marine Environmental Protection Committee (MEPC) for over 5 years to amend MARPOL Annex V and greatly reduce the discharge of ship-generated garbage into the sea. A Coast Guard official serves as head of the United States Delegation to the MEPC. The Coast Guard held a public meeting in Washington, DC prior to each MEPC meeting to present the United States' position(s) on the amendments and to receive public comments which would be taken into consideration when finalizing the U.S. negotiating positions. There were no adverse public comments received prior to the July 2011 MEPC 62 (the meeting where the amendments were formally adopted by MEPC). Previous MARPOL Annex V-related regulatory projects, including the Wider Caribbean Region (WCR) special area regulation, similarly did not receive any adverse comments (77 FR 19537, April 2, 2012).

Additionally, the original APPS regulations in 33 CFR parts 151, 155, and 158 were implemented through a full informal rulemaking process, including an Advance Notice of Proposed Rulemaking (ANPRM) (53 FR 23884, June 24, 1988), an Interim Rule (IR) with Request for Comments (54 FR 18384, April 28, 1989), and a Final Rule (55 FR 35986, September 4, 1990).

IV. Basis and Purpose

… The subject of this rulemaking, MARPOL Annex V, regulates the discharge of garbage from ships. APPS implements MARPOL into domestic law, requiring the Secretary of the Department in which the Coast Guard is operating to administer and enforce the various Annexes of MARPOL. Through APPS, the United States accepts any modifications or amendments to MARPOL as domestic law (33 U.S.C. 1901(a)(5), see also section 1907(a) (requiring compliance with MARPOL)). In July 2011, the IMO MEPC adopted amendments to MARPOL Annex V which entered into force January 1, 2013.

MARPOL applies to the oceangoing vessels of all signatory flag administrations. Domestically, APPS requires all vessels subject to MARPOL to be in compliance with its provisions while in U.S. navigable waters. APPS goes further and specifically applies the provisions of Annex V to U.S. navigable waters as well as all other waters and vessels over which the United States has jurisdiction, including U.S. vessels in U.S. internal waters (33 U.S.C. 1901(b)).

Because APPS implements MARPOL and any modifications or amendments thereto, regulations are not required in order to carry out the provisions of MARPOL on signatory flag state vessels in U.S. waters. MARPOL, however, requires signatory states to apply the requirements equally to all vessels so no more favorable treatment is given to non-signatory vessels (MARPOL, Article 5(4)). Under MARPOL, as implemented by APPS, federal regulations must be promulgated to ensure compliance of non-signatory vessels to MARPOL standards while in U.S. navigable waters. This rulemaking meets this U.S. obligation under MARPOL as implemented by APPS and revises 33 CFR part 151 accordingly.

V. Discussion of the Interim Rule

MARPOL provisions, as implemented through APPS, are key elements of the Coast Guard's prevention and compliance programs. The domestic Annex V conforming regulations are located in 33 CFR part 151.

In July 2011, the IMO MEPC adopted amendments to MARPOL Annex V which entered into force January 1, 2013. The United States played a lead role at MEPC over the last several years in the development of the amendments to Annex V. These amendments reduce the types of garbage that can be discharged into the sea by establishing a general prohibition on discharges of

garbage into the sea. Under prescribed conditions, exceptions are provided for food wastes, cargo residues, cleaning agents and additives in wash waters, and animal carcasses.

Part 151 of Title 33 of the CFR will be revised to conform to the amendments. The primary revisions as the subject of this rulemaking are (1) Updating operational requirements, (2) adding new definitions, and (3) replacing placards.

* * * *

b. Energy Efficiency Design Index Amendments

On January 1, 2013, the new chapter 4 of MARPOL Annex VI entered into force, establishing energy efficiency requirements for new ships through the creation of the Energy Efficiency Design Index ("EEDI"). The U.S. Environmental Protection Agency had previously published an announcement describing these energy efficiency design requirements for ships, available at *www.epa.gov/otaq/regs/nonroad/marine/ci/420f11025.pdf*. Excerpts from this announcement appear below (with footnotes omitted).

* * * *

Under this new program, an Energy Efficiency Design Index (EEDI) will be required for new ships, with progressively more stringent efficiency targets phasing in beginning in 2013. These standards will result in significant reductions in fuel consumption, cutting fuel costs for ship operators, while reducing air and marine pollution from ships, including CO2. …

These EEDI standards phase in from 2013 to 2025, and by then will result in 30 percent reduction in fuel consumption, and hence CO_2, compared to today's vessels.

…The EEDI applies to the most energy-intensive segments of the international shipping fleet, representing more than 70 percent of ship emissions. These segments include the following ship classes: container ships, general cargo ships, refrigerated cargo carriers, gas tankers, oil and chemical tankers, dry bulk carriers, and combination dry/liquid bulk carriers. In its present form, the EEDI requirements do not apply to other ship classes or ships with non-standard propulsion systems (*e.g*. dieselelectric, turbine, or hybrid propulsion systems). IMO is considering the extension of EEDI standards to other classes of ships.

The Need for Efficiency Standards

Ships provide the most efficient means for transporting goods. However, emissions from ships represent a meaningful contribution to air and marine pollution around the world. Emissions from ships will continue to grow if left unchecked. … A recent study by IMO projects that emissions from shipping will increase 150 percent to 250 percent by 2050 in the absence of policies to reduce emissions.

The IMO study also shows that many options exist to improve the efficiency of new ships, thereby reducing fuel consumption and emissions. The measures identified by the study include hull improvements, propeller/propulsion system upgrades, alternative power options (e.g., towing kite), hull coatings, propeller improvements, auxiliary systems, speed reduction, and main engine improvements.

Although technologies and methods are available today that can be used to improve energy efficiency and therefore achieve cost savings, standards in the form of energy efficiency targets such as the EEDI are needed to provide an incentive for the implementation of this technology. While many of these efficiency improvements will pay for themselves through fuel savings, there are non-financial barriers that prevent their use. These non-financial barriers include 1) fuel price uncertainty, 2) split incentives between owners, operators, and shipyards and 3) lack of good information on the fuel efficiency improvements for different technologies, and impact on life cycle costs.

EEDI Standards

The EEDI standards are expressed as percent emissions reductions from reference lines established for each ship class. …

The EEDI standards for new ships will be implemented through four phases from 2013 to 2025….

Benefits

When this program is fully phased in, new ships will be 30 percent more efficient than they are today. This efficiency improvement has beneficial energy implications due to reduced oil consumption. More efficient ships will also emit lower amounts of criteria pollutants such as oxides of nitrogen (NOx), oxides of sulfur (SOx), and particulate matter (PM). Emissions of CO_2, which are directly related to fuel consumption, will be reduced by 30 percent per ship over the long run compared to typical ships operating today. Reductions in these air emissions will benefit human health and the environment, including benefits from reduced acid deposition in our oceans.

* * * *

c. Amendments to the 1996 Protocol to the London Convention

At a meeting in October 2013, the Contracting Parties to the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 ("London Convention") adopted amendments to the Protocol that create a new permitting regime for certain marine geoengineering activities. The amendments define "marine geoengineering" as "a deliberate intervention in the marine environment to manipulate natural processes, including to counteract anthropogenic climate change and/or its impacts, and that has the potential to result in deleterious effects, especially where those effects may be widespread, long lasting or severe." The amendments prohibit Contracting Parties from allowing "the placement of matter into the sea" for the purpose of conducting any listed marine geoengineering activity, unless the placement is authorized under a permit. The amendments include a new annex that currently lists only ocean fertilization activities as requiring a "placement" permit. Under the amendments, such a permit may be issued only for ocean fertilization involving "legitimate scientific research." It is expected that other marine geoengineering activities will be listed in the future. The amendments would enter into force after two-thirds of the Contracting Parties accept them. The United States has

signed but not ratified the 1996 Protocol. The United States is a party to the London Convention.

5 . Fish and Marine Mammals

a. Transmittal of the amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries

On April 22, 2013, President Obama transmitted to the U.S. Senate for advice and consent to ratification the Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries. Daily Comp. Pres. Docs., 2013 DCPD No. 00265, p. 1. The President's message to the Senate with the transmittal follows.

* * * *

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (the "Convention"), adopted on September 28, 2007, at the twenty-ninth Annual Meeting of the North Atlantic Fisheries Organization (NAFO). I also transmit, for the information of the Senate, the report of the Secretary of State on the Amendment, which includes an article-by-article analysis.

The Amendment serves to bring the Convention in line with modern international fisheries governance, including revisions to its decisionmaking and objection rules and a new comprehensive dispute settlement procedure. The Amendment also reflects changes to the budget contribution scheme that are expected to significantly reduce U.S. annual payments to NAFO. Involved Federal agencies and stakeholders strongly support the proposed changes to the Convention. The strengthened Convention will improve the way NAFO manages the fish stocks under its purview and enforces compliance with the measures it adopts, which in turn will improve the chances that key stocks in the Northwest Atlantic will recover enough to support resumed fishing.

The recommended changes to the Northwest Atlantic Fisheries Convention Act of 1995 necessary to implement the Amendment will be submitted separately to the Congress. I therefore recommend that the Senate give favorable consideration to the Amendment to the Convention and give its advice and consent to ratification at the earliest possible date.

* * * *

b. Transmittal of Convention on Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean

Also on April 22, 2013, President Obama transmitted to the U.S. Senate for advice and consent the Convention on the Conservation and Management of High Seas Fisheries

Resources in the North Pacific Ocean. Daily Comp. Pres. Docs., 2013 DCPD No. 00264, p. 1. President Obama's transmittal message follows.

* * * *

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, done at Tokyo on February 24, 2012, and signed by the United States on May 2, 2012 (the "Convention"). I also transmit, for the information of the Senate, the report of the Secretary of State on the Convention that includes an article-by-article analysis.

The Convention establishes a regional fisheries management organization through which Parties will cooperate to ensure the long-term conservation and sustainable use of the fisheries resources in the high seas of the North Pacific Ocean while protecting the marine ecosystems in which these resources occur.

The Convention will require implementing legislation, which is being drafted and will be submitted separately to the Congress for its consideration.

Cooperation under the Convention will address fisheries resources not covered under preexisting international fisheries management instruments and will help to prevent destructive fishing practices on the high seas that may have impacts on fisheries resources in areas subject to U.S. jurisdiction. Ratification by the United States would also ensure that future U.S. fisheries interests in the region subject to the Convention will be factored into allocation decisions. I therefore recommend that the Senate give favorable consideration to the Convention and give its advice and consent to ratification at the earliest possible date.

* * * *

c. Transmittal of Convention on Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean

Also on April 22, 2013, President Obama transmitted to the Senate for its advice and consent the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean Convention. Daily Comp. Pres. Docs., 2013 DCPD No. 00266, p. 1. President Obama's message to the Senate follows.

* * * *

I transmit herewith the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (the "Convention"), done at Auckland, New Zealand, November 14, 2009, with a view to receiving the advice and consent of the Senate to ratification. I also transmit, for the information of the Senate, the report of the Secretary of State on the Convention that includes an article-by-article analysis.

The Convention establishes a regional fisheries management organization through which Parties will give effect to their duty to cooperate in the conservation and sustainable use of the

high seas fishery resources in the South Pacific Ocean and to safeguard the marine ecosystems in which these resources occur.

The Convention requires Parties to apply specific conservation and management principles and approaches in giving effect to the objective of the Convention. These principles and approaches are enshrined in existing international instruments to which the United States is a party, such as the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of December 4, 1995. In addition, the Convention requires that Parties design and adopt specific conservation and management measures, such as limitations on catch or effort, time or area closures, and gear restrictions.

The Department of State, Department of Commerce, U.S. Coast Guard, and relevant U.S. stakeholders strongly support the Convention. The legislation necessary to implement the Convention will be submitted separately to the Congress for its consideration. I therefore recommend that the Senate give early and favorable consideration to this Convention and give its advice and consent to ratification.

* * * *

d. CITES new framework on introduction from the sea

At the 16th Conference of the Parties (CoP16) to the Convention on International Trade in Endangered Species ("CITES") in March 2013, the Parties adopted a new framework for implementation of CITES provisions on "introduction from the sea." CITES Resolution Conf. 14.6 (Rev. CoP16). "Introduction from the sea" refers to the taking of CITES-listed species from a marine area beyond the jurisdiction of any State (*e.g.*, the high seas) and transporting them into a State. The U.S. National Oceanic and Atmospheric Administration ("NOAA") within the Department of Commerce published a fact sheet on the new framework, available at *www.nmfs.noaa.gov/ia/agreements/global_agreements/cites_page/cites.pdf*. The NOAA fact sheet hails the CITES resolution on introduction from the sea: "This new framework will provide certainty and consistency regarding which CITES documents are issued and which Party is responsible for issuing these documents. It is a pragmatic and effective permitting scheme for CITES specimens taken on the high seas." The fact sheet continues:

> Within the new framework, if a vessel harvests CITES-listed specimens on the high seas and delivers them to the same country in which it is flagged, Parties will treat the transaction as an introduction from the sea and issue an introduction-from-the-sea certificate. Under this scenario, there is only one country involved…
>
> If there is more than one country involved in the trade (the vessel that harvests the specimens delivers them to a country other than the country to which it is flagged), CITES Parties will treat the transaction as an export and

> require the issuance of an export permit by the country to which the harvesting vessel is flagged….
>
> …A narrow exception, to accommodate some chartering arrangements, was incorporated into the new framework. Under the exception, when one country charters a vessel flagged to another country and that vessel harvest CITES-listed specimens on the high seas, the two countries involved could reach an agreement to allow the country that chartered the vessel to issue an introduction-from-the-sea certificate…

e. CITES amendments to include marine species

Also at CITES CoP16 in March 2013, the United States joined other countries in a successful effort to amend CITES to include several shark species in the list of species covered by Appendix II. The shark species are commercially harvested for their fins and/or meat. With the addition to Appendix II, these species can only be traded with CITES permits and with evidence that they are harvested sustainably and legally. The CITES news release on the conclusion of the meeting is available at *www.cites.org/eng/news/pr/2013/20130314_cop16.php*.

f. 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 May 2, 2013, the Department of State made its annual certifications related to conservation of sea turtles, certifying that 13 nations have adopted programs to reduce the incidental capture of sea turtles in their shrimp fisheries comparable to the program in effect in the United States. The Department also certified that the fishing environments in 26 other countries and one economy do not pose a threat of the incidental taking of sea turtles protected under Section 609. As excerpted below, the Federal Register notice announcing the State Department's May 2 certifications explained the Department's determinations and the applicable legal framework. 78 Fed. Reg. 45,285 (July 26, 2013).

---

* * * *

On May 2, 2013, 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. 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 fewer 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.

* * * *

In order for shrimp harvested with turtle excluder devices (TEDs) in an uncertified nation or economy 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 or economy has put in place adequate procedures to ensure the accurate completion of the DS–2031forms. 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 or economy will not be allowed…

* * * *

C. OTHER CONSERVATION ISSUES

1. Wildlife Trafficking

On July 1, 2013, President Obama issued Executive Order 13648 on Combating Wildlife Trafficking. 78 Fed. Reg. 40,621 (July 5, 2013). Sections 2, 3, and 4 of the Order establish and describe the Presidential Task Force on Wildlife Trafficking ("Task Force"), an interagency group charged with developing a National Strategy for Combating Wildlife Trafficking. Section 5 of the Order calls for the creation of an Advisory Council on Wildlife Trafficking ("Advisory Council") to assist the Task Force. Section 1 of the Order, set forth below, describes U.S. government policy with respect to wildlife trafficking.

* * * *

The poaching of protected species and the illegal trade in wildlife and their derivative parts and products (together known as "wildlife trafficking") represent an international crisis that continues to escalate. Poaching operations have expanded beyond small-scale, opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates. The survival of protected wildlife species such as elephants, rhinos, great apes, tigers, sharks, tuna, and turtles has beneficial economic, social, and environmental impacts that are important to all nations. Wildlife trafficking reduces those benefits while generating billions of dollars in illicit revenues each year, contributing to the illegal economy, fueling instability, and undermining security. Also, the prevention of trafficking of live animals helps us control the spread of

emerging infectious diseases. For these reasons, it is in the national interest of the United States to combat wildlife trafficking.

In order to enhance domestic efforts to combat wildlife trafficking, to assist foreign nations in building capacity to combat wildlife trafficking, and to assist in combating transnational organized crime, executive departments and agencies (agencies) shall take all appropriate actions within their authority, including the promulgation of rules and regulations and the provision of technical and financial assistance, to combat wildlife trafficking in accordance with the following objectives:

(a) in appropriate cases, the United States shall seek to assist those governments in anti-wildlife trafficking activities when requested by foreign nations experiencing trafficking of protected wildlife;

(b) the United States shall promote and encourage the development and enforcement by foreign nations of effective laws to prohibit the illegal taking of, and trade in, these species and to prosecute those who engage in wildlife trafficking, including by building capacity;

(c) in concert with the international community and partner organizations, the United States shall seek to combat wildlife trafficking; and

(d) the United States shall seek to reduce the demand for illegally traded wildlife, both at home and abroad, while allowing legal and legitimate commerce involving wildlife.

* * * *

The White House released a fact sheet, available at *www.whitehouse.gov/the-press-office/2013/07/01/fact-sheet-us-efforts-combat-wildlife-trafficking*, announcing the Executive Order and summarizing other actions to address wildlife trafficking. Among those actions described in the fact sheet is the use of the Transnational Organized Crime Rewards Program to combat perpetrators of wildlife trafficking. For a discussion of the first reward offer relating to a transnational criminal organization involved in wildlife trafficking, see Chapter 3.B.4.a.

On July 2, 2013, the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") welcomed the issuance of the U.S. Executive Order on Combating Wildlife Trafficking. See CITES news release, available at *www.cites.org/eng/news/pr/2013/20130702_us_eo.php*.

On July 29, 2013, the first meeting of the Task Force established by E.O. 13,648 convened at the State Department. As described in a State Department media note available at *http://www.state.gov/r/pa/prs/ps/2013/07/212551.htm*, the meeting included Robert D. Hormats, Under Secretary of State for Economic Growth, Energy and the Environment; Robert G. Dreher, Acting Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice; Daniel M. Ashe, Director of the U.S. Fish and Wildlife Service of the Department of the Interior; and representatives from 18 other U.S. government agencies.

2. ILC Work on Transboundary Aquifers

On October 22, 2013, Governor Ted Strickland, senior adviser for the U.S. Mission to the UN, delivered remarks at the U.N. General Assembly Sixth Committee's discussion of the

work of the International Law Commission ("ILC") on the law of transboundary aquifers. Governor Strickland's remarks are excerpted below and are available in full at *http://usun.state.gov/briefing/statements/215758.htm*.

* * * *

The United States continues to believe that the International Law Commission's work on transboundary aquifers has constituted an important advance in providing a possible framework for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations. For all states, and especially those struggling to cope with pressures on transboundary aquifers, the Commission's effort to develop a set of flexible tools for using and protecting these aquifers has been a very useful contribution.

With respect to next steps, there is still much to learn about transboundary aquifers in general. Specific aquifer conditions and state practices vary widely. Moreover, many aspects of the draft articles clearly go beyond current law and practice. For these reasons, the United States continues to believe that context-specific arrangements provide the best way to address pressures on transboundary groundwaters in aquifers, as opposed to refashioning the draft articles into a global framework treaty or into principles. States concerned should take into account the provisions of these draft articles when negotiating appropriate bilateral or regional arrangements for the proper management of transboundary aquifers.

Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; present uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. These factors will vary in each particular set of circumstances, and maintaining the articles as a resource in draft form seems to us the best way of ensuring that the draft articles will be a useful resource for states in all circumstances.

If the draft articles were fashioned into a global convention or principles, we remain unconvinced that they would garner sufficient support. We also note that the draft articles seem to cover some waters that are already within the scope of the 1997 Watercourses Convention, such that the existence of two overlapping framework conventions could lead to confusion.

Instead, we would support commending the draft articles to the attention of governments, and encouraging states concerned to make appropriate bilateral or regional agreements or arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles.

* * * *

Cross references

Wildlife trafficking, **Chapter 3.B.5.**

Constitutionality of MARPOL amendment, **Chapter 4.B.2.**
Human rights and the environment, **Chapter 6.E.**
ILC's work protection of the atmosphere, **Chapter 7.D.1.**
ILC's work on protection of the environment in relation to armed conflict, **Chapter 7.D.3.**
Addressing aviation impacts on climate change, **Chapter 11.A.3.**
Environmental cooperation agreement with Colombia, **Chapter 11.D.1.c.**

CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2013, the United States took steps to protect the cultural property of Belize and Cambodia by imposing or extending import restrictions on certain archaeological 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 entry into an agreement were met, or that the factors permitting entry into the initial agreement still pertained and that there was no cause for suspension of the agreement. 19 U.S.C. §§ 2602 (a)(1) and (e), respectively. In 2013, the United States entered into one agreement and extended another 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(a)(1) 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. Pursuant to 19 U.S.C. §§ 2603 and 2604, the President may also determine that an emergency condition applies with respect to the archaeological and/or ethnological material of a State Party and apply import restrictions with respect to such material.

1. Belize

On February 27, 2013, the Government of the United States of America and the Government of Belize entered into a Memorandum of Understanding ("MOU"), effective for five years, to protect categories of archaeological material from the Pre-

ceramic Period to the late Colonial Period, from 9,000 B.C. to 250 years ago. The text of the MOU is available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*. Effective March 5, 2013, U.S. Customs and Border Protection ("CBP") of the Department of Homeland Security and the Department of the Treasury imposed import restrictions on certain archaeological material from Belize pursuant to the MOU. 78 Fed. Reg. 14,183 (Mar. 5, 2013). The State Department issued a media note on March 5, 2013 announcing the signing of the MOU, available at *www.state.gov/r/pa/prs/ps/2013/03/205661.htm*. The media note includes the following:

> …This MOU demonstrates a commitment by both governments to staunch the pillage and illicit trafficking of Belize's archaeological heritage of African, indigenous Maya, Spanish, and British influences.
>
> The Government of Belize requested this agreement under Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Convention offers a framework of cooperation among State Parties to reduce the further pillage of intact archaeological sites and ethnological objects.
>
> With this MOU, the United States now has agreements with Belize, El Salvador, Guatemala, Honduras, and Nicaragua in Central America, promoting a regional approach to combating pillage and trafficking of cultural property. …

2. Cambodia

Effective September 19, 2013, the United States and Cambodia further amended and extended for five years the MOU between the Government of the United States of America and the Government of the Kingdom of Cambodia Concerning the Imposition of Import Restrictions on Archaeological Material from Cambodia from the Bronze Age through the Khmer Era. Cooperation to protect the cultural property of Cambodia began in 1999 when the United States implemented emergency import restrictions to address the pillage of Cambodia's rich archaeological heritage and the illicit trafficking in such material. In 2003, the United States and Cambodia then entered into a cultural property MOU, which was first amended and extended in 2008. See *Digest 2003* at 821, 823–25; *Digest 2008* at 729-30. The text of the 2013 MOU and the diplomatic notes exchanged in 2013 to further amend and extend the MOU are available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*. See also the September 16, 2013 Department of State media note, available at *www.state.gov/r/pa/prs/ps/2013/09/214273.htm*. The Department of Homeland Security (*i.e.*, CBP) and the Department of the Treasury further extended the import restrictions imposed previously with respect to certain archaeological materials from Cambodia. 78 Fed. Reg. 56,832 (Sept. 16, 2013).

B. SYRIA

In a September 23, 2013 press statement, available at *www.state.gov/r/pa/prs/ps/2013/09/214549.htm*, the Department of State announced the launch of an "Emergency Red List of Syrian Cultural Objects at Risk." The Red List was developed by the International Council of Museums ("ICOM"), in collaboration with the Department of State, to respond to the widespread looting of museums and archaeological sites in Syria and to help authorities identify Syrian objects that may be protected by national or international law. In the context of the ongoing civil war in Syria, there have been widespread destruction and looting of sites and monuments that have been preserved for millennia, placing Syria at risk of losing a cultural legacy of universal importance.

C. 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

Syria, **Chapter 17.B.1. and Chapter 19.F.1.**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. General

On October 16, 2013, John Arbogast, Counselor for Legal Affairs for the U.S. Mission to the UN, 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 46th session. See U.N. Doc. A/68/17. Mr. Arbogast's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/215561.htm*.

* * * *

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 46th session of the Commission reveals significant accomplishments during the past year.

We welcome the adoption of numerous instruments during the Commission's 46th session. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the related revision of the UNCITRAL Arbitration Rules aim to make arbitrations involving a State, initiated under an investment treaty concluded after April 1, 2014, accessible to the public through publication of information regarding the commencement of the arbitration, key arbitration documents, open hearings, and participation by third parties. The UNCITRAL Guide on the Implementation of a Security Rights Registry provides commentary and recommendations on legal and practical issues that need to be addressed in a modern security rights registry. The guidance on procurement regulations to be promulgated in accordance with the UNCITRAL Model Law on Public Procurement and glossary of procurement-related terms used in that model law will provide assistance in the area of public procurement. Revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency are intended to address

uncertainty that has arisen in the application of that model law and to provide valuable guidance to domestic courts. Part four of the UNCITRAL Legislative Guide on Insolvency Law provides a useful discussion of issues related to the responsibilities of directors of corporations that are in the vicinity of insolvency.

The Report also details the ongoing and new work in the various UNCITRAL working groups. Working Group I will focus on the reduction of legal obstacles faced by micro, small and medium sized enterprises throughout their life cycle, particularly in developing countries. Working Group II is preparing a convention on the application of the new Rules on Transparency to investor-State arbitrations initiated under investment treaties. Working Group III will continue to draft generic procedural rules for online dispute resolution for the resolution of disputes arising from cross-border electronic commerce. Working Group IV will continue to consider the electronic transferability of rights. Working Group V is in the process of clarifying how it might proceed with enterprise group issues and other issues. Working Group VI will continue its work on a model law on secured transactions.

In light of the financial situation affecting UNCITRAL and its member states, the United States provided a paper, A/CN.9/789, encouraging members to consider many aspects of the operation of UNCITRAL. The United States is pleased that the Commission did begin the process of considering whether changes are needed to the processes by which UNCITRAL operates. In particular, the United States is pleased that the Commission discussed criteria to be addressed when considering projects to be undertaken by UNCITRAL and that the Commission acknowledged various tools through which it can introduce flexibility, and perhaps greater efficiency, in its working methods, such as through the use of experts or special rapporteurs. Moreover, the United States is pleased that the Commission realized the benefits of substantive cooperation with other organizations such as the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law, and looks forward to the Secretariat's forthcoming report on possible joint projects with these organizations. We also look forward to continued discussion of reform measures that could help maximize UNCITRAL's ability to accomplish more using its limited resources and ensure a focus on the highest-priority projects.

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.

* * * *

2. Rules on Transparency in Treaty-based Investor-State Arbitration

As mentioned in Mr. Arbogast's statement above, UNCITRAL finished negotiations on a set of Rules on Transparency in Treaty-based Investor-State Arbitration in 2013. Those Rules are available at *www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html*. The Rules are designed to promote transparency in investor-state arbitrations occurring under bilateral investment treaties ("BITs) and other treaties. The United States actively

participated in formulating the Rules and, as stated above, welcomed their adoption by UNCITRAL.

B. JUDGMENTS

1. Resumption of the Judgments Project

Over a decade ago, the Member States of the Hague Conference on Private International Law initiated "The Judgments Project," which originally contemplated harmonization of the rules of jurisdiction of courts and the recognition and enforcement of their judgments across borders. The most notable result of their efforts was a more limited agreement, the Convention on Choice of Court Agreements ("COCA"), which was concluded in 2005. In 2011, the Council on General Affairs and Policy of the Hague Conference convened an "Experts' Group" to explore the possibility of resuming the Judgments Project. The Experts' Group agreed that there was some prospect of success for an instrument on the recognition and enforcement of judgments, but there was no consensus regarding further work on an instrument on jurisdictional bases. In 2012, the Council considered the findings of the Experts' Group and divided the project into two parts: (1) a Working Group tasked with preparing proposals for consideration by a Special Commission in relation to provisions that might be included in a possible future instrument relating to recognition and enforcement of judgments; (2) further study by the Experts' Group regarding the feasibility of making provisions in relation to matters of jurisdiction, including parallel proceedings, in the same or another future instrument. Initial meetings of the Working Group and the Experts' Group took place in The Hague in February 2013.

In August of 2013, after some disagreement among delegations as to how the work on the Judgments Project should proceed, the Permanent Bureau of the Hague Conference disseminated to Member States a "Process Paper on Continuation of the Judgments Project," which proposed (in paragraph 20) the following plan for the timing and agenda of the two groups (the Working Group and the Experts' Group):

> (i) the Working Group continue to further advance its work in response to its mandate and report to the Council in 2014;
> (ii) the Experts' Group inform the Council in 2014 that while its study and discussion on the desirability and feasibility of work on international jurisdiction is suspended to allow all Members of the Groups to have a clearer idea as to the evolution of the work on recognition and enforcement, it intends to resume its work at some point in the future so as to allow Members of the Experts' Group to develop a more informed position on the policy issues at stake in relation to jurisdictional matters; and
> (iii) at the appropriate time, the Council consider the results of the work of the Working Group and the recommendations of the Experts' Group in order to determine the scope and nature of the future instrument(s).

The Process Paper is available in full at *www.state.gov/s/l/c8183.htm*.

On December 6, 2013, John J. Kim, Assistant Legal Adviser for Private International Law at the U.S. Department of State, provided U.S. views regarding the proposed plan for the Working Group and the Experts' Group in proceeding with the Judgments Project. The letter from Mr. Kim to Christophe Bernasconi, Secretary General of the Hague Conference on Private International Law, is also available at *www.state.gov/s/l/c8183.htm*. In response to the Process Paper, Mr. Kim's letter states:

> The United States very much appreciates the Permanent Bureau's work in preparing the Process Paper. The Process Paper usefully summarizes the debate among delegations as to how the Judgments Project should proceed—in particular, whether the Conference should focus first on the recognition and enforcement of judgments alone, or whether work should proceed on a dual track including negotiations on direct jurisdiction. …
>
> As you know, the U.S. delegation has expressed its views on the Judgments Project at prior meetings of the Council on General Affairs and Policy. We believe that we must first see if an agreement can be reached on the fundamental objective of the Judgments Project (the recognition and enforcement of judgments) before the Council decides whether it makes sense to pursue work on direct jurisdiction. Further, we believe that the Permanent Bureau and the Member States should focus their limited resources in an area where the prospects for success are more promising.
>
> Accordingly, the United States can accept the recommendations made by the Permanent Bureau in paragraph 20 of the Process Paper, subject to certain clarifications. First, we agree that the Working Group should resume its work in response to its mandate and report to the Council on General Affairs and Policy in April 2014.
>
> Second, we agree that the Experts' Group should refrain from the study and discussion of the desirability and feasibility of work on international jurisdiction until all Members of the Hague Conference have a clearer idea as to the evolution of the work on recognition and enforcement. The Experts' Group should not meet again until there is a consensus by the Members of the Hague Conference that it is appropriate for the Experts' Group to meet.
>
> Third, we appreciate the Permanent Bureau's recommendation that "at the appropriate time" the Council can consider the results of the work of the Working Group and the recommendations of the Experts' Group in order to determine the scope and nature of the future instruments. We wish to make clear, however, that the Council should consider the work product of the Working Group and the Experts' Group at such times as the relevant group presents its findings to the Council. The presentations of these two groups, which have very different mandates, need not be, and should not be, made in tandem. …

2. Hague Convention on Choice of Court Agreements

The United States signed the Hague Convention on Choice of Court Agreements ("COCA") in 2009. *Digest 2009* at 536. On January 19, 2013, shortly before the end of his tenure as Legal Adviser, Harold Hongju Koh signed a memorandum regarding U.S. implementation of COCA, which is available at *www.state.gov/s/l/releases/2013/index.htm*. Also available along with the memorandum are the attachments mentioned therein. The memorandum appears below.

---

* * * *

On January 19, 2009, Legal Adviser John Bellinger signed the Hague Convention on Choice of Courts Agreement (COCA) (Attachment 1) on behalf of the United States. In the last four years, the U.S. Department of State's Office of the Legal Adviser (particularly the Office of Private International Law (L/PIL)) has expended great effort seeking to identify a mechanism for implementing this Convention (at such time as the United States becomes a party to it) in a way that would accommodate the interests of all concerned participants at both the federal and state levels. Our goal has been to develop an agreed-upon package of legislation that would implement the Convention effectively in the United States. During that time, two principal options have emerged for COCA implementation:

I. The "Cooperative Federalism" Approach:

Over the past four years, the Legal Adviser and other representatives of the Office of the Legal Adviser have participated in numerous meetings and have engaged in extended discussions among concerned stakeholders regarding an implementation scheme for the Convention. At those meetings, many participants have expressed strongly held and divergent views on issues relating to domestic implementation of the COCA, including with regard to the scope of federal court jurisdiction and the law applicable in federal court. The compromise proposal set forth in our April 16, 2012, State Department White Paper (Attachment 2) was intended to bridge the differences among the many views expressed. We continue to believe that the White Paper's approach represents a principled position and the one most likely to attract broad support from different stakeholders. The Department of Justice has advised that the White Paper approach would raise no constitutional concerns were it adopted as the method of COCA implementation.

The State Department's White Paper proposal presents a compromise with regard to a bundle of issues. It strikes what we believe is a fair balance between federal and state interests, taking into account all of the relevant circumstances. The White Paper is premised on a cooperative federalism approach involving parallel federal and state legislation, with states having the ability to elect to opt out of the federal statute and instead be governed by state law, applicable in state court, based on the uniform act developed by the Uniform Law Commission (ULC). It makes no change in existing rules regarding federal diversity jurisdiction or removal to federal court. It gives states autonomy in determining the length of the relevant statute of limitations and it allows states to elect whether to accept "no-connection" cases that involve no contacts with the forum. Nor does our proposed approach impair the authority of the states to establish common law jurisprudence with respect to substantive law relating to contracts or the

recognition and enforcement of judgments. Whether or not a court is applying the federal implementing law or a state's enactment of the uniform act, it is understood that certain principles of state law that are not addressed in the Convention will apply.

The White Paper approach was supported, as a necessary compromise, by the New York State Bar Association International Section, the New York City Bar Committee on International Commercial Disputes, and the prevailing majority of polled members of the Section of International Law of the American Bar Association. The Committee on Federal-State Jurisdiction of the Judicial Conference of the United States did not take a position on the White Paper proposals. The Maritime Law Association objected to the proposals, stating that it believes that cooperative federalism is an inappropriate method for implementation of a convention. The Uniform Law Commission and the Conference of Chief Justices indicated that they cannot support the White Paper approach as a workable compromise, specifically because of the provision on applicable law in federal court. In the attached correspondence with ULC President Michael Houghton (Attachment 3), I explained why the State Department believes the White Paper approach is fair and workable, should all stakeholders endorse it. A key factor underlies the White Paper proposals: under cooperative federalism, by design the federal and state implementing statutes are to be substantively the same – in fact, identical insofar as possible – and, in the event of any substantive discrepancy, the federal statute will preempt.

On July 18, 2012, the Uniform Law Commission formally approved the Uniform Choice of Court Agreements Convention Implementation Act (Uniform Act) (Attachment 4). We had advised the ULC that, in light of the unresolved issues regarding implementation of the Convention, the State Department was not in a position to endorse that action. We have further cautioned the ULC that, because the draft federal legislation is still evolving – and would likely undergo further change if and when it is taken up by Congress – if states proceed with enactment of the Uniform Act in its current form, there is a serious risk that non-conforming federal and state texts could impair the effective implementation of the Convention. The Uniform Act and the federal legislation that was drafted to accompany it (Attachment 5) are quite detailed and largely replicate all of the operational provisions in the Convention.

II. The "Federal Arbitration Act" Approach:

With the continuing impasse over the acceptability of the White Paper proposals, progress on a cooperative federalism approach remains stalled. Those who objected to the White Paper compromise have not come forward with an alternative proposal, based on cooperative federalism, that would attract broader support from key stakeholders. Accordingly, I thought it necessary and important to present an alternative proposal before the end of my tenure as Legal Adviser.

At a public meeting on January 4, 2013, held under the auspices of the State Department's Advisory Committee on Private International Law (ACPIL), a different draft vehicle for COCA implementation was discussed. It is a shorter version of a federal statute (Attachment 6), patterned after the gap-filling approach of the legislation (chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208) (Attachment 7) that has proved successful in implementing the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). It does not seek to replicate the operative provisions of the Convention, generally leaving those to be directly enforceable in U.S. courts in self-executing fashion, and it does not contemplate parallel uniform state law.

At that meeting, a representative of the Conference of Chief Justices queried whether the new approach could achieve the necessary level of support from stakeholders. At the same time,

the "Federal Arbitration Act" approach was strongly endorsed by representatives of the New York State Bar Association International Section, the New York City Bar Committee on International Commercial Disputes, the Maritime Law Association, and a number of other practitioners and academics in attendance. The ULC said that it cannot support that approach, but offered no alternative to break the impasse surrounding the "cooperative federalism" approach. As of this date, my judgment is that the federal-only approach is the most promising available path that would achieve simplicity, uniformity, and predictability in the implementation of the Convention. While further vetting and polishing of the proposal is advisable in the next period, I have recommended to my successor as Legal Adviser and the next Secretary of State that, absent new proposals from key stakeholders regarding how the package of issues under the cooperative federalism approach might be restructured to gain wider support, the Department should focus its energies upon the federal-only approach in order to complete this important implementation effort.

Let me say in closing that achieving U.S. ratification of the COCA is an important experiment in how private law conventions may be implemented in our federal system. We continue to believe that creative solutions are appropriate and necessary in order to bridge the policy differences that exist among key stakeholders. We also believe that either the White Paper approach or a fully vetted version of the Federal Arbitration Act approach would represent a reasonable method of implementation that would allow the United States to meet its international obligations under the Convention at such time as it becomes a party. Because the former approach is currently at an impasse, the latter approach is currently the most promising way forward. I hope that the extensive groundwork that has been laid during my time as Legal Adviser will make it possible for all stakeholders to arrive at an agreed-upon approach that would allow the United States to proceed to prompt ratification and implementation of this most important convention.

Attachments:

1 – Convention on Choice of Court Agreements
2 – State Department White Paper, April 16, 2012
3 – Correspondence between the Legal Adviser and Michael Houghton, President of the Uniform Law Commission
4 – Uniform Choice of Court Agreements Convention Implementation Act, adopted July 18, 2012
5 – Draft federal implementing legislation, April 24, 2012
6 – Draft federal implementing legislation, December 11, 2012
7 – Chapter 2 of the Federal Arbitration Act

* * * *

C. FAMILY LAW

Hague Convention on the Civil Aspects of International Child Abduction

1. *Chafin*

As discussed in *Digest 2012* at 459-67, the United States filed an *amicus* brief in 2012 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 Supreme Court decided the case on February 19, 2013, unanimously reaching the conclusion recommended by the U.S. *amicus* brief that the appeal from the district court was not rendered moot. Excerpts follow (with footnotes omitted) from the majority opinion of the Court (there was one separate concurring opinion).

* * * *

This dispute is still very much alive. Mr. Chafin continues to contend that his daughter's country of habitual residence is the United States, while Ms. Chafin maintains that E.C.'s home is in Scotland. Mr. Chafin also argues that even if E.C.'s habitual residence was Scotland, she should not have been returned because the Convention's defenses to return apply. Mr. Chafin seeks custody of E.C., and wants to pursue that relief in the United States, while Ms. Chafin is pursuing that right for herself in Scotland. And Mr. Chafin wants the orders that he pay Ms. Chafin over $94,000 vacated, while Ms. Chafin asserts the money is rightfully owed.

On many levels, the Chafins continue to vigorously contest the question of where their daughter will be raised. This is not a case where a decision would address "a hypothetical state of facts." *Lewis, supra,* at 477, 110 S.Ct. 1249 (quoting *Rice, supra,* at 246, 92 S.Ct. 402; internal quotation marks omitted). And there is not the slightest doubt that there continues to exist between the parties "that concrete adverseness which sharpens the presentation of issues." *Camreta v. Greene,* 563 U.S. ——, ——, 131 S.Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011) (quoting *Lyons, supra,* at 101, 103 S.Ct. 1660; internal quotations marks omitted).

A

At this point in the ongoing dispute, Mr. Chafin seeks reversal of the District Court determination that E.C.'s habitual residence was Scotland and, if that determination is reversed, an order that E.C. be returned to the United States (or "re-return," as the parties have put it). In short, Mr. Chafin is asking for typical appellate relief: that the Court of Appeals reverse the District Court and that the District Court undo what it has done. See *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.,* 249 U.S. 134, 145–146, 39 S.Ct. 237, 63 L.Ed. 517 (1919); *Northwestern Fuel Co. v. Brock,* 139 U.S. 216, 219, 11 S.Ct. 523, 35 L.Ed. 151 (1891) ("Jurisdiction to correct what had been wrongfully done must remain with the court so long as

the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal"). The question is whether such relief would be effectual in this case.

Ms. Chafin argues that this case is moot because the District Court lacks the authority to issue a re-return order either under the Convention or pursuant to its inherent equitable powers. But that argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—confuses mootness with the merits. In *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), this Court held that a claim for backpay saved the case from mootness, even though the defendants argued that the backpay claim had been brought in the wrong court and therefore could not result in relief. As the Court explained, "this argument ... confuses mootness with whether [the plaintiff] has established a right to recover ..., a question which it is inappropriate to treat at this stage of the litigation." *Id.*, at 500, 89 S.Ct. 1944. Mr. Chafin's claim for re-return—under the Convention itself or according to general equitable principles—cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction, see *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and his prospects of success are therefore not pertinent to the mootness inquiry.

As to the effectiveness of any relief, Ms. Chafin asserts that even if the habitual residence ruling were reversed and the District Court were to issue a re-return order, that relief would be ineffectual because Scotland would simply ignore it. But even if Scotland were to ignore a U.S. re-return order, or decline to assist in enforcing it, this case would not be moot. The U.S. courts continue to have personal jurisdiction over Ms. Chafin, may command her to take action even outside the United States, and may back up any such command with sanctions. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289, 73 S.Ct. 252, 97 L.Ed. 319 (1952); cf. *Leman v. Krentler–Arnold Hinge Last Co.*, 284 U.S. 448, 451–452, 52 S.Ct. 238, 76 L.Ed. 389 (1932). No law of physics prevents E.C.'s return from Scotland, see *Fawcett v. McRoberts*, 326 F.3d 491, 496 (C.A.4 2003), abrogated on other grounds by *Abbott v. Abbott*, 560 U.S. ——, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010), and Ms. Chafin might decide to comply with an order against her and return E.C. to the United States, see, *e.g.*, *Larbie v. Larbie*, 690 F.3d 295, 303–304 (C.A.5 2012) (mother who had taken child to United Kingdom complied with Texas court sanctions order and order to return child to United States for trial), cert. pending, No. 12–304. After all, the consequence of compliance presumably would not be relinquishment of custody rights, but simply custody proceedings in a different forum.

Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured. For example, courts issue default judgments against defendants who failed to appear or participate in the proceedings and therefore seem less likely to comply. See Fed. Rule Civ. Proc. 55. Similarly, the fact that a defendant is insolvent does not moot a claim for damages. See 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, p. 3 (3d ed.2008) (cases not moot "even though the defendant does not seem able to pay any portion of the damages claimed"). Courts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed. See, *e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (suit against Austria for return of paintings); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (suit against Argentina for repayment of bonds). And we have heard the Government's appeal from the reversal of a conviction, even though the defendants had been deported, reducing the practical impact of any decision; we concluded that the case was not moot because the defendants might "re-enter this country on their own" and encounter the

consequences of our ruling. *United States v. Villamonte–Marquez,* 462 U.S. 579, 581, n. 2, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

So too here. A re-return order may not result in the return of E.C. to the United States, just as an order that an insolvent defendant pay $100 million may not make the plaintiff rich. But it cannot be said that the parties here have no "concrete interest" in whether Mr. Chafin secures a re-return order. *Knox,* 567 U.S., at ——, 132 S.Ct., at 2287 (internal quotation marks omitted). "[H]owever small" that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and is enough to save this case from mootness. *Ibid.* (internal quotation marks omitted).

* * * *

IV

Ms. Chafin is correct to emphasize that both the Hague Convention and [the International Child Abduction Remedies Act or] ICARA stress the importance of the prompt return of children wrongfully removed or retained. We are also sympathetic to the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children. But courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children—through the familiar judicial tools of expediting proceedings and granting stays where appropriate. There is no need to manipulate constitutional doctrine and hold these cases moot. Indeed, doing so may very well undermine the goals of the treaty and harm the children it is meant to protect.

If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal. See, *e.g., Garrison v. Hudson,* 468 U.S. 1301, 1302, 104 S.Ct. 3496, 82 L.Ed.2d 804 (1984) (Burger, C.J., in chambers) ("When ... the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted" (citation and internal quotation marks omitted)); *Nicolson v. Pappalardo,* Civ. No. 10–1125 (C.A.1, Feb. 19, 2010) ("Without necessarily finding a clear probability that appellant will prevail, we grant the stay because ... a risk exists that the case could effectively be mooted by the child's departure"). In cases in which a stay would not be granted but for the prospect of mootness, a child would lose precious months when she could have been readjusting to life in her country of habitual residence, even though the appeal had little chance of success. Such routine stays due to mootness would be likely but would conflict with the Convention's mandate of prompt return to a child's country of habitual residence.

Routine stays could also increase the number of appeals. Currently, only about 15% of Hague Convention cases are appealed. Hague Conference on Private Int'l Law, N. Lowe, A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Pt. III–National Reports 207 (2011). If losing parents were effectively guaranteed a stay, it seems likely that more would appeal, a scenario that would undermine the goal of prompt return and the best interests of children who should in fact be returned. A mootness holding here might also encourage flight in future Hague Convention cases, as prevailing parents try to flee the jurisdiction to moot the case. See *Bekier,* 248 F.3d, at 1055 (mootness holding "to some degree conflicts with the purposes of the Convention: to prevent parents from fleeing jurisdictions to find a more favorable judicial forum").

Courts should apply the four traditional stay factors in considering whether to stay a return order: " '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.' " *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). In every case under the Hague Convention, the well-being of a child is at stake; application of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child's best interests.

Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation. Many courts already do so. See Federal Judicial Center, J. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 116, n. 435 (2012) (listing courts that expedite appeals). Cases in American courts often take over two years from filing to resolution; for a six-year-old such as E. C., that is one-third of her lifetime. Expedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child.

* * *

The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties' respective claims.

The judgment of the United States Court of Appeals for the Eleventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

* * * *

2. *Lozano*

Another case relating to the Hague Convention, *Lozano v. Alvarez*, No. 12-820, discussed in *Digest 2012* at 467-74, is the subject of two U.S. *amicus* briefs filed in the U.S. Supreme Court in 2013. In its *amicus* brief in support of the petition for certiorari in the case, the United States asserted that Supreme Court review was warranted on the question of whether the one-year period for automatic return of a child in Article 12 of the Hague Convention is subject to equitable tolling. The U.S. brief on the petition for certiorari filed on May 24, 2013 is available at *www.state.gov/s/l/c8183.htm*.

As the U.S. brief on certiorari advocated, the Supreme Court agreed to review the issue of equitable tolling. Excerpts (with footnotes omitted) follow from the U.S. *amicus* brief filed on October 29, 2013 arguing, as the United States had in the court of appeals, that the one-year period under Article 12 is not subject to equitable tolling. The October 29 *amicus* brief is also available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

A. Article 12 Provides For The Return Of A Child "Forthwith" Only If A Petition Is Filed Within One Year

A central purpose of the Hague Convention is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State." Art. 1; see Introductory Declarations. To accomplish that purpose, the Convention provides that children abducted in violation of a parent's rights of custody should be promptly returned to their country of habitual residence. See Arts. 1, 12. Article 12 requires that a court order the return of a child "forthwith," except in limited circumstances provided in other Articles (see note 2, *supra*), if a petition is filed within one year of the wrongful removal or retention of the child. The Convention also provides, however, that if more than one year has elapsed, the court may consider whether the child is "now settled" in her new environment. Art. 12. That one-year period is not subject to equitable tolling.

1. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott v. Abbott,* 130 S. Ct. 1983, 1990 (2010) (citation omitted). The plain language of Article 12 indicates that the one-year period is not subject to extension. Article 12 provides that if a child has been wrongfully removed or retained in violation of a parent's custody rights, and "a period of less than one year has elapsed from the date of the wrongful removal or retention" to "the date of the commencement of the proceedings" for return of the child, authorities in the State where the child is located "shall order the return of the child forthwith." Convention Art. 12. When "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in [her] new environment." *Ibid.*

The one-year period thus runs "from the date of the wrongful removal or retention," and Article 12 makes no provision for an extension of that period. Convention Art. 12. As the court of appeals observed, if the States Parties to the Convention had meant to vary the starting date of the one-year period based on the circumstances of a left-behind parent's locating his or her child, they easily could have adopted a discovery rule-providing for a one-year period running from the date the petitioning parent learned or reasonably could have learned of the child's whereabouts. Pet. App. 17a n.8.

The choice of language is significant because the Convention negotiators fully understood that wrongful removal of a child to a foreign country commonly results in difficulties, often due to concealment, in learning the child's whereabouts. See Elisa Pérez-Vera, *Explanatory Report* in 3 Hague Conference on Private Int'l Law, 14th Sess., Oct. 6-25, 1980, *Actes et Documents de la Quatorzième Session: Child Abduction* 426, paras. 107-108, at 458-459 (Permanent Bureau trans., 1982) (*Actes et Documents*) (acknowledging "difficulties encountered in establishing the child's whereabouts," but stating that the "single time-limit of one year" was the optimal resolution of competing concerns); see also, *e.g., Replies of the Governments to the Questionnaire* in *Actes 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."); *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 215, 231-232 (noting that in many cases, a child's location is unknown at the time of abduction and that some abductors will conceal the child's whereabouts). Given that understanding, one would expect Article 12's text to provide for the running of the one-year period from the date the left-behind parent knew or should have known of the child's whereabouts, or to address tolling in circumstances involving concealment, had the Convention's drafters intended either result.

2. The Convention's drafting history demonstrates that the decision to calculate Article 12's one-year period from the time of a child's removal or retention, rather than from the discovery of the child's whereabouts, was a considered choice made during Convention negotiations. See *Air France v. Saks*, 470 U.S. 392, 396, 400 (1985) (noting that because multilateral treaties are negotiated by numerous delegates, "the history of the treaty, [and] the negotiations," may be especially important, and therefore "[i]n interpreting a treaty it is proper *** to refer to the records of its drafting and negotiation").

At the outset of the process of drafting the Convention, a preliminary report prepared for a Special Commission charged by the Hague Conference on Private International Law with studying the problem of international parental kidnapping emphasized 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." Adair Dyer, *Report on International Child Abduction by One Parent* in *Actes et Documents* 12, 23-24. Thus, the Special Commission initially suggested that if "an application has been made more than six months after the removal" and the child has been "habitually resident" in the new country for more than one year, a court in the new country should "assume jurisdiction to determine" the proper custody arrangement rather than simply return the child. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping* in *Actes et Documents* 162, 164.

Consistent with that view, the preliminary draft of the Convention provided that when a parent sought return within six months of the abduction, the court was required to "order the return of the child forthwith." *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera* in *Actes et Documents* 166, 168 (Art. 11). But when the child's location "was unknown," the six months would "run from the date of the discovery," although even then the "total period" could not exceed one year. *Ibid.*

During consideration of that draft, the delegations from the participating nations debated the workability of a two-tier system and the proper length of each time period. See, *e.g.*, *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 216, 218, 242; *Proces-verbal No. 6* in *Actes et Documents* 283, 288; see also *Proces-verbal No 7* in *Actes et Documents* 290, 291-293. Several delegations expressed concern that abductors would conceal the whereabouts of their children. See, *e.g.*, *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 216. Nevertheless, after a number of delegations expressed the view that determining the "date of 'discovery' " would be difficult, the delegations decided to adopt a single time period that did not vary based on discovery. See *Procès-verbal No 7* in *Actes et Documents* 291-293; *Explanatory Report* para. 108, at 458-459.

During discussion of the appropriate length of that single time period, the United States delegation urged that the period should be long enough to account for the difficulty of locating a child but should also take into account the possibility of the child's assimilation into a new environment after enough time had passed. *Procès-verbal No 7* in *Actes et Documents* 292. … Under the resulting framework, as described by the United States delegation, the Convention provides 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. *Id.* at 315; see note 2, *supra.* After one year, "assimilation in a new environment [becomes] an open question." *Procès-verbal No 10* in *Actes et Documents* 315.

The one-year period during which return is required, without further inquiry thus represented a compromise between the interest in securing the immediate return of a wrongfully

removed child and the interests that may arise when a child develops attachments to a new environment. From the outset, the delegations negotiating the Convention contemplated that after *some* fixed period of time, return would not be mandatory. See *Preliminary Draft Convention* in *Actes et Documents* 168 (Art. 11) (time period running from "date of the discovery" but "total period" could not exceed one year). The negotiators explicitly considered but ultimately rejected a two-tier framework in which the period for obligatory return would be extended if there were difficulty locating the child. See *Procès-verbal No 7* in *Actes et Documents* 291-293. When the negotiators adopted the single time limit, they plainly understood that the time limit would apply regardless of difficulty in locating the child. See, *e.g., id.* at 292-293, 295.

3. The post-ratification understanding of States Parties to the Convention reinforces the conclusion that the one-year period is not subject to equitable tolling. See *Abbott,* 130 S. Ct. at 1993 ("In interpreting any treaty, [t]he opinions of our sister signatories *** are entitled to considerable weight.") (internal quotation marks omitted; brackets in original); 42 U.S.C. 11601(b)(3)(B) ("recogniz[ing]" "the need for uniform international interpretation of the Convention").

To our knowledge, the courts of other States Parties that have considered invocation of equitable tolling to extend Article 12's one-year period of automatic return have uniformly declined to adopt it. …

* * * *

Article 12 thus reflects a compromise based on the judgment that once enough time elapses, the return of a child may not be appropriate. The Convention implements that judgment with a single one-year period during which the child must be returned "forthwith"; after that period, the court may consider whether the child is settled before ordering return. The text, drafting history, and decisions of other States Parties demonstrate that the one-year period may not be extended.

B. The Department Of State Interprets Article 12 Not To Permit Equitable Tolling, But To Allow A Court To Consider The Abducting Parent's Concealment In Exercising Its Equitable Discretion To Order The Child's Return

1. The Department of State—which negotiated the Convention and facilitates the return of children from and to other countries, and whose Office of Children's Issues serves as the Central Authority for the United States - interprets Article 12 not to permit equitable tolling. But it interprets the Convention to confer on the court equitable discretion, in cases filed more than a year after wrongful removal or retention, to consider concealment and other equitable factors in determining whether the child should be returned.

The State Department's interpretation is informed, in part, by its recognition that foreign courts hearing petitions seeking the return of a child to the United States should not be precluded from considering relevant factors, including the behavior of the abducting parent, in determining whether to order the return of the child. The State Department's interpretation is "entitled to great weight." *Abbott,* 130 S. Ct. at 1993 (citation omitted).

2. Although Article 12 is not subject to equitable tolling, the Convention "provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct - *** discretion to order the return of a child, even when a defense is satisfied." Pet. App. 27a; see *id.* at 19a (even when a child is settled, a court may order the child's return).

Article 12 provides that "where the proceedings have been commenced after the

expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in [her] new environment." Article 12 thus *requires* return of the child if less than one year has elapsed or if the child is not settled in her new environment.

But even when a year has passed and the child is now settled in her new environment, the Convention does not affirmatively *prohibit* return. …

As multiple courts of appeals have concluded, a court thus retains equitable discretion to order the return of a child even though she is settled in her new environment. See *Yaman v. Yaman,* Nos. 13-1240, 13-1285, 2013 WL 4827587, at *12-*17 (1st Cir. Sept. 11, 2013) (recognizing discretionary authority to return "now settled" child); *Blondin v. Dubois,* 238 F.3d 153, 164 (2d Cir. 2001) (same); cf. *Asvesta v. Petroutsas,* 580 F.3d 1000, 1004 (9th Cir. 2009) (courts have discretion to order return notwithstanding establishment of any Convention exception to return); *Miller v. Miller,* 240 F.3d 392, 402 (4th Cir. 2001) (same); *Friedrich v. Friedrich,* 78 F.3d 1060, 1067 (6th Cir. 1996) (same); *Feder v. Evans-Feder,* 63 F.3d 217, 226 (3d Cir. 1995) (same).

The British House of Lords and courts of other States Parties have similarly held that they possess equitable discretion to order the return of a settled child, or that they should consider equitable factors, including concealment and the objectives of the Convention, in performing the "settled" analysis. …

In conducting that equitable assessment, the court should take into account the Convention's background presumption favoring return. Cf. *United States v. Oakland Cannabis Buyers' Coop.,* 532 U.S. 483, 497-499 (2001). The court could ultimately conclude that the abducting parent's conduct in concealing the child's whereabouts, and other equitable factors, justify returning the child to the country of her habitual residence. Deterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent are important animating principles of the Convention. See *Explanatory Report* in *Actes et Documents* paras. 15-16, at 429. The court may therefore consider the abducting parent's misconduct (including whether the parent actively took steps to conceal the child), together with any other relevant circumstances such as the degree to which the child is settled, whether return would not be harmful or disruptive even if the child has become settled, the extent of the left-behind parent's custody rights, and any other reasons for the lapse of time in filing the petition.

Furthermore, given that the child's settlement can be outweighed by other equitable factors, Article 12 should be understood to afford the court discretion in appropriate cases to pretermit an extensive "settled" inquiry—which can involve a fact-intensive and time-consuming inquiry into the child's living situation—if it is apparent to the court at the outset that equitable factors favoring return would clearly outweigh the outcome of any "settled" analysis. Cf. *Chisom v. Roemer,* 853 F.2d 1186, 1188 (5th Cir. 1988) (because alleged harm to party seeking a preliminary injunction was not irreparable and the public interest did not require an injunction, court "pretermit[ted] a discussion" of the first two preliminary injunction factors).

Although Article 12 does not explicitly state that a court may forgo deciding whether a child is "now settled" (see Pet. Br. 41-42; Resp. Br. 55 n.20), that is simply the logical implication of the fact that even if a child is "now settled," a court may still order the child's return. Such discretion is reinforced by Article 18, which provides that "[t]he provisions of this chapter [enumerating exceptions] 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). A court could conclude in a particular case, for example, that fact-intensive discovery and hearings delving into

the child's life would serve little purpose where the abducting parent's conduct was egregious, and - based perhaps on scarcely more than a year having passed, or on a child's young age or her continued strong ties to the habitual residence - that whether the child was now settled would be, at most, a close question that could not outweigh other factors. See *Chafin*, 133 S. Ct. at 1027 ("[C]ourts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation."); *id.* at 1028 (litigation "uncertainty adds to the challenges confronting both parents and child"); cf. Convention Art. 1 (one object of the Convention is "[t]o secure the prompt return of children").

C. Petitioner Identifies No Authority For Extending Article 12's One-Year Period During Which A Child Must Be Returned "Forthwith"

1. Petitioner's arguments in support of equitable tolling appear to rest on the premise that Article 12 is a statute of limitations (Br. 23-29), and that it may therefore be tolled under general principles of domestic law of the United States. There is no indication that the Convention negotiators intended the one-year period they adopted to be applied against the backdrop of one State's domestic tolling principles—or the disparate domestic tolling principles of each State. But in any event, Article 12's one-year period is not a statute of limitations; it is a period that triggers a substantive defense. Accordingly, even if ordinary presumptions for interpreting domestic law were applicable to the Convention, see *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (describing "rebuttable presumption" that equitable tolling applies for " federal statute[s] of limitations"), there is no basis for presuming that the one-year period contained in Article 12 is subject to equitable tolling. See *Hallstrom v. Tillamoook Cnty.*, 493 U.S. 20, 27 (1989) (60-day notice period was not subject to equitable tolling because it was a condition precedent, not a limitations period, and tolling would be inconsistent with the purpose of the notice period).

A statute of limitations establishes a period in which a claim must be brought if it is to be adjudicated at all. The limitations period reflects a judgment about the point at which concerns about repose, stale claims, lost evidence, and the parties' need for certainty outweigh the plaintiff's interest in bringing a claim. See *Young v. United States*, 535 U.S. 43, 47 (2002). The doctrine of equitable tolling applies when circumstances render the balancing of interests embodied in the limitations period inequitable - *i.e.*, when extraordinary circumstances prevent the plaintiff, despite due diligence, from bringing his claim during the limitations period. See *Lawrence v. Florida*, 549 U.S. 327, 330-332, 336 (2007). When applied, tolling permits the court to treat the claim as though it were timely filed. *Ibid.*

Article 12's one-year period is not a statute of limitations. It does not fix a time limit in which a parent may petition for the return of a child. Instead, the one-year period establishes the permissible substantive scope of a court's inquiry in adjudicating the petition. The consequence of failing to file suit within a year is that the court is no longer automatically required to "order the return of the child forthwith" if it finds that the child was wrongfully removed (and no other exception to return applies). After one year, the court may also consider the child's ties to her new environment in deciding whether to order return. The expiration of the one-year period does not extinguish the left-behind parent's ability to seek return, and it does not eliminate the court's authority to order return. To the contrary, the court must still order return if the child is not settled (and no other exception to return applies), and it may order return even if the child is settled.

* * * *

Petitioner, in essence, asks the Court to restrike the balance of considerations the negotiators of the Convention struck in drafting Article 12. But recognizing equitable tolling of Article 12's one-year period would disrupt the framework adopted in the Convention. Under petitioner's view, in cases where (1) the left-behind parent has been pursuing his rights diligently, and (2) some extraordinary circumstance stood in the way of his filing a timely petition, the petition would be treated as having been filed within one year. See Pet. Br. 45-46, 53 (citing *Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005)). The court would then be *required* to order return "forthwith," Convention Art. 12, and would be foreclosed from considering whether the child had become settled in her new environment—no matter how long the child had lived there, how strong her attachments had become, or how few attachments she had left in her country of habitual residence. But affording the court discretion to consider the child's settlement in cases in which she has been in the new country for a year—regardless of the reason for that prolonged residence—is the very purpose of the Convention's provision of a one-year cutoff for the child's mandatory return. *Explanatory Report* in *Actes et Documents* para. 107, at 458.

Petitioner observes (Br. 6, 27-28, 38) that the United States delegation used the term "statute of limitations" when suggesting changes to the preliminary draft of the Convention. The delegation was commenting on a different version of Article 12, and one that explicitly provided for extension of the filing period when the whereabouts of the child were unknown. See *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera* in *Actes et Documents* 168 (Art. 11). In any event, one delegation's passing use of the term "statute of limitations" during a negotiation session does not transform an explicit and firm time period in a multinational Convention into a flexible period presumed subject to equitable tolling based on background principles applied by the courts of one nation (the United States).

* * * *

3. Petitioner further contends (Br. 34-36, 53) that equitable tolling should be applied as a policy matter, so that parents will not have an incentive to conceal an abducted child for a year to avoid Article 12's period of automatic return. That argument is both legally and factually incorrect.

Even in a case involving a statute of limitations in an Act of Congress (which Article 12 is not), the question whether equitable tolling is available is a question of statutory interpretation. There is only a "rebuttable presumption" that tolling applies, which can be overcome by a showing that Congress intended to the contrary. See *Holland,* 130 S. Ct. at 2560-2561; *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 137-138 (2008); *United States v. Brockamp,* 519 U.S. 347, 350-354 (1997); *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95-96 (1990). Here, the negotiators of the Convention took account of the concealment concern petitioner identifies, but they also understood the potential harm of an automatic-return requirement for children who may have formed significant attachments in a new environment. The Convention reflects a judgment that the proper balance of those interests is to enable the court to consider the child's attachments in cases where it has been more than a year since the wrongful removal or retention. Petitioner's policy arguments are therefore already accounted for in the balance struck in the Convention. Any presumption in favor of equitable tolling is overcome by the negotiators' rejection of a discovery rule and adoption of the one-year period instead.

Furthermore, petitioner is wrong to assume that abducting parents can always rely on the prediction that by concealing the child, they can defeat a petition for the child's return. Concealment may undermine a child's ability to form stable attachments in a new environment. Concealment may also call into doubt other evidence and defenses that the abducting parent can be expected to present, such as the child's objection to return, a defense found in Article 13. See *Wasniewski v. Grzelak-Johannsen*, No. 06-cv-2548, 2007 WL 2344760, at *5 (N.D. Ohio Aug. 15, 2007) (refusing to give weight to child's opinion when his "generalized statements" suggested that "his mother's influence *** biased [the child's] opinion of Poland, particularly given [her] efforts to isolate [the child] from his father and his earlier childhood"); *Gonzalez v. Nazor Lurashi*, No. 04-cv-1276, 2004 WL 1202729, at *5 (D.P.R. May 20, 2004) (refusing to treat child's opinion as conclusive because the "child has not seen [his mother] nor his sister in over 16 months even though they occasionally communicate by telephone, e-mail and letters. Thus, we understand the child has been heavily influenced by [his father's] wish for the child to remain in Puerto Rico").

More fundamentally, as discussed in Part B, *supra*, even if an abducting parent can establish that a child is now settled, a court retains equitable discretion to order the child's return and may take the abducting parent's conduct into account in deciding whether to order return despite the passage of one year since the wrongful removal. Abducting parents therefore cannot rely on the prediction that by concealing the child, they can defeat a petition for the child's return. The inequity of rewarding an abducting parent's misconduct is appropriately addressed at that later stage, but it does not warrant an extension of the one-year period of automatic return adopted in the Convention so as to bar any consideration at all of whether the child has become settled in her new environment.

4. Finally, although petitioner agrees (Br. 40) that a court has discretion to order a child's return even if the child is now settled in a new environment, petitioner contends (Br. 45) that the Court should nevertheless recognize equitable tolling because, according to petitioner, few courts have exercised that discretion to order a child's return after the one-year period has expired. That concern is unfounded.

As petitioner has described, a number of United States courts have addressed concealment by tolling Article 12's one-year period of mandatory return, as petitioner urges this Court to do. Pet. Br. 45, Pet. 13-19 (cataloguing cases). Had those courts instead correctly recognized that Article 12's one-year period is not a statute of limitations subject to equitable tolling, it is entirely speculative for petitioner to assume that that those courts would have concluded the children involved were settled and that the full range of equitable factors would not have warranted their return in any event.

The one-year period of mandatory return was a compromise adopted to balance the interests of returning a child forthwith and the prospect that as time progresses, a child may form attachments to a new environment. Petitioner has identified no authority for extending that period through a principle of equitable tolling, and doing so would be inconsistent with the framework agreed to in the Convention.

* * * *

D. SECURITIES LAW

In 2013, the International Institute for the Unification of Private Law ("UNIDROIT") completed negotiations on a set of Principles on the Operation of Close-Out Netting Provisions. The Principles are available at *www.unidroit.org/instruments/capital-markets/netting*. Close-out netting is one of the main tools used by financial institutions and others to manage counterparty risk. Ensuring that netting provisions in contracts are enforceable is also important for managing systemic risk. The Principles are designed to encourage countries to provide in their domestic law at least some minimum level of enforceability for netting provisions. The United States government was involved in the negotiations and strongly supports the Principles.

E. INTERNATIONAL CIVIL LITIGATION

1. Arbitration

In 2013, the United States filed two briefs as *amicus curiae* in the Supreme Court of the United States in a case challenging an award issued in an arbitration conducted under a bilateral investment treaty. *BG Group PLC v. Argentina*, No. 12-138. Both briefs are available at *www.state.gov/s/l/c8183.htm*. The arbitration was brought by a United Kingdom company, BG Group, after its investment in a gas distribution enterprise in Argentina was adversely affected by state action taken to address Argentina's economic crisis beginning in 2001. The United Kingdom and Argentina had entered into a bilateral investment treaty ("BIT") in 1990 which provided for arbitration if the dispute was first submitted to a court in the state where the investment was made and eighteen months had passed without resolution. BG Group did not resort to the courts in Argentina, but proceeded directly to arbitration, which resulted in an award of more than $185 million for BG Group.

Argentina filed suit in U.S. district court in 2008 seeking to vacate the arbitral award, while BG Group sought confirmation of the award. The district court denied Argentina's motion to vacate and confirmed the award. Argentina appealed. The U.S. Court of Appeals for the District of Columbia reversed and vacated the award, holding that the court had the authority to decide questions of "arbitrability" under the facts of the case and that BG Group had failed to comply with a precondition to arbitration. BG Group petitioned for the U.S. Supreme Court to review the case

In May 2013, the United States filed a brief in opposition to the petition for certiorari in the case. The United States opposed Supreme Court consideration of the case because there was no circuit split on the issue and the U.S. government did not foresee that the decision of the court of appeals would have far-reaching implications, due to the uniqueness of the litigation requirement in the UK-Argentina BIT.

After the Supreme Court granted certiorari, the United States filed a second brief with the Court in support of remanding the case to the appeals court for a proper

application of international law principles uniquely relevant in the investment arbitration setting, rather than applying domestic commercial arbitration case law. In particular, the U.S. brief argues that, in the investor-state arbitration context, courts should review independently arbitral rulings on objections to jurisdiction based on a lack of consent to arbitrate. Excerpts follow from the U.S. *amicus* brief filed in September 2013 (with footnotes and citations to the record omitted).*

---

* * * *

This case presents the question whether, in an action to set aside an investor-state arbitral award subject to the New York Convention, the court should review de novo the arbitral tribunal's ruling on an investor's compliance with a requirement of prior litigation in the host State's courts in a bilateral investment treaty, or instead should review the ruling under the same deferential standard that applies to the tribunal's ruling on the merits. The Convention does not establish a standard of review governing vacatur proceedings, but contemplates that the reviewing court will generally apply the set-aside law of the country in which (or under the law of which) the award was made—in this case, the FAA. New York Convention art. V(1)(e); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19-21 (2d Cir. 1997), cert, denied, 522 U.S. 1111 (1998). Argentina contends that the arbitral tribunal exceeded its powers, 9 U.S.C. 10(a)(4), by proceeding to adjudicate the merits of the parties' investment dispute even though Argentina had agreed to arbitrate only after the investor had first submitted the dispute to Argentina's courts and allowed 18 months for its resolution. The parties disagree over whether the courts should review the arbitral tribunal's resolution of that question independently or deferentially.

In the context of private commercial arbitration agreements, this Court has held that while parties are presumed to have expected arbitrators to have primary authority to decide "'procedural' questions" concerning the requirements for submitting claims to arbitration, subject to deferential review, "question[s] of arbitrability" are presumptively for the courts to review independently. *Howsam*, 537 U.S. at 83-84. In the distinct context of investor-state arbitral proceedings conducted pursuant to investment treaties, courts should not apply that interpretive framework wholesale, but instead should review de novo arbitral rulings on consent-based objections to arbitration, and review deferentially rulings on other objections.

I. IN THE CONTEXT OF PRIVATE COMMERCIAL ARBITRATION, WHETHER THE ARBITRAL TRIBUNAL HAS PRIMARY POWER TO RESOLVE OBJECTIONS TO ARBITRATION TURNS ON THE PARTIES' AGREEMENT, INTERPRETED ACCORDING TO PRESUMPTIONS REFLECTING THEIR LIKELY EXPECTATIONS

A. Because "arbitration is a matter of consent, not coercion," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010), the jurisdiction of an arbitral tribunal to resolve a dispute depends on whether the parties have agreed to arbitrate the matter. See *First Options*, 514 U.S. at 943; *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). This Court has referred to questions concerning whether an arbitrator is empowered to decide a particular dispute as questions of "arbitrability." *First Options*, 514 U.S. at 942.

When a party objects to the propriety of submitting a particular dispute to arbitration, the

---

* Editor's Note: On March 5, 2014, the Supreme Court decided the case.

question arises whether a court or arbitrators should rule upon that objection. If the arbitrators have "primary power" to rule on the objection, the "court reviews their arbitrability decision deferentially." *First Options*, 514 U.S. at 942 (emphasis omitted). If the court has primary power, "the court makes up its mind about arbitrability independently," either by engaging in de novo review of the arbitrators' decision on arbitrability or, if the parties are litigating in advance whether arbitration is required, by conclusively resolving the issue for itself. *Ibid.* Whether the court or the arbitrator "has the primary power to decide arbitrability," *id.* at 943 (internal quotation marks omitted), turns on whether the parties have agreed "to arbitrate 'gateway' questions of ' arbitrability,' " *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010).

B. In the context of private commercial arbitration, this Court has held that in "deciding whether the parties agreed to arbitrate a certain matter (including arbitrability)," courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. To guide that determination, however, the Court employs a set of "interpretive" presumptions based on the nature of the question at issue and the Court's understanding of what the parties would likely have agreed upon had they considered the matter expressly. *Rent-A-Center*, 130 S. Ct. at 2777 n.1.

Generally, in the private commercial context, the Court presumes that the parties did not agree to arbitrate "question[s] of arbitrability," a category that includes "whether the parties are bound by a given arbitration clause" and whether a particular dispute falls within the scope of an arbitration clause. *Howsam*, 537 U.S. at 83-84; *First Options*, 514 U.S. at 945. Accordingly, unless the arbitration agreement contains "clea[r] and unmistakabl[e] evidence" that the parties agreed to arbitrate those questions, the court will decide the issue independently. *Id.* at 944 (internal quotation marks omitted). Conversely, when the objection to arbitration is one that the parties likely would have expected the arbitrator to decide, such as " 'procedural' questions that grow out of the dispute and bear on its final disposition"—including "allegation[s] of waiver, delay, or a like defense to arbitrability"—the Court presumes that the parties intended to assign the arbitrator primary responsibility for deciding the issue. *Howsam*, 537 U.S. at 84 (citation omitted), 86.

II. WHEN AN INVESTOR-STATE ARBITRAL AWARD IS SUBJECT TO SET-ASIDE PROCEEDINGS, THE COURT SHOULD INDEPENDENTLY REVIEW ARBITRAL RULINGS ON OBJECTIONS BASED ON THE LACK OF A VALID ARBITRATION AGREEMENT, AND SHOULD PRESUMPTIVELY REVIEW OTHER RULINGS DEFERENTIALLY

This Court has not yet had occasion to consider whether its existing precedents, all of which concerned questions of arbitrability arising under private commercial agreements, should apply to objections to arbitration undertaken pursuant to investment treaties—here, an objection pertaining to an investor's compliance with a litigation requirement in an investment treaty. Petitioner contends that this Court should apply *First Options* and *Howsam* to the investment-treaty context, and hold that under *Howsam*, responsibility to adjudicate objections to arbitration based on non-compliance with any procedural "precondition to arbitration" under the investment treaty "presumptively lies with the arbitrators." In this case, petitioner asserts, compliance with the litigation requirement should be deemed to be such a precondition. Applying *First Options* and *Howsam* wholesale to investment treaties, however, would be inconsistent with principles of treaty interpretation and the treaties' structure. Rather, the judicial standard of review should turn on the nature of the objection under the applicable treaty. Courts should review de novo arbitral

rulings concerning objections based on the asserted lack of a valid agreement to arbitrate, even if the absence of an agreement is caused by a failure to comply with a requirement that resembles what might be viewed as a "procedural" matter or a mere "precondition" to arbitration in a private commercial dispute. Rulings on other objections should be reviewed deferentially, unless the treaty provides that the arbitral tribunal's authority to rule on such matters is more limited.

A. The Standard Of Review Of Arbitral Rulings On Threshold Objections To Arbitration Under Investment Treaties Is Not Governed By The Presumptions Set Forth In *First Options* And *Howsam*

1. As in the private context, arbitration between a State and a foreign investor under an investment treaty is fundamentally a matter of consent. Christopher F. Dugan et al., *Investor-State Arbitration* 219 (2008) (Dugan). The arbitral tribunal's authority therefore arises from, and is limited by, the consent of the parties. Christoph Schreuer, *Consent to Arbitration, in The Oxford Handbook of International Investment Law* 830, 831 (Peter Muchlinski et al. eds., 2008) (Schreuer); Vandevelde 433; Jeswald W. Salacuse, *The Law of Investment Treaties* 385 (2010) (Salacuse).

A crucial distinction between investor-state and private commercial arbitration, however, is that in the investor-state context, the relevant agreement concerning the arbitral tribunal's authority is contained in the investment treaty itself and reflects the *treaty* parties' agreement. An investment treaty typically sets forth a host State's standing offer to arbitrate certain categories of disputes with a class of investors from the other contracting State, and the "offer includes the various terms and conditions contained in the *** investment treaty." Salacuse 381. The actual "arbitration agreement" between the disputing parties comes into being only after an investor accepts the host State's offer by initiating arbitration against the State in the manner provided in the treaty. See Dugan 222; Vandevelde 437. The treaty itself therefore sets forth the prerequisites to consent and the parameters of the contemplated arbitration proceedings - the types of disputes covered, and the procedures governing arbitration. If a foreign investor properly initiates arbitration in accordance with the treaty's conditions, those terms become part of the arbitration agreement between the host State and the investor. Dugan 207. It is therefore the shared intent of the *treaty* parties, not the disputing parties, that determines the existence and substance of an agreement to arbitrate.

As a result, questions concerning the treaty parties' agreement—and therefore the existence and substance of a contracting State's agreement to arbitrate with an individual investor—are matters of treaty interpretation, and are not governed by any nation's domestic contract law. See Gary B. Born, *International Arbitration: Law and Practice*, § 18:01[B], at 420 (2012). Under principles of interpretation that this Court has applied to treaties to which the United States is a party, a court begins "with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392,397 (1985). Because a treaty is negotiated between two sovereign States, the court must "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* at 399; see *Zichemnan v. Korean Air Lines Co.*, 516 U.S. 217, 223 (1996). Although this case involves a treaty between two foreign Nations, those basic principles of treaty interpretation are generally adhered to among Nations. See Vienna Convention art. 31.1 ("[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

2. In an investment treaty, the States parties typically do not address the arbitration of any particular dispute. The host State's standing offer to arbitrate under the treaty is made with

respect to a class of investors as a whole. See, *e.g.*, Gus Van Harten, *Investment Treaty Arbitration and Public Law* 63 (2007). Multiple investors may accept a single state offer of arbitration, and a single treaty may therefore lead to multiple investor-state arbitrations. A treaty generally provides an investor with an option of several forums in which to pursue arbitration, and it generally leaves the seat of arbitration - and thus the national law that will govern any set-aside proceedings - for later determination by the parties to a particular dispute or by the arbitral tribunal. See David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* ¶ 17.27, at 596-597 (2d ed. 2010).

Investment treaties may permit investors to pursue arbitration under the ICSID Arbitration Rules, which do not permit judicial review of arbitral awards. Vandevelde 434-435. Alternatively, investors may choose to initiate arbitration under separate rules subject to the New York Convention, which provides for judicial review of arbitral awards in the form of set-aside proceedings governed by the law of the seat of arbitration and recognition proceedings under Article V of the Convention. While the States parties to an investment treaty generally contemplate that the arbitral tribunal will initially resolve objections to arbitration, subject to judicial review in cases subject to the Convention, they do not ordinarily agree, in the *First Options* sense, as to whether the arbitral tribunal or any reviewing court has authority definitively to resolve such disputes across the board. Nor do the treaty parties, at the time they enter into the treaty, ordinarily have specific expectations as to the availability or scope of judicial review of an arbitral tribunal's resolution of threshold objections in any particular dispute.

3. *First Options* and *Howsam* set forth default rules governing whether the court or the arbitral tribunal has authority to finally resolve particular objections to arbitration, based on the Court's understanding of what the parties to private commercial arbitration agreements would have agreed to had they considered the matter expressly. See pp. 12-14, *supra.* But, as noted above, States parties to an investment treaty do not ordinarily establish in the treaty itself the scope (or availability) of judicial review. Those matters are determined later, when the investor chooses to arbitrate under the ICSID Arbitration Rules (where available) or, in other arbitrations, when the investor and the host State select the ***19** place of arbitration. There is no reason to read into an investment treaty - especially one, as here, to which the United States is not a party - the specific interpretive presumptions set forth in *First Options* and *Howsam* concerning private commercial arbitration under United States law. Applying those presumptions wholesale to investment treaties, without taking into account distinct sovereign interests of the contracting States, would graft onto those treaties default provisions that would not necessarily reflect the parties' expectations. See *Zicherman*, 516 U.S. at 223.

B. Under An Investment Treaty, Courts Presumptively Should Independently Review Objections Based On The Absence Of An Agreement To Arbitrate And Deferentially Review Other Objections

In investor-state arbitrations governed by the New York Convention, the appropriate scope of judicial review of arbitral rulings on objections to arbitration depends on whether the objection concerns the host State's consent to enter into an arbitration agreement with the investor. When treaty parties agree that particular treaty requirements are conditions on their consent, they necessarily agree that if an investor fails to comply with those conditions, no agreement to arbitrate with that investor is formed. Because the absence of a valid arbitration agreement prevents the arbitral tribunal from obtaining authority to rule on *any* dispute between the parties, it is appropriate for a reviewing court to independently evaluate objections based on

noncompliance with conditions on consent. Once an arbitration agreement is formed, however, it is as a general matter most consistent with the basic purpose of investment treaties for courts to review deferentially the tribunal's resolution of other objections to arbitration,***20** including non-consent-based objections to the tribunal's "jurisdiction" (see n.3, *supra*).

1. Investment treaties set forth a State's standing offer to arbitrate in multiple forums, subject to any conditions on its consent to arbitrate that limit the arbitral tribunal's final authority to adjudicate an individual dispute

Because an investment treaty is structured as a standing offer to arbitrate, States parties may condition their consent to enter into an arbitration agreement with any individual investor on that investor's compliance with particular treaty requirements. …

If a condition on the State's consent to arbitrate with an investor is not satisfied, no arbitration agreement will be formed when the investor attempts to initiate arbitration. See *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award ¶ 16 (June 2, 2000), 40 I.L.M. 56, 63 (2001) (NAFTA). Because an arbitrator's authority to resolve any dispute between the parties must arise from the existence of an arbitration agreement between them, see p. 15, *supra*, in the absence of the host State's consent and of any resulting agreement, the arbitrator will lack any authority to consider any dispute between the parties. See *Waste Mgmt.* ¶¶ 16-17, 40 I.L.M. at 63 ("the entire effectiveness of this institution depends" on "fulfillment of the prerequisites established as conditions precedent to submission of a claim to arbitration," because those conditions pertain to "consent to arbitration"); 1 Born 893; cf. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543,547 (1964) (a party cannot be compelled to arbitrate if it never entered into an agreement to do so).

States expect an arbitral tribunal—and if necessary, a reviewing court—to enforce conditions on a State's consent to form an investor-state agreement. In entering into an investment treaty, a State acts in its sovereign capacity to establish a legal regime under which the State will consent to an adjudication of disputes against it by private parties. When present, conditions on the formation of an arbitration agreement—like limitations on a waiver of sovereign immunity to a suit in court—can serve important sovereign functions by limiting the terms under which the sovereign State may be subject to such proceedings against it. Dugan 219. And once an arbitration agreement is formed by an investor's valid initiation of arbitration under the treaty, the consequences for a State can be significant: investor-state disputes may often implicate the State's national economic and regulatory policies and entail large financial stakes. Salacuse 355. Conditions on consent therefore can protect States' sovereign interests in a variety of ways, by establishing mandatory steps an investor must take to invoke arbitration. For instance, a treaty that makes waiving pursuit of alternative remedies a condition on consent (see p. 20, *supra*) protects the State from parallel proceedings and double recoveries.

2. When States parties make a treaty requirement a condition on consent, it is appropriate for a reviewing court to engage in de novo review of compliance with that condition

By providing in a treaty that a particular requirement is a condition on a State's consent to enter into an arbitration agreement with an individual investor, the treaty parties contemplate that the arbitral tribunal and courts engaging in judicial review under the Convention will enforce the condition as written. If the condition is unfulfilled, no agreement to arbitrate is formed, and the arbitrator never gains any authority to rule on any dispute between the parties—including on whether an arbitration agreement exists. See *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274,288 (3d Cir. 2003). To defer to an arbitral tribunal's ruling where the host State denies that it entered into an arbitration agreement with the particular investor would

thus be to assume the very arbitral authority that the State denies ever arose.

As a result, it is generally recognized that "where a party denies ever having concluded an agreement to arbitrate, there is no basis for concluding, without independent judicial assessment, that a party has agreed to submit any issues, including jurisdictional issues, to the tribunal." 2 Born 2792; *John Wiley*, 376 U.S. at 547; *China Minmetals*, 334 F.3d at 288; *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46 ¶ 30, [2011] 1 A.C. 763 ("The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all."). When the existence of the agreement is disputed, therefore, the "possibility of de novo judicial review of any jurisdictional award in an annulment action is logically necessary." 2 Born 2792; Restatement (Third) of the U.S. Law of International Commercial Arbitration § 4-12, cmt. d (Tentative Draft no. 2,2012) ("[a] court reviews de novo an arbitral tribunal's determination of whether an arbitration agreement exists").

Accordingly, although different States' national laws concerning judicial review of arbitral rulings on objections to arbitration may vary, courts in several States that commonly serve as seats for investor-state arbitration generally review de novo whether an arbitration agreement exists. See, *e.g.*, *Republic of Ecuador/Chevron Corp.*, Rechtbank's-Gravenhage [District Court of the Hague], 2 mei 2012,38694/HA ZA 11-402 en 408948/HA ZA 11-2813, ¶ 4.11 (Neth.) (translated by Harm Lassche, May 4, 2012) (objection that no arbitration agreement was formed pursuant to BIT was subject to de novo review, but other objections to arbitration were primarily for arbitrators to decide); *Dallah*, [2010] UKSC 46 ¶ 104 (English courts are "entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement"); George A. Bermann, *The 'Gateway' Problem in International Commercial Arbitration*, 37 Yale J. Int'l 1. 1, 18-19 (2012) (describing French practice); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int'l Arb. 133, 134-136 (1997) (Swiss practice). Similarly, the New York Convention provides that a court considering a pre-arbitration challenge to arbitration where "the parties have made an agreement" to arbitrate "shall *** refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." New York Convention art. II(3). The clear implication is that the court may independently determine that no valid agreement exists, even though the arbitral tribunal has not considered the issue, and may then decline to refer the dispute to arbitration. See 1 Born 977.

Thus, it is appropriate for courts in the United States, on review under the Convention and the FAA, to review de novo the arbitral tribunal's resolution of objections based on an investor's non-compliance with a condition on the State's consent to enter into an arbitration agreement. Indeed, this rule is also consistent with *First Options* itself, which establishes even in the context of private commercial arbitration that the existence of an agreement to arbitrate is presumptively for the Court to decide independently. 514 U.S. at 944-945.

* * * *

C. When A Party Seeks To Set Aside An Arbitral Award Based On An Objection To Arbitration, The Court Should Apply Principles Of Treaty Interpretation To Determine The Appropriate Standard Of Review

1. When a State challenges an arbitral award on the ground that the arbitrator should have concluded that arbitration was not authorized, the court must ascertain the nature of the State's objection in order to determine the proper standard of review. When a State argues to a reviewing court that there is no arbitration agreement between the State and the investor, the court should engage in independent review of that objection. Sometimes the State and the investor may dispute the antecedent question whether the treaty requirement on which the State relies is in fact a condition on the State's consent. Because resolving that dispute is integral to determining whether an arbitration agreement was formed, the court should independently evaluate whether the requirement is a condition on consent, applying principles of treaty interpretation. See, *e.g.*, Dugan 224-225; pp. 16-17, *supra.*

In considering whether a treaty provision is a condition on the State's consent to enter into an arbitration agreement, the court should be cognizant of the fact that investment treaties are structured to provide a State's standing offer to arbitrate, and so the treaty itself should provide any limitations on the State's consent to form an arbitration agreement. See pp. 20-21, *supra; Waste Mgmt.* ¶¶ 13-14, 40 I.L.M. 62-63 (emphasizing NAFTA's use of the phrase "conditions precedent to submission" of a claim to arbitration, and the requirement that arbitration may be instituted "*[o]nly if*" the conditions are fulfilled). Absent a sufficient indication in the treaty's text and, if necessary, other appropriate evidence of the parties' intent, that a particular requirement is a condition precedent to the formation of an investor-state arbitration agreement, noncompliance with that requirement does not prevent the formation of an agreement. See *Mondev Int'l Ltd. v. United States,* ICSID Case No. ARB(AF)/99/2, Award on Jurisdiction, ¶ 44 (Oct. 11, 2002), 42 I.L.M. 85, 94 (2003). Courts should not assume that all threshold requirements stated in the treaty presumptively implicate a State's consent, or that the treaty parties intended any particular requirement to be a limitation on consent. Rather, courts should analyze the treaty's text and materials relevant to treaty interpretation to determine whether the States parties intended the requirement to operate as a limitation on consent. See *Saks*, 470 U.S. at 396.

At the same time, courts should be cognizant of the fact that different treaty parties, as sovereigns, may choose to make different requirements conditions on consent—including those that might resemble ones in private commercial agreements that are characterized as "procedural" and presumptively for arbitrators to decide. *Howsam*, 537 U.S. at 84; see pp. 12-14, *supra;* Schreuer 843-849. Courts should therefore conclude that a treaty requirement is a condition on consent if the text and other relevant evidence sufficiently so indicate, rather than presuming that certain types of treaty pre-conditions—such as time limits, notice requirements, or waiver of any right to pursue other remedies—are *not* conditions on a State's consent based on the assertedly "procedural" nature of the requirement. Cf. *Howsam*, 537 U.S. at 83; *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26-28 (1989) (requirement of pre-enforcement-suit notice to federal agency is a mandatory prerequisite to suit, requiring dismissal if not complied with, that serves important regulatory purposes). Such an approach would risk subjecting a sovereign State to an adjudication to which it never consented and to the liability that might ensue.

2. When a reviewing court concludes that a treaty requirement is a condition on the State's consent to arbitrate, the court, like the arbitral tribunal, must enforce that condition

according to its terms to avoid forcing a nonconsenting State to submit to arbitration. If the arbitrator concluded that the investor complied with the condition on consent, the court should independently review that ruling. If the issue implicates factual questions, the court, in exercising its independent judgment, should consider affording respectful consideration to the findings made by an arbitral tribunal in resolving any factual disputes. Cf. *Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006) (reviewing court's independent consideration may be "informed by the arbitrator's resolution of the arbitrability question").

3. If the court concludes that the requirement on which the State relies is not a condition to its consent, then any noncompliance with that condition did not prevent the formation of an agreement between the disputing parties. Because the arbitrator's ruling on the objection was made pursuant to an arbitration agreement, the court presumptively should review the arbitrator's ruling on the objection deferentially.

III. THE COURT SHOULD REMAND THIS CASE FOR FURTHER PROCEEDINGS

A. In this case, the court of appeals did not employ the correct analytical framework in considering whether the United Kingdom and Argentina contemplated that an investor could be excused from complying with the Treaty's litigation requirement. The court framed the operative question as whether there was "clear and unmistakable evidence" that the "contracting parties intended the arbitrator to decide" objections based on the litigation requirement. Pet. App. 15a-16a (citing *First Options*, 514 U.S. at 944). The court's holding that de novo review was appropriate was based on its conclusion that because the treaty contemplated litigation in local courts, the treaty parties would have intended a court in the seat of arbitration to independently review compliance with the litigation requirement. *Ibid.* For the reasons stated above, however, the court should have examined as a matter of treaty interpretation whether the litigation requirement was a condition on Argentina's consent to enter into an arbitration agreement, and it should have applied de novo review only if it concluded that the requirement was indeed such a condition. Although the substance of the particular requirement—here, that the investor first seek to resolve the dispute in the host State's courts—may inform that determination, it is not the ultimate focus of the inquiry in its own right.

B. The Court should remand this case to the court of appeals so that it can construe the Treaty in accordance with the proper interpretive framework. That course is warranted because the parties to this point appear to have assumed that the contract-law framework set forth in *First Options* and *Howsam* should control the arbitrability analysis, and they have accordingly not presented arguments concerning the proper interpretation of the Treaty under governing international-law principles. See, *e.g.*, *AT&T Techs. Inc.*, 475 U.S. at 651-652.

On remand, the court of appeals should determine, applying principles of treaty interpretation, whether the litigation requirement is a condition to Argentina's consent to arbitrate, and it should then apply the appropriate standard of review to the arbitral panel's ruling on Argentina's objection to arbitration. See pp. 28-31, *supra.* The United States takes no position on whether this litigation requirement is a condition on consent. Although litigation requirements like that at issue here appear to be uncommon in investment-treaty practice, those tribunals that have interpreted treaties containing similar litigation provisions have divided on the nature of such provisions. Compare, *e.g.*, *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 571-591 (Aug. 4, 2011) (Argentina-Italy BIT) (litigation requirement concerned whether claim was properly presented to tribunal, and noncompliance was excused on the facts presented), with, *e.g.*, *Daimler Fin. Servs. AG v. Argentina*, ICSID Case No. ARB/05/1, Award, ¶ 194 (Aug. 22,2012) (Argentina-Germany BIT) (litigation requirement

"cannot be bypassed"). Ultimately, resolution of the question will depend on the text and structure of the treaty and evidence as to the treaty parties' intent. The court of appeals should address the matter on remand after the parties have had an opportunity to brief it.

* * * *

2. Jurisdiction Over Foreign Entities in U.S. Courts

On July 5, 2013, the United States submitted a brief as *amicus curiae* in support of petitioner, DaimlerChrysler, in a case on appeal from the U.S. Court of Appeals for the Ninth Circuit, *DaimlerChrysler AG v. Bauman*, No. 11-965. The question presented on appeal was whether the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution permits a court to exercise general personal jurisdiction over an out-of-state corporation based on its subsidiary's contacts with a U.S. state , in a case not arising out of, or related to, either corporations' contacts with the U.S. state. Plaintiffs in the district court brought suit against German company DaimlerChrysler, alleging that DaimlerChrysler's Argentinian subsidiary had collaborated with state forces during Argentina's "Dirty War" in the 1970s and 1980s. The district court dismissed for lack of personal jurisdiction. The court of appeals initially affirmed, but reversed on rehearing. The appeals court reasoned primarily that another of DaimlerChrysler's subsidiaries, Mercedes-Benz United States, LLC ("MBUSA"), performed services for DaimlerChrysler in California that were sufficiently important to the parent company and that there was an element of control by the parent so as to allow for attribution of activities to the parent for jurisdictional purposes.

Excerpts below from the U.S. *amicus* brief (with most footnotes omitted) argue that the court of appeals erred, noting that it did not take into account the Supreme Court's decision in *Goodyear*, discussed in *Digest 2011* at 458-62, which was decided after the *DaimlerChrysler* appeal was decided.[**]

* * * *

INTEREST OF THE UNITED STATES

This case concerns a federal court's exercise of personal jurisdiction over a foreign parent corporation based on its subsidiary's contacts with the State in which the federal court sits, in a case not arising out of, or related to, either entity's contacts with the State. This Court has referred to such a claim of adjudicatory authority as "general" personal jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). In some instances, the interests of the United States are served by permitting suits against foreign entities to go forward in domestic courts. But expansive assertions of general jurisdiction over foreign corporations may operate to the detriment of the United States' diplomatic relations and its foreign trade and

[**] Editor's Note: On January 14, 2014, the Supreme Court issued its decision in the case, *Daimler AG v. Bauman*, 134 S.Ct. 746. The Court held that due process did not permit exercise of general jurisdiction over the corporation in California. The Supreme Court's decision will be discussed in *Digest 2014*.

economic interests. See U.S. Br. at 1-2, 28-34, *Goodyear, supra* (No. 10-76) (U.S. *Goodyear* Br.). Those concerns would only be magnified under the court of appeals' framework, which fails even to give foreign defendants fair warning of what conduct would subject them to suit in domestic courts, and thus leaves them unable "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980).

From an economic perspective, the inability to predict the jurisdictional consequences of commercial or investment activity may be a disincentive to that activity. Likewise, an enterprise may be reluctant to invest or do business in a forum, if the price of admission is consenting to answer in that forum for all of its conduct worldwide. The uncertain threat of litigation in United States courts, especially for conduct with no significant connection to the United States, could therefore discourage foreign commercial enterprises from establishing channels for the distribution of their goods and services in the United States, or otherwise making investments in the United States. Such activities are likely to be undertaken through domestic subsidiaries and thus are likely to implicate the decision below.

From a diplomatic perspective, foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments. See Friedrich K. Juenger, *The American Law of General Jurisdiction,* 2001 U. Chi. Legal F. 141, 161-162. The conclusion of such international compacts is an important foreign policy objective because such agreements serve the United States' interest in providing its residents a fair, sufficiently predictable, and stable system for the resolution of disputes that cross national boundaries.

The United States has a further interest in preserving the federal government's legislative and regulatory flexibility to foster those trade, investment, and diplomatic interests, while assuring a domestic forum to adjudicate appropriate cases. This case does not directly implicate that interest. It does not, for example, involve an Act of Congress addressing the relationship between a parent corporation and its subsidiary, or reflecting Congress's judgment concerning relevant contacts with a forum for jurisdictional purposes. And it presents a question under the Due Process Clause of the Fourteenth Amendment, while exercises of the federal judicial power are, as a constitutional matter, constrained instead by the Due Process Clause of the Fifth Amendment.[1] Nonetheless, because the political Branches are well positioned to determine when the exercise of personal jurisdiction will, on balance, further the United States' interests, the United States has an interest in ensuring proper regard for their judgments in this field.

* * * *

[1] "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J McIntyre Mach., Ltd. v. Nicastro,* 131 S. Ct. 2780, 2789 (2011) (plurality opinion). For example, the United States' special competence in matters of interstate commerce and foreign affairs, in contrast to the limited and mutually exclusive sovereignty of the several States (see *ibid.*), would permit the exercise of federal judicial power in ways that have no analogue at the state level. This Court has consistently reserved the question whether its Fourteenth Amendment personal jurisdiction precedents would apply in a case governed by the Fifth Amendment, and it should do so here. See, *e.g., Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

ARGUMENT

The court of appeals applied a rule for attributing a subsidiary's forum contacts to its foreign parent that is inconsistent with due process, and indeed is not grounded in any applicable law shaping petitioner's expectations about the jurisdictional consequences of its corporate affiliations. Even apart from its flawed approach to attribution of contacts, the court below embraced the startling conclusion that the relatively small fraction of a German manufacturer's production sold in California by a corporate affiliate permits that State's courts to bind the German corporation to judgment on potentially any claim, arising anytime, anywhere in the world. *Goodyear* puts that result in doubt by holding that a forum court may properly exercise general jurisdiction only over corporations that are "essentially at home in the forum." 131 S. Ct. at 2851.

A. The Ninth Circuit's Decision Did Not Take Account Of *Goodyear*

The court of appeals' approach would hold a foreign parent corporation subject to general jurisdiction in a forum whenever the parent has an element of control over its subsidiary that makes substantial sales in the forum State of products manufactured and sold abroad by the foreign parent. The lower court endorsed that approach without the benefit of this Court's decision in *Goodyear*, which was announced a month after the panel's decision. The result below is difficult to square with *Goodyear's* reaffirmation of the principle that a State may bind a corporation to judgment on any claim arising anywhere in the world only when the corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State," 131 S.Ct. at 2851.

1. Because the foreign corporate defendants in *Goodyear* had only "attenuated connections to the [forum] State" that "f[e]ll far short" of the standard for exercising general jurisdiction, 131 S. Ct. at 2857, this Court did not have occasion there to explain what kinds of contacts would establish that a defendant is "essentially at home" in a particular forum. …Whatever precise rule emerges from *Goodyear*, we understand the Court's test to be appropriately demanding, given that an exercise of general jurisdiction subjects a defendant to suit for any claim arising anytime, anywhere in the world.

The Ninth Circuit's approach is very different. As the court of appeals acknowledged, its "agency" test "has its origins in case law from the Second Circuit," Pet. App. 32a. In particular, *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 423 (9th Cir. 1977), adopted the test in *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967), cert. denied, 390 U.S. 966 (1968). *Gelfand* in turn drew its standard from New York cases, most prominently *Frummer v. Hilton Hotels International, Inc.*, 227 N.E.2d 851, 852-854 (N.Y.), cert. denied, 389 U.S. 923 (1967). *Frummer* applied a principle of "[t]raditional" New York personal jurisdiction law, viz., that New York courts have general jurisdiction over a foreign corporation "engaged in such a continuous and systematic course of 'doing business' [in New York] as to warrant a finding of its 'presence' in this jurisdiction." *Id.* at 853 (citation omitted). That principle traces back decades before *International Shoe*, to cases such as *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917) (Cardozo, J.), which held that a Pennsylvania coal company's maintenance of a "branch office in New York" for salesmen, "contain[ing] eleven desks, and other suitable equipment," subjected it to general jurisdiction in New York. *Id.* at 916-917. At bottom, therefore, the Ninth Circuit's test articulates what it meant a century ago for an out-of-state corporation to be "doing business" in New York, and then extends that test through a nontraditional concept of "agency" to attribute a subsidiary's "doing business" to its foreign parent.

Substantial reason exists to doubt the continuing vitality of the Ninth Circuit's concept of general jurisdiction. The analysis below is unmoored from this Court's "continuous and systematic" test for general jurisdiction, obligingly quoting it once (Pet. App. 20a) but never mentioning it again. More broadly speaking, a foreign corporation that merely does business in the forum State would not necessarily be "essentially at home" there. The "doing business" approach to general jurisdiction has been a source of contention in diplomatic contexts, see U.S. *Goodyear* Br. at 33 n.14, and has been subject to extensive scholarly criticism, see, *e.g.*, *Essen tially at Home,* 63 S.C. L. Rev. at 545-548; *General Jurisdiction,* 66 Tex. L. Rev. at 758-759, 781.

2. The particular result below, moreover, is in tension with this Court's decisions. A court may not assert general jurisdiction over a foreign parent based simply on (1) a conclusion (or concession) that its subsidiary is subject to the court's general jurisdiction, and (2) a determination to attribute some or all of the subsidiary's contacts to its parent. See *Keeton,* 465 U.S. at 781 n.13 ("Each defendant's contacts with the forum State must be assessed individually."). Rather, the court must directly apply *Goodyear*'s test to the foreign parent's direct contacts (if any) and any contacts fairly attributed to it. Moreover, this Court's decisions suggest that if contacts are attributed from a subsidiary to its parent, their significance may well shrink by their placement in context with the foreign parent's independent contacts with other jurisdictions throughout the world. Cf. *Goodyear,* 131 S. Ct. at 2853-2854 (identifying as "paradigm" certain forums with which a defendant is likely to have relatively substantial contacts, implying that relatively insubstantial contacts are less likely to support the exercise of general jurisdiction); *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 447-448 (1952) (finding modest corporate contacts with Ohio sufficient to establish general jurisdiction, given that the company had ceased its Philippine mining operations, but implying that if such operations were ongoing, the result might have been different).

Here, MBUSA's contacts with California, even if properly attributed to petitioner, would be modest relative to petitioner's contacts with the forum in which petitioner is most obviously "at home" and subject to general jurisdiction—Germany. Cf. European Community Council Reg. 1215/2012 Art. 4.1 ("[P]ersons domiciled in a [European Union] Member State shall, whatever their nationality, be sued in the courts of that Member State."); Zivilprozessordnung [ZPO] [Code of Civil Procedure] Dec. 5, 2005, Bundesgesetzblatt [BGBI] 3202, as amended, § 17, ¶ 1, sentences 1-2 ("The general venue of *** corporate bodies *** is defined by their registered seat. Unless anything to the contrary is stipulated elsewhere, a legal person's registered seat shall be deemed to be the place at which it has its administrative centre."). Petitioner's headquarters are in Germany, where it manufactures and sells Mercedes-Benz vehicles, and where it presumably orchestrates its corporate operations. J.A. 60a-62a. By contrast, only 2.4% of petitioner's production is ultimately sold in California by MBUSA, Pet. App. 7a, and none is sold by petitioner, whose direct contacts with California appear minimal or nonexistent, see *id.* at 95a.

This Court has eschewed "simply mechanical or quantitative" jurisdictional tests. *International Shoe,* 326 U.S at 319. But *Goodyear*'s "at home" inquiry weighs against recognizing general jurisdiction where, as here, the defendant's forum contacts are dwarfed (in both qualitative and quantitative senses) by its contacts with a forum in which it is paradigmatically "at home." See Pet. Br. 31 n.5; *J. McIntyre,* 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (recognizing that an English corporate defendant whose product was distributed through a third party and caused an injury in New Jersey "surely [wa]s not subject to general

(all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation [was] hardly 'at home' in New Jersey") (quoting *Goodyear*, 131 S. Ct. at 2851). Likewise, the sheer consequences of the court of appeals' expansive notions of general jurisdiction are a further reason to doubt the compatibility of the judgment below with *Goodyear*. The decision below ultimately rests on the sales and marketing contacts associated with a relatively small portion of production to assert general jurisdiction over petitioner potentially concerning claims arising anytime, anywhere in the world—the vast majority of which would (like respondents' claims here) have no relation to California. There seems little to recommend that result, in either theory or practice.

B. The Ninth Circuit's Framework For Attributing Contacts Of A Corporate Subsidiary To Its Parent Offends Due Process

For the reasons above, the Ninth Circuit's result is in considerable tension with *Goodyear*, even assuming that MBUSA's contacts with California were properly attributed to petitioner. But the record was developed and the case was decided below without the benefit of *Goodyear*, and petitioner sought this Court's review on the specific question (see Pet. i) of the Ninth Circuit's approach to attribution of a subsidiary's forum contacts to its foreign parent. Answering that question, the Court should reject the Ninth Circuit's approach to attribution.

The Due Process Clause itself does not intrinsically forbid or permit the attribution of a subsidiary's contacts to its parent. Rather, due process analysis should look to the general framework of state law (and when appropriate, federal law) to define the circumstances in which forum contacts may be attributed to a foreign defendant, within outer constitutional limits that ensure fairness and sufficient predictability. In our legal system, the pervasive principle of separate corporate personality is grounded in positive law; it forms the backdrop for the operation of other legal norms; and it molds the expectations of the corporations themselves and those with whom they interact. Within that legal framework, the paradigmatic (if not inevitably exclusive) state law bases on which one entity is held responsible for the acts of another are the traditional understandings on which substantive alter ego liability is imposed on a parent corporation, and on which a principal is held vicariously liable for its agent's actions. The Ninth Circuit's approach, however, ignores that framework and is inconsistent with the Due Process Clause's demand that jurisdictional rules be fair and sufficiently predictable in operation.

1. The Due Process Clause does not itself prescribe rules for attribution of contacts to a juridical person

* * * *

2. Considerations of fairness, notice, and consent support looking to state law (or when appropriate, federal law) to decide questions of attribution

Corporations are creatures of positive law and, within broad constitutional limits, the benefits and obligations of corporate existence are matters of legislative judgment. Corporate "personality is a fiction, although a fiction intended to be acted upon as though it were a fact." *International Shoe*, 326 U.S. at 316 (citation omitted). Because state law (or when appropriate, federal law) defines the legal characteristics of juridical persons in general, that law ordinarily should form the foundation for determining when one juridical person's contacts will be attributed to another. When one corporation (the parent) creates or acquires a controlling ownership interest in another corporation (its subsidiary), the parent is on notice of, and can

properly be treated as subjecting itself to, the law governing the existence of the subsidiary and the parent-subsidiary relationship.

In particular, by creating or acquiring a subsidiary, the parent accedes to the rights of ownership in the subsidiary. See generally Model Business Corporation Act §§ 7.01-.48. But it also becomes liable for the subsidiary's debts if the articles of incorporation provide for shareholder liability (see, *e.g.*, *id.* § 2.02(b)(2)(v)) or if state veil-piercing law is applied to disregard the subsidiary (see generally 1 Philip I. Blumberg et al., *Blumberg on Corporate Groups* chs. 11-12 (2d ed. 2005) (*Blumberg*)). The parent-subsidiary relationship has substantial consequences under federal law too. Although this Court has interpreted federal law by default to respect state corporation law, Congress may provide otherwise, see *United States v. Bestfoods*, 524 U.S. 51, 61-64 (1998), and it has in numerous federal laws attached substantive or regulatory consequences to intercorporate relationships.

Moreover, reference to state and federal law in this context is consistent with this Court's practice of looking to and respecting legislative judgments about the corporate characteristics and intercorporate relationships that bear on the proper forum for a suit. See, *e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (interpreting Congress's rule for determining corporate citizenship for purposes of diversity jurisdiction); *Scophony*, *supra* (applying venue and service provisions of federal antitrust laws to British corporation holding a controlling interest in an American firm); *Cannon*, 267 U.S. at 337 (concluding that service there was ineffective "in the absence of an applicable statute").

3. The Due Process Clause limits the rules of attribution a State may adopt

The Due Process Clause of the Fourteenth Amendment nonetheless limits the rules a State may adopt for attribution of contacts. The attribution inquiry, like any other aspect of the exercise of personal jurisdiction, must "not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (citation omitted). Those limits come in two forms.

First, a State may attribute the in-state contacts of one entity to a foreign defendant for jurisdictional purposes only on terms of which the defendant has fair notice, and which are reasonably susceptible of predictable ex ante application. See *Burger King*, 471 U.S. at 472 (explaining that due process requires defendants to be given "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign") (citation omitted, brackets in original); *WorldWide Volkswagen*, 444 U.S. at 297 (insisting on rules that afford "a degree of predictability *** that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."); cf. *Hertz*, 559 U.S. at 94 ("Simple jurisdictional rules *** promote greater predictability. Predictability is valuable to corporations making business and investment decisions.").

Second, however clearly announced, some rules of attribution are arbitrary or fundamentally unfair, and for that reason impermissible. "A defendant [may] not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted). Thus, for example, this Court has rejected the forum contacts of an insurer as a basis for exercising personal jurisdiction over the insured defendant. *Rush v. Savchuk*, 444 U.S. 320, 328-329 (1980). A court's determination about the permissibility of attribution under the Due Process Clause should, however, be informed by legislative judgments about the basis for attribution of contacts. See *Shaffer v. Heitner*, 433 U.S. 186, 213-214 (1977) (emphasizing "the failure of the [state] Legislature to assert [a] state interest" in exercising

jurisdiction over a state-chartered corporation's out-of-state fiduciaries in a derivative suit against the fiduciaries).

Within those broad limits, a State has latitude to provide for the exercise of personal jurisdiction over a foreign defendant on the basis of someone else's direct or physical contacts with the State. This Court has repeatedly endorsed the exercise of specific jurisdiction based on "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Such a forum contact may be made through use of agents, salesmen, distributors, or subsidiaries in the forum (at least when that activity is deliberate on the defendant's part). See, *e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.) (suggesting that a foreign defendant's creation, control, or use of a distribution system that predictably delivers products into the forum State may establish minimum contacts); *Burger King*, 471 U.S. at 471-476 ("[W]e have consistently rejected the notion that an absence of physical contacts can [alone] defeat personal jurisdiction.").

4. Traditional alter ego and agency principles from substantive law generally should govern the attribution of contacts from a corporate subsidiary to its parent

Legislatures have seldom spoken directly to the rules governing attribution of forum contacts for jurisdictional purposes. In the absence of clear legislative direction, courts have developed a range of approaches for attributing a subsidiary's contacts to its parent. See generally 1 *Blumberg* Pt. III (comprehensively surveying these approaches). We do not think the Due Process Clause countenances the complex, malleable, and unpredictable approaches that some lower courts have devised to justify the attribution of a subsidiary's forum contacts to its foreign parent for purposes of exercising general jurisdiction over the parent.

Rather, formally distinct corporations should presumptively be regarded as separate for jurisdictional purposes. Commercial and investment activity in this country relies on a widely shared understanding, now firmly embodied in law, that parent and subsidiary corporations possess separate juridical personalities. See *Anderson*, 321 U.S. at 362 ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."). This Court has recognized that principle in general (see, *e.g., First Nat'l City Bank v. Banco Para El Commercio Exterior de Cuba*, 462 U.S. 611, 628 n.19 (1983) (*Bancec*)), and it has particular support in the Court's personal jurisdiction cases. See, *e.g.,Keeton*, 465 U.S. at 781 n.13 (emphasizing, in a case involving affiliated corporate defendants, that "[e]ach defendant's contacts with the forum State must be assessed individually").

But that baseline of separate corporate personality has always been qualified, most prominently in the field of substantive liability. Thus, for example, this Court has held in a number of cases applying federal law that "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, *** one may be liable for the actions of the other," and that the corporate form "will not be regarded when to do so would work fraud or injustice" or "where it is interposed to defeat legislative policies." *Bancec*, 462 U.S. at 629-630 (citations omitted); see note 8, *supra* (noting array of federal laws that disregard or give only qualified regard to separate corporate personality).

Such background principles of federal law (when applicable), and the corresponding principles of state substantive law that speak to the circumstances in which a parent corporation is responsible for the acts of its subsidiary, would generally be a sound basis for attributing the subsidiary's contacts to its parent for the purpose of exercising general jurisdiction. As we have

previously suggested (U.S. *Goodyear* Br. at 26 n.9), that approach in practice permits the attribution of a corporate subsidiary's contacts to its parent if state substantive law would treat the two corporations as one for all purposes (*i.e.*, treats them as alter egos), or if the subsidiary acted as a traditional agent to establish contacts on behalf of its parent as principal (to the extent of its agency and its contacts). See also Pet. Br. 21-22 (alter ego); *id.* at 27-29 (agency).

Those traditional alter ego and agency principles are very likely to comport with due process. They are deeply embedded in our legal structure, and their general contours are similar (though not identical) from State to State. They have proven to be predictable enough in application that there is no serious claim that they are arbitrary or unfair. And they are among the legal doctrines that commercial actors already account for because they govern matters of substantive liability in a wide range of contexts.

5. The Ninth Circuit's approach to attribution of contacts fails to satisfy due process

As articulated by the court of appeals, the contacts of a subsidiary may be attributed to its parent for jurisdictional purposes when (1) "the subsidiary *** performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services," and (2) there exists "an element of control" of the subsidiary by the parent. Pet. App. 21a-22a (citation and emphasis omitted). That approach is defective in two respects.

First, the Ninth Circuit's approach has no foundation in any state or federal law that governs the subsidiary-parent relationship more generally and that might reasonably have set petitioner's expectations about its responsibility for the California conduct of a New Jersey-based Delaware LLC (MBUSA) owned by petitioner's Michigan-based Delaware-chartered corporate holding company subsidiary (DCNAHC). Rather, that test ultimately traces to turn-of-the-century New York courts' practice of taking jurisdiction over any foreign corporation doing business in New York. …

Second, the Ninth Circuit's approach is too malleable, ill-defined, and subjective to give a parent corporation fair and sufficiently predictable notice of when its subsidiary's forum contacts will be attributed to it. …

The test the court of appeals ultimately applied forces a potential corporate-parent defendant to predict what activities a court might believe at some future time were "sufficiently important" to it, and whether a court would think that the parent would take over (or "substantially" take over) if it could not rely on its subsidiary to engage in those "important" activities. …

Layered over that uncertain inquiry would be the question whether the parent corporation has "an element of control" over the subsidiary. Inasmuch as the court of appeals refused to "define the precise degree of control required to meet that test or establish any particular method for determining its existence," Pet. App. 22a n.12, potential defendants could not hope to reliably predict the jurisdictional consequences of their business arrangements with corporate affiliates. The pervasive indeterminacy of the Ninth Circuit's approach does not "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen*, 444 U.S. at 297, and it "offend[s] traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316, for that reason as well. It is therefore not a permissible basis on which to exercise general personal jurisdiction.

Cross References

Hague Abduction Convention, **Chapter 2.B.2.**
Organization for Economic Cooperation and Development, **Chapter 7.E.2.**

CHAPTER 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2013 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 2013, available at *www.bis.doc.gov/index.php/forms-documents/doc_view/866-bis-annual-report-to-congress-for-fiscal-year-2013*. Details on the State Department's defense trade control programs are available at *www.pmddtc.state.gov*.

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS

1. Iran

a. Overview

In 2013, the dual-track U.S. approach to preventing Iran from gaining nuclear weapons capabilities (discussed in *Digest 2009* at 585–90 and 773–74) yielded some promising results. On November 24, 2013 the permanent five members of the Security Council plus Germany (the "P5+1") and Iran committed to the Joint Plan of Action ("JPOA") in Geneva. Both prior to and after conclusion of the JPOA, the United States and the international community continued to maintain multiple sanctions regimes directed at Iran. For further discussion of the U.S. approach to Iran's nuclear program in 2013, see Chapter 19.B.5(b)

On May 15, 2013, Under Secretary of State for Political Affairs Wendy Sherman provided a written statement before the Senate Foreign Relations committee on U.S. policy toward Iran. Under Secretary Sherman's statement is excerpted below and available in full at *www.state.gov/p/us/rm/2013/202684.htm*.

---

* * * *

…Thank you for inviting me here today to discuss the Administration's approach to the multiple challenges posed by Iran—by its nuclear ambitions, its support for international terrorism and destabilizing activities in the region, and its human rights abuses at home. I want to use this opportunity to speak clearly about these challenges; to lay out the multi-vectored strategy we are pursuing to counter them; and to be clear about the consequential choices ahead for America and our allies, but especially for Iran, its rulers, and its people.

The Nuclear Challenge

Iran's nuclear activity—in violation of its international obligations and in defiance of the international community—is one of the greatest global concerns we face. A nuclear-armed Iran would pose a threat to the region, to the world, and to the future of the global nuclear proliferation regime. It would risk an arms race in a region already rife with violence and conflict. A nuclear weapon would embolden a regime that already spreads instability through its proxies and threatens chokepoints in the global economy. It would put the world's most dangerous weapons into the hands of leaders who speak openly about wiping one of our closest allies, the state of Israel, off the map. In confronting this challenge, our policy has been clear: we are determined to prevent Iran from acquiring a nuclear weapon. Our preference is to resolve this through diplomacy. However, as President Obama has stated unequivocally, we will not allow Iran to obtain a nuclear weapon, and there should be no doubt that the United States will use all elements of American power to achieve that objective.

Iran's Supreme Leader Ayatollah Khamenei has asked why it is that the international community does not believe that Iran's nuclear program is for peaceful purposes only. The answer is simple: Iran has consistently concealed its nuclear activities and continues to do so, denying required access and information to the International Atomic Energy Agency. As a signatory to the Nuclear Non-Proliferation Treaty, Iran has responsibilities to the international community, and it is that blatant disregard for those responsibilities that has made Iran the subject of four UN Security Council resolutions imposing mandatory sanctions.

* * * *

The Dual-Track Policy

Since this Administration took office in 2009, we have pursued a dual-track policy. Working with the P5+1—the five members of the UN Security Council—China, France, Russia, the United Kingdom, and the United States, plus Germany, under the auspices of the European Union—we have actively pursued a diplomatic solution to international concerns over Iran's nuclear program. As a result of Iran's continuing disregard for its international obligations, we have ratcheted up the pressure on the Iranian government. We have built and led a global coalition to create the toughest, most comprehensive sanctions to date on the Iranian regime. The international community is united in its determination to prevent a nuclear-armed Iran.

Today, Iran is isolated and sanctions are having a real impact on the ground, exacerbated by the regime's own mismanagement of its economy. Iran exports over 1 million fewer barrels of crude oil each day than it did in 2011, costing Iran between $3-$5 billion per month. All 20 importers of Iranian oil have either significantly reduced or eliminated oil purchases from Iran. Financial sanctions have crippled Iran's access to the international financial system and fueled the depreciation of the value of Iran's currency to less than half of what it was last year. Foreign direct investment into Iran has decreased dramatically as major oil companies and international firms as diverse as Ernst & Young, Daimler AG, Caterpillar, ENI, Total, and hundreds more have divested themselves from Iran. The International Monetary Fund projects the Iranian economy will contract in 2013, a significant decrease from the over 7 percent growth six years ago, and far below the performance of neighboring oil-exporting countries. Put simply, the Iranian economy is in a downward spiral, with no prospect for near-term relief.

And we continue to increase the pressure. Iranian oil exports will continue to decline as we implement the law through our engagement with the last remaining six importers of Iranian oil. Iran's currency will remain volatile as we block Iran's revenue streams and block its access to funds held abroad. And we will continue to track, identify, and designate individuals and entities assisting Iran's proliferation efforts and attempting to evade sanctions on Iran. Last week, the State Department sanctioned four Iranian companies and one individual for providing the Iranian government with goods, technology, and services that increase Iran's ability to enrich uranium, which is prohibited by UN Security Council resolutions. On March 14, the State and Treasury Departments imposed sanctions on Dr. Dimitris Cambis and his company Impire Shipping for operating vessels on behalf of the National Iranian Tanker Company (NITC) that disguised the Iranian origin of the crude oil. On July 1, the Iran Freedom and Counter-Proliferation Act of 2012 takes full effect, targeting an array of sectors and industries in Iran. Looking forward, as long as Iran continues on its current unproductive path, the Administration will continue to assess and implement potential additional sanctions on sectors and industries that can serve as pressure points. We look forward to continued strong collaboration with members of Congress to develop smart sanctions and increase pressure on the regime, while maintaining the strong coalition we have built through sustained diplomatic efforts with partners.

In fact, one of the keys to our successful ratcheting up of the pressure on Iran is that we are not doing so alone. The European Union has enacted its own stringent sanctions regime, including an oil import ban that resulted in all 27 EU member states ceasing oil purchases from Iran. Australia, Canada, South Korea, Japan, and others have enacted their own sets of domestic measures, strengthening the international sanctions regime and sending a clear message to Iran: adhere to your international obligations, or face increasing pressure from the international community. And, even among partners who are frankly skeptical of sanctions, we have seen robust implementation of UN Security Council resolutions and cooperation on specific sanctions issues. We continue to coordinate closely with all of our international partners, ensuring stringent implementation of existing sanctions and encouraging strong domestic measures on Iran. As we move forward, it will be critical that we continue to move together and not take steps that undo the progress made so far. Doing such would signal divisions to Iran that it could and likely would exploit.

Even as we significantly increase pressure on the Iranian regime, we remain committed to ensuring that legitimate, humanitarian trade can continue for the benefit of the Iranian people. We take no pleasure in any hardship our sanctions might cause the Iranian people in their everyday lives, and it is U.S. policy to not target Iranian imports of humanitarian items. We have

worked hard to ensure U.S. regulations contain an explicit exception from sanctions for transactions for the sale of agricultural commodities, food, medicine, or medical devices to Iran as long as the transactions do not involve a designated entity or otherwise proscribed conduct. And when natural disasters have struck Iran, we have been ready to assist. Following a tragic earthquake in northwest Iran in August 2012, the Administration issued a general license to facilitate U.S. support to the Iranian people as they responded to and rebuilt from the natural disaster. In all our efforts on Iran, we have demonstrated that supporting the Iranian people and pressuring the policies of their government are not mutually exclusive.

As we have built unprecedented pressure on the Iranian regime, we have also intensified our efforts towards pursuing a diplomatic solution to the nuclear issue. Since his first days in office, the President has emphasized our readiness, working with members of the P5+1 to seek a negotiated resolution regarding Iran's nuclear program. The P5+1 has been incredibly unified, and we have worked closely and well with the Russians and Chinese. On February 26, 2013, the P5+1 met with Iranian representatives in Almaty, where the P5+1 jointly presented Iran with an updated, balanced proposal that offered Iran a real opportunity to take steps toward reducing tensions and creating the time and space to negotiate a comprehensive solution to the nuclear issue. As in prior talks, Iran was presented with a strong and united message: address the international's community's concerns or face mounting pressure. Interestingly, Iran's initial public response was positive and they signaled a potential turning point.

* * * *

We have approached these negotiations realistically, conscious of our difficult history. We continue to seek concrete results in our talks, not empty promises. The onus is on Iran.

Support for Terrorism

Beyond its illicit nuclear activity, we also have grave concerns about Iran's destabilizing activities in the Middle East, particularly its support for Bashar Asad in Syria; its support for terrorist organizations like Hizballah; and its unacceptable attacks on innocent civilians worldwide. These activities are not going unchecked.

Iran is the world's foremost state sponsor of terrorism, which it uses as a strategic tool of its foreign policy. Led by the Islamic Revolutionary Guard Corps (IRGC)-Qods Force and the Ministry of Intelligence and Security (MOIS), the "Iran Threat Network" comprises an alliance of surrogates, proxies, and partners such as Hizballah, HAMAS, and Iraqi Shi'a militants, among others. Iran funds, trains, and equips these terrorist organizations, in whole or in part, to use in attacks around the world. This clandestine threat network destabilizes countries throughout the Middle East and threatens regional security. Iran's leaders have aimed most of their threats at one of our closest allies, blatantly declaring their desire to see the destruction of the state of Israel. We have a moral obligation to ensure that Iran never has the tools to make good on that threat.

* * * *

Regional Meddling and Support for Asad

In Syria, Iran has made it clear that it fears losing its closest ally and will stop at no cost, borne by both the Syrian and Iranian people, to prop up the Asad regime. …

* * * *

Human Rights

We are equally disturbed by the regime's ongoing campaign of repression against its own people. Such oppression has included the harassment and intimidation of family members of those who speak out for freedoms, the torture of political prisoners, and the limitation of freedom of expression and access to information. These acts of aggression have created a culture of fear in which few dare to voice dissent or challenge regime officials. Students, lawyers, journalists, and bloggers, ethnic and religious minorities, artists and human rights activists are all targets for abuse, intimidation, or discrimination.

Labeled by press advocacy group Reporters Without Borders as an "enemy of the internet," Iran filters online content and blocks access to the internet to prevent Iranian people from acquiring knowledge and unbiased information about their own country and the outside world. We are committed to raise the cost of repression and help Iranians break through the "electronic curtain" the regime is erecting to communicate with one another and share their story with the world.

* * * *

Outreach to the Iranian People

Coupled with our concerns about human rights are our concerns about the well-being of the Iranian people. Every day, we hear from the Iranian people directly through our public diplomacy programs and Farsi-language social media platforms. The Virtual Embassy Tehran, launched in December 2011, has over 2 million hits and our Farsi-language Facebook, Twitter, Google+, and YouTube channel have also been enormously successful. The 170 videos on our YouTube channel have more than 1 million views and our Facebook page has over 120,000 fans, 60 percent of whom are inside of Iran and who access our sites even though the Iranian regime blocks the site.

What we see through our interactions is that the Iranian people are being detrimentally affected by the misplaced priorities, corruption and mismanagement of their government. Instead of meeting the needs of its own people, the Iranian regime has chosen to spend enormous amounts of its money and resources to support the Asad regime as well as its militant proxies around the world, and to pursue the development of weapons of mass destruction. Instead of investing in its people, Iran continues to restrain their vast potential through censorship, oppression, and severe limitations on their social, political and even academic freedoms.

As the President and the Secretary have said, in the United States our own communities have been enhanced by the contributions of Iranian Americans. We know that the Iranian people come from a great civilization whose accomplishments have earned the respect of the world. That is why in his 2013 Nowruz message, the President emphasized that there is no good reason for Iranians to be denied the opportunities enjoyed by people in other countries.

Iranians deserve the same freedoms and rights as people everywhere and all nations would benefit from the talents and creativity of the Iranian people, especially its youth. It is a shame that much of the world realizes this and the Iranian government has yet to do so.

* * * *

On November 23, 2013, the White House released a fact sheet on the initial understandings reached by the P5+1 and Iran in Geneva regarding Iran's nuclear program, subsequently referred to as the Joint Plan of Action. The White House fact sheet is excerpted below and available at *www.whitehouse.gov/the-press-office/2013/11/23/fact-sheet-first-step-understandings-regarding-islamic-republic-iran-s-n.*

_____

* * * *

…Today, the P5+1 and Iran reached a set of initial understandings that halts the progress of Iran's nuclear program and rolls it back in key respects. These are the first meaningful limits that Iran has accepted on its nuclear program in close to a decade. The initial, six month step includes significant limits on Iran's nuclear program and begins to address our most urgent concerns including Iran's enrichment capabilities; its existing stockpiles of enriched uranium; the number and capabilities of its centrifuges; and its ability to produce weapons-grade plutonium using the Arak reactor. The concessions Iran has committed to make as part of this first step will also provide us with increased transparency and intrusive monitoring of its nuclear program. In the past, the concern has been expressed that Iran will use negotiations to buy time to advance their program. Taken together, these first step measures will help prevent Iran from using the cover of negotiations to continue advancing its nuclear program as we seek to negotiate a long-term, comprehensive solution that addresses all of the international community's concerns.

In return, as part of this initial step, the P5+1 will provide limited, temporary, targeted, and reversible relief to Iran. This relief is structured so that the overwhelming majority of the sanctions regime, including the key oil, banking, and financial sanctions architecture, remains in place. The P5+1 will continue to enforce these sanctions vigorously. If Iran fails to meet its commitments, we will revoke the limited relief and impose additional sanctions on Iran.

The P5+1 and Iran also discussed the general parameters of a comprehensive solution that would constrain Iran's nuclear program over the long term, provide verifiable assurances to the international community that Iran's nuclear activities will be exclusively peaceful, and ensure that any attempt by Iran to pursue a nuclear weapon would be promptly detected. The set of understandings also includes an acknowledgment by Iran that it must address all United Nations Security Council resolutions—which Iran has long claimed are illegal—as well as past and present issues with Iran's nuclear program that have been identified by the International Atomic Energy Agency (IAEA). This would include resolution of questions concerning the possible military dimension of Iran's nuclear program, including Iran's activities at Parchin. As part of a comprehensive solution, Iran must also come into full compliance with its obligations under the Non-Proliferation Treaty (NPT) and its obligations to the IAEA. With respect to the comprehensive solution, nothing is agreed until everything is agreed. Put simply, this first step expires in six months, and does not represent an acceptable end state to the United States or our P5+1 partners.

* * * *

Putting Limited Relief in Perspective

In total, the approximately $7 billion in relief is a fraction of the costs that Iran will continue to incur during this first phase under the sanctions that will remain in place. The vast majority of Iran's approximately $100 billion in foreign exchange holdings are inaccessible or restricted by sanctions.

In the next six months, Iran's crude oil sales cannot increase. Oil sanctions alone will result in approximately $30 billion in lost revenues to Iran—or roughly $5 billion per month—compared to what Iran earned in a six month period in 2011, before these sanctions took effect. While Iran will be allowed access to $4.2 billion of its oil sales, nearly $15 billion of its revenues during this period will go into restricted overseas accounts. In summary, we expect the balance of Iran's money in restricted accounts overseas will actually increase, not decrease, under the terms of this deal.

Maintaining Economic Pressure on Iran and Preserving Our Sanctions Architecture

During the first phase, we will continue to vigorously enforce our sanctions against Iran, including by taking action against those who seek to evade or circumvent our sanctions.

- Sanctions affecting crude oil sales will continue to impose pressure on Iran's government. Working with our international partners, we have cut Iran's oil sales from 2.5 million barrels per day (bpd) in early 2012 to 1 million bpd today, denying Iran the ability to sell almost 1.5 million bpd. That's a loss of more than $80 billion since the beginning of 2012 that Iran will never be able to recoup. Under this first step, the EU crude oil ban will remain in effect and Iran will be held to approximately 1 million bpd in sales, resulting in continuing lost sales worth an additional $4 billion per month, every month, going forward.
- Sanctions affecting petroleum product exports to Iran, which result in billions of dollars of lost revenue, will remain in effect.
- The vast majority of Iran's approximately $100 billion in foreign exchange holdings remain inaccessible or restricted by our sanctions.
- Other significant parts of our sanctions regime remain intact, including:
    - Sanctions against the Central Bank of Iran and approximately two dozen other major Iranian banks and financial actors;
    - Secondary sanctions, pursuant to the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) as amended and other laws, on banks that do business with U.S.-designated individuals and entities;
    - Sanctions on those who provide a broad range of other financial services to Iran, such as many types of insurance; and,
    - Restricted access to the U.S. financial system.
- All sanctions on over 600 individuals and entities targeted for supporting Iran's nuclear or ballistic missile program remain in effect.
- Sanctions on several sectors of Iran's economy, including shipping and shipbuilding, remain in effect.
- Sanctions on long-term investment in and provision of technical services to Iran's energy sector remain in effect.
- Sanctions on Iran's military program remain in effect.

- Broad U.S. restrictions on trade with Iran remain in effect, depriving Iran of access to virtually all dealings with the world's biggest economy
- All UN Security Council sanctions remain in effect.
- All of our targeted sanctions related to Iran's state sponsorship of terrorism, its destabilizing role in the Syrian conflict, and its abysmal human rights record, among other concerns, remain in effect.

A Comprehensive Solution

During the six-month initial phase, the P5+1 will negotiate the contours of a comprehensive solution. Thus far, the outline of the general parameters of the comprehensive solution envisions concrete steps to give the international community confidence that Iran's nuclear activities will be exclusively peaceful. With respect to this comprehensive resolution: nothing is agreed to with respect to a comprehensive solution until everything is agreed to. Over the next six months, we will determine whether there is a solution that gives us sufficient confidence that the Iranian program is peaceful. If Iran cannot address our concerns, we are prepared to increase sanctions and pressure.

Conclusion

In sum, this first step achieves a great deal in its own right. Without this phased agreement, Iran could start spinning thousands of additional centrifuges. It could install and spin next-generation centrifuges that will reduce its breakout times. It could fuel and commission the Arak heavy water reactor. It could grow its stockpile of 20% enriched uranium to beyond the threshold for a bomb's worth of uranium. Iran can do none of these things under the conditions of the first step understanding.

Furthermore, without this phased approach, the international sanctions coalition would begin to fray because Iran would make the case to the world that it was serious about a diplomatic solution and we were not. We would be unable to bring partners along to do the crucial work of enforcing our sanctions. With this first step, we stop and begin to roll back Iran's program and give Iran a sharp choice: fulfill its commitments and negotiate in good faith to a final deal, or the entire international community will respond with even more isolation and pressure.

The American people prefer a peaceful and enduring resolution that prevents Iran from obtaining a nuclear weapon and strengthens the global non-proliferation regime. This solution has the potential to achieve that. Through strong and principled diplomacy, the United States of America will do its part for greater peace, security, and cooperation among nations.

* * * *

The Joint Plan of Action ("JPOA"), finalized on November 24, 2013 in Geneva, appears below (with footnotes omitted) and is available at *www.whitehouse.gov/sites/default/files/foreign/jointplanofaction24november2013thefinal.pdf*. Secretary Kerry testified before the House Foreign Affairs Committee on December 10, 2013 regarding the JPOA. Secretary Kerry's testimony is available at *www.state.gov/secretary/remarks/2013/12/218578.htm*. Under Secretary Sherman also testified about the JPOA before the Senate Committee on Banking, Housing, and Urban

Affairs on December 12, 2013. Her testimony is available at www.state.gov/p/us/rm/2013/218639.htm.

---

* * * *

Preamble

The goal for these negotiations is to reach a mutually-agreed long-term comprehensive solution that would ensure Iran's nuclear programme will be exclusively peaceful. Iran reaffirms that under no circumstances will Iran ever seek or develop any nuclear weapons. This comprehensive solution would build on these initial measures and result in a final step for a period to be agreed upon and the resolution of concerns. This comprehensive solution would enable Iran to fully enjoy its right to nuclear energy for peaceful purposes under the relevant articles of the NPT in conformity with its obligations therein. This comprehensive solution would involve a mutually defined enrichment programme with practical limits and transparency measures to ensure the peaceful nature of the programme. This comprehensive solution would constitute an integrated whole where nothing is agreed until everything is agreed. This comprehensive solution would involve a reciprocal, step-by-step process, and would produce the comprehensive lifting of all UN Security Council sanctions, as well as multilateral and national sanctions related to Iran's nuclear programme.

There would be additional steps in between the initial measures and the final step, including, among other things, addressing the UN Security Council resolutions, with a view toward bringing to a satisfactory conclusion the UN Security Council's consideration of this matter. The E3+3 and Iran will be responsible for conclusion and implementation of mutual near-term measures and the comprehensive solution in good faith. A Joint Commission of E3/EU+3 and Iran will be established to monitor the implementation of the near-term measures and address issues that may arise, with the IAEA responsible for verification of nuclear-related measures. The Joint Commission will work with the IAEA to facilitate resolution of past and present issues of concern.

Elements of a first step

The first step would be time-bound, with a duration of 6 months, and renewable by mutual consent, during which all parties will work to maintain a constructive atmosphere for negotiations in good faith.

Iran would undertake the following voluntary measures:

• From the existing uranium enriched to 20%, retain half as working stock of 20% oxide for fabrication of fuel for the TRR. Dilute the remaining 20% UF6 to no more than 5%. No reconversion line.

• Iran announces that it will not enrich uranium over 5% for the duration of the 6 months.

• Iran announces that it will not make any further advances of its activities at the Natanz Fuel Enrichment Plant, Fordow, or the Arak reactor, designated by the IAEA as IR-40.

• Beginning when the line for conversion of UF6 enriched up to 5% to UO2 is ready, Iran has decided to convert to oxide UF6 newly enriched up to 5% during the 6 month period, as provided in the operational schedule of the conversion plant declared to the IAEA.

• No new locations for the enrichment.

• Iran will continue its safeguarded R&D practices, including its current enrichment R&D practices, which are not designed for accumulation of the enriched uranium.

• No reprocessing or construction of a facility capable of reprocessing.
• Enhanced monitoring:
    - Provision of specified information to the IAEA, including information on Iran's plans for nuclear facilities, a description of each building on each nuclear site, a description of the scale of operations for each location engaged in specified nuclear activities, information on uranium mines and mills, and information on source material. This information would be provided within three months of the adoption of these measures.
    - Submission of an updated DIQ for the reactor at Arak, designated by the IAEA as the IR-40, to the IAEA.
    - Steps to agree with the IAEA on conclusion of the Safeguards Approach for the reactor at Arak, designated by the IAEA as the IR-40.
    - Daily IAEA inspector access when inspectors are not present for the purpose of Design Information Verification, Interim Inventory Verification, Physical
    - Inventory Verification, and unannounced inspections, for the purpose of access to offline surveillance records, at Fordow and Natanz.
    - IAEA inspector managed access to:
        - centrifuge assembly workshops;
        - centrifuge rotor production workshops and storage facilities; and,
        - uranium mines and mills.

In return, the E3/EU+3 would undertake the following voluntary measures:

• Pause efforts to further reduce Iran's crude oil sales, enabling Iran's current customers to purchase their current average amounts of crude oil. Enable the repatriation of an agreed amount of revenue held abroad. For such oil sales, suspend the EU and U.S. sanctions on associated insurance and transportation services.
• Suspend U.S. and EU sanctions on:
    - Iran's petrochemical exports, as well as sanctions on associated services.
    - Gold and precious metals, as well as sanctions on associated services.
• Suspend U.S. sanctions on Iran's auto industry, as well as sanctions on associated services.
• License the supply and installation in Iran of spare parts for safety of flight for Iranian civil aviation and associated services. License safety related inspections and repairs in Iran as well as associated services.
• No new nuclear-related UN Security Council sanctions.
• No new EU nuclear-related sanctions.
• The U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from imposing new nuclear-related sanctions.
• Establish a financial channel to facilitate humanitarian trade for Iran's domestic needs using Iranian oil revenues held abroad. Humanitarian trade would be defined as transactions involving food and agricultural products, medicine, medical devices, and medical expenses incurred abroad. This channel would involve specified foreign banks and non-designated Iranian banks to be defined when establishing the channel.
    - This channel could also enable:
        - transactions required to pay Iran's UN obligations; and,
        - direct tuition payments to universities and colleges for Iranian students studying abroad, up to an agreed amount for the six month period.
• Increase the EU authorisation thresholds for transactions for non-sanctioned trade to an agreed

amount.

Elements of the final step of a comprehensive solution

The final step of a comprehensive solution, which the parties aim to conclude negotiating and commence implementing no more than one year after the adoption of this document, would:

• Have a specified long-term duration to be agreed upon.
• Reflect the rights and obligations of parties to the NPT and IAEA Safeguards Agreements.
• Comprehensively lift UN Security Council, multilateral and national nuclear-related sanctions, including steps on access in areas of trade, technology, finance, and energy, on a schedule to be agreed upon.
• Involve a mutually defined enrichment programme with mutually agreed parameters consistent with practical needs, with agreed limits on scope and level of enrichment activities, capacity, where it is carried out, and stocks of enriched uranium, for a period to be agreed upon.
• Fully resolve concerns related to the reactor at Arak, designated by the IAEA as the IR-40. No reprocessing or construction of a facility capable of reprocessing.
• Fully implement the agreed transparency measures and enhanced monitoring. Ratify and implement the Additional Protocol, consistent with the respective roles of the President and the Majlis (Iranian parliament).
• Include international civil nuclear cooperation, including among others, on acquiring modern light water power and research reactors and associated equipment, and the supply of modern nuclear fuel as well as agreed R&D practices.

Following successful implementation of the final step of the comprehensive solution for its full duration, the Iranian nuclear programme will be treated in the same manner as that of any non-nuclear weapon state party to the NPT.

* * * *

b. 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: 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. The Panel's mandate has been renewed yearly, most recently in Resolution 2105 (2013).

In 2013, 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. On March 6, 2013, U.S.

Ambassador to the UN Susan E. Rice[*] addressed the Security Council at a briefing by the Iran Sanctions Committee. Her remarks are excerpted below and available in full at *http://usun.state.gov/briefing/statements/205684.htm*.

* * * *

The Iranian nuclear issue remains one of the gravest threats to international security and a top priority for the Security Council. We meet today at a time of new opportunities but growing risks. In recent weeks, the IAEA Director-General reaffirmed yet again that Iran continues to advance its nuclear program and obstruct the IAEA's investigation into the program's possible military dimensions by refusing to grant the IAEA access to the Parchin site and to documents, personnel and equipment requested by the agency. These actions, as well as Iran's continued enrichment and heavy-water related activities, are in clear violation of this Council's demands.

And more alarming still, the IAEA Director-General has confirmed that Iran is now further contravening UN Security Council resolutions by installing hundreds of second-generation centrifuges that could significantly increase its uranium enrichment capacity. The installation of these centrifuges, as well as Iran's stockpiling of twenty percent-enriched uranium and continued enrichment at the Fordow facility, are cause for serious concern.

These actions are unnecessary and thus provocative. Iran already has enough enriched uranium to fuel the Tehran Research Reactor for at least a decade. Increasing this capacity—without any clear civilian use—makes no sense. Iran's actions neither build international confidence nor bring us closer to a comprehensive and peaceful solution. On the contrary, they raise the world's concerns.

For this very reason, the work of the Iran Sanctions Committee is vital. As long as Iran rejects its international obligations, we must be resolute in implementing fully the sanctions this Council has imposed.

In recent months, we've witnessed troubling new violations of these sanctions. In January, Yemen seized a vessel transporting a very large cache of sophisticated Iranian arms, ammunition and explosives in violation of Resolution 1747. These arms could have destabilized Yemen's fragile transition. We urge the Committee, with the support of the Panel of Experts, to investigate this case rigorously and work with the Council to craft a worthy response.

We have also observed more public statements acknowledging Iran's illicit arms smuggling. Representatives of Hamas, Hezbollah, Palestinian Islamic Jihad and even Iran itself are now publicly admitting to activities that violate UN sanctions. The Committee should consider these statements as additional proof of Iran's blatant disregard for its obligations and follow up to the fullest extent possible.

The Committee is now also assessing Iranian missile launches that violated Resolution 1929. These launches allow Iran to refine and develop a technology that—if ever combined with weapons of mass destruction—would constitute an intolerable threat to international peace and security. We urge the Committee, in line with its mandate, to take swift and sure action in response, including imposing targeted sanctions on those responsible for these violations.

[*] Editor's Note: Susan Rice left her post as U.S. Ambassador to the UN on June 25, 2013 to become National Security Adviser to President Obama. On August 5, 2013 Samantha Power was sworn in as U.S. Ambassador to the UN.

Each and every violation of UN sanctions is a serious matter. It is our collective responsibility to report on these cases, to support efforts to investigate them, and to act decisively when investigations are completed. Responding effectively to these incidents bolsters both the Council's credibility and the efficiency of diplomatic efforts to resolve the Iranian nuclear issue.

The United States remains committed to a diplomatic solution and, therefore, we welcome the recently resumed P5 +1 dialogue with Iran. But let us not forget that dialogue is only a means to an end.

Our goal remains a durable and comprehensive solution to the Iranian nuclear issue which restores international confidence in the exclusively peaceful nature of Iran's nuclear program in accordance with the NPT and in compliance with all relevant UN Security Council and IAEA Board of Governors' resolutions. As a first step, we seek to address Iran's most significant nuclear activities—the production and accumulation of near-20% enriched uranium and the installation of additional centrifuges at Fordow. In that event, the P5+1 countries have demonstrated that we are willing to take steps to respond to Iran's expressed concerns.

The talks between the P5+1 and Iran in Almaty were useful, but we must see whether real progress towards a negotiated solution can result from this renewed process. The process cannot continue indefinitely or be used as a stalling mechanism.

Therefore, we remain committed to the dual-track approach – mounting pressure on Iran as we pursue meaningful dialogue in good faith. Working together, we can continue to clarify for Iran the consequences of its actions and show Iran the benefits of choosing cooperation over provocation.

* * * *

On September 5, 2013, Ambassador Samantha Power delivered remarks at a Security Council briefing on Iran and Resolution 1737. Her remarks, excerpted below and available at *http://usun.state.gov/briefing/statements/213854.htm*, raise the hopes of progress in planned negotiations with Iran after its election of a new president, but also emphasize the need to maintain sanctions.

* * * *

Like others here, the United States hopes that the inauguration of President Rouhani creates an opportunity for Iran to act quickly to resolve the international community's serious concerns about Iran's nuclear intentions.

Unfortunately, we have not yet seen any clear signs that Iran is committed to addressing the most pressing concerns about its nuclear program. To the contrary, recent developments trouble us.

Just last week, IAEA Director General Amano reported that Iran continues to march forward with its prohibited nuclear activities. The Director General stated that "the agency will not be in a position to provide credible assurance about the absence of undeclared material and activities in Iran unless and until Iran provides the necessary cooperation." This is a conclusion we have heard repeatedly from the IAEA.

Rather than take steps to meet the obligations imposed by this Security Council, Iran is installing advanced centrifuges, which may be two to three times more efficient at enriching

uranium than its current centrifuges. The Director General also reported that Iran continues adding to its stockpile of enriched uranium. Iran's expanded enrichment, its construction of the IR-40 heavy water reactor at Arak, and other examples raised by the Director General not only violate multiple Security Council resolutions, but they move us further away from a negotiated solution. Later this month the IAEA will hold a new round of talks with Iran. At these talks, we strongly encourage Iran to adopt a cooperative and transparent approach with the IAEA.

In the meantime, and until concrete progress has been made, this Committee must step up its efforts to improve sanctions implementation. In recent months, the Committee's work has not kept pace with the threat. We are disappointed, as the President indicated, that despite the best efforts of the chair to find consensus, this Committee often fails to take even routine steps to implement its technical mandate. This must change.

As a first step, the Committee should implement the recommendations contained in the May 2013 Final Report of the Panel of Experts. These recommendations are reasonable. If implemented, they would provide clarity and guidance to states about aspects of the sanctions. The Committee should also sign an agreement with Interpol to help disseminate information about individuals subject to targeted sanctions. Other sanctions committees routinely take such measures to implement the Council's resolutions. In this Committee, however, some members have politicized these actions and prevented the Committee from doing its job.

Even more critical, the Committee must improve its ability to respond to Iran's sanctions violations. The Committee should immediately respond to Iran's July 2012 ballistic missile launches, which were a clear violation of Resolution 1929. An effective response to this violation would include new targeted sanctions on those responsible. The Committee should also follow up vigorously on violations involving Iran's attempts to procure proliferation sensitive items.

Failure to address these and other violations undermines the Council's credibility and authority.

In line with its mandate, the Committee must do more to address Iran's arms smuggling. Iran's steady supply of weapons and military support to extremist groups clearly violates resolution 1747. In addition to violating sanctions, this assistance directly threatens stability in Yemen, Lebanon, Gaza, Iraq and other regions. Needless to say, Iran's longstanding military support to the Assad regime is, under the current circumstances, simply unconscionable.

Mr. President, even in light of Iran's troubling actions, we remain convinced that principled diplomacy remains the best tool to achieve a comprehensive and peaceful solution to the international community's serious concerns.

We would welcome a constructive sign that Iran may be prepared to engage substantively and seriously with the international community. If Iran chooses to do so, then it will find a willing partner in the United States. We hope that Iran's new leadership chooses this path. Until Iran decides to meet its obligations, the Committee's work remains critical to the diplomacy of holding Iran accountable to this Council and to the broader international community.

* * * *

c. U.S. sanctions and other controls

In 2013, President Obama again continued the national emergency under IEEPA with respect to Iran (78 Fed. Reg. 16,395 (Mar. 14, 2013)), thereby maintaining the existing sanctions program. The United States also implemented additional sanctions intended

to pressure Iran to comply with its international obligations. One new executive order was issued. 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) E.O. 13553

President Obama issued 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" in 2010. See *Digest 2010* at 656-60. On May 30, 2013, OFAC designated one individual pursuant to E.O. 13553, Asghar MIR-HEJAZI. 78 Fed. Reg. 39,064 (June 28, 2013). A May 30, 2013 State Department press statement, available at *www.state.gov/r/pa/prs/ps/2013/05/210102.htm*, describes the basis for designating Mir-Hejazi:

> Asghar Mir-Hejazi is being designated pursuant to E.O. 13553 for supporting the commission of serious human rights abuses in Iran on or after June 12, 2009, as well as providing material support to the IRGC and the Ministry of Intelligence and Security (MOIS). Mir-Hejazi is the Deputy Chief of Staff to the Supreme Leader, and is closely involved in all discussions and deliberations related to military and foreign affairs. After the disputed 2009 election, Mir-Hejazi played a leading role in suppressing the unrest in Iran.

(2) E.O. 13599

President Obama issued Executive Order 13599, "Blocking Property of the Government of Iran and Iranian Financial Institutions," in 2012. See *Digest 2012* at 504-06. On February 20, 2013, OFAC published in the Federal Register a list of 110 entities and vessels identified as the Government of Iran, Iranian financial institutions, or property or interest in property of the Government of Iran under the Iranian Transactions and Sanctions Regulations (the "ITSR"), 31 CFR part 560, and Executive Order 13599. 78 Fed. Reg. 11,950 (Feb. 20, 2013). On February 22, 2013, OFAC published a list of 37 vessels identified as property owned or controlled by the Government of Iran under the ITSR and E.O. 13599. 78 Fed. Reg. 12,420 (Feb. 22, 2013).

Effective March 14, 2013, OFAC identified one individual and fourteen entities as the Government of Iran, and eight vessels as the property of the Government of Iran pursuant to E.O. 13599. 78 Fed. Reg. 19,075 (Mar. 28, 2013). On May 9, 2013 OFAC identified eight vessels as property in which the Government of Iran has an interest that is blocked pursuant to E.O. 13599. 78 Fed. Reg. 29,813 (May 21, 2013). Also on May 9, 2013, OFAC identified another entity as meeting the definition of the Government of Iran under the ITSR and E.O. 13599: Sambouk Shipping FZC. 78 Fed. Reg. 30,397 (May 22, 2013). On May 23, 2013, OFAC identified six additional individuals as meeting the definition of the Government of Iran pursuant to E.O. 13599 and the ITSR. 78 Fed. Reg.

33,470 (June 4, 2013). On June 4, 2013, OFAC identified 38 entities as meeting the definition of the Government of Iran pursuant to E.O. 13599 and the ITSR. 78 Fed. Reg. 37,664 (June 21, 2013).

On September 6, 2013, OFAC identified six individuals and four companies as meeting the definition of the Government of Iran pursuant to the Order and the ITSR: Seyed Nasser Mohammad SEYYEDI; Reza PARSAEI; Seyyed Mohammad Ali Khatibi TABATABAEI; Mahmoud ZIRACCHIAN ZADEH; Seyed Mahmoud MOHADDES; Mohammad MOINIE; Swiss Management Services SARL; KASB International LLC; Petro Royal FZE; AA Energy FZCO. 78 Fed. Reg. 57,001 (Sep. 16, 2013).

(3) Iran Sanctions Act, as amended

As discussed in *Digest 2012* at 509-11, Congress amended the Iran Sanctions Act ("ISA") in 2012 with passage of the Iran Threat Reduction Act and Syria Human Rights Act of 2012 ("TRA") (Pub. L. 112–158). OFAC amended the Iranian Financial Sanctions Regulations ("IFSR") to implement sections 503 and 504 of the TRA, which amended section 1245 of the National Defense Authorization Act for Fiscal Year 2012; and section 1, portions of section 6, and other related provisions of Executive Order 13622 of July 30, 2012. E.O. 13622 is discussed in *Digest 2012* at 507-9. Excerpts below are from the background section of the Federal Register Notice of the IFSR amendments. 78 Fed. Reg. 16,403 (Mar. 15, 2013).

_____

* * * *

The Department of the Treasury's Office of Foreign Assets Control ("OFAC") originally published the Iranian Financial Sanctions Regulations, 31 CFR part 561 (the "IFSR"), on August 16, 2010 (75 FR 49836), to implement subsections 104(c) and (d) and other related provisions of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195) (22 U.S.C. 8501-8551) ("CISADA"), which had been signed into law by the President on July 1, 2010. Subsection 104(c) of CISADA requires the Secretary of the Treasury to prescribe regulations to prohibit, or impose strict conditions on, the opening or maintaining in the United States of a correspondent account or a payable-through account for a foreign financial institution that the Secretary finds knowingly engages in specified sanctionable activities.

On February 27, 2012, OFAC amended the IFSR and reissued them in their entirety (77 FR 11724), in order to implement section 1245(d) of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81) (22 U.S.C. 8513a) ("NDAA"), which had been signed into law by the President on December 31, 2011. Section 1245(d)(1) of the NDAA provides for the President to 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 a foreign financial institution that the President determines has knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution designated by the Secretary of the Treasury pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) ("IEEPA").

Section 1245(d)(2) of the NDAA excepted transactions for the sale of food, medicine, or medical devices to Iran from the imposition of sanctions under section 1245(d)(1). Section 1245(d)(3) of the NDAA limited the imposition of sanctions pursuant to section 1245(d)(1) on foreign financial institutions owned or controlled by the government of a foreign country, including the central bank of a foreign country, to significant transactions for the sale or purchase of petroleum or petroleum products to or from Iran. Section 1245(d)(4)(D) of the NDAA provided for an exception from the imposition of sanctions pursuant to section 1245(d)(1) on any foreign financial institution if the President determines and periodically reports to Congress that the country with primary jurisdiction over that foreign financial institution has significantly reduced its crude oil purchases from Iran during the 180-day period preceding the report.

On July 30, 2012, invoking the authority of, inter alia, IEEPA, the President issued Executive Order 13622, "Authorizing Additional Sanctions With Respect to Iran" (77 FR 45897, August 2, 2012) ("E.O. 13622"). The President issued E.O. 13622 to take additional steps with respect to the national emergency declared in Executive Order 12957 of March 15, 1995, particularly in light of 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(a) of E.O. 13622 authorizes the Secretary of the Treasury, in consultation with the Secretary of State and subject to certain exceptions, to impose correspondent and payable-through account sanctions on foreign financial institutions determined to have knowingly conducted or facilitated any significant financial transaction with the National Iranian Oil Company ("NIOC"); with Naftiran Intertrade Company ("NICO"); or for the purchase or acquisition of petroleum, petroleum products, or petrochemical products from Iran. Section 10 of E.O. 13622 defines the terms NIOC and NICO as including any entity owned or controlled by, or operating for or on behalf of, respectively, NIOC and NICO.

Section 1(c) of E.O. 13622 provides that sanctions under subsections 1(a)(i) and (ii) for transactions with NIOC or NICO or for the purchase or acquisition of petroleum or petroleum products from Iran will apply only if (1) the President determines under subsections 1245(d)(4)(B) and (C) 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 purchase of petroleum and petroleum products from Iran by or through foreign financial institutions; and (2) a significant reduction exception under subsection 1245(d)(4)(D) of the NDAA does not apply with respect to the transaction.

Thus, transactions with NIOC or NICO or for the purchase or acquisition of petroleum or petroleum products from Iran are excepted from the imposition of sanctions under section 1(a) of E.O. 13622 if the transaction qualifies for the significant reduction exception under subsection 1245(d)(4)(D) of the NDAA. Transactions for the purchase or acquisition of petrochemical products from Iran are subject to sanctions under section 1(a) of E.O. 13622 regardless of whether the President makes the determination that there is a sufficient supply of petroleum and petroleum products under subsections 1245(d)(4)(B) and (C) of the NDAA or whether a significant reduction exception under subsection 1245(d)(4)(D) of the NDAA applies. Section 1(d) of E.O. 13622 also provided an exemption from sanctions under section 1(a) for transactions 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. Executive Order 13628 of October 9, 2012 (77 FR 62139, October 12, 2012), amended E.O. 13622 by adding the sale of agricultural

commodities to Iran to the list of exempt transactions in section 1(d) and by making other conforming changes to E.O. 13622.

* * * *

On August 10, 2012, the President signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012 (Pub. L. 112-158) (22 U.S.C. 8701-8795) ("TRA"), which, inter alia, amends section 1245(d) of the NDAA. Section 503(a) of the TRA adds sales of agricultural commodities to Iran to the list of excepted transactions under section 1245(d)(2) of the NDAA, effective as if originally included in the NDAA. Section 503(b) of the TRA revises the timing of the reports on the availability and price of petroleum and petroleum products produced in countries other than Iran that, pursuant to section 1245(d)(4)(A) of the NDAA, the Administrator of the Energy Information Administration is required to submit to Congress. Beginning September 1, 2012, this report is to be submitted to Congress not later than October 25, 2012, and the last Thursday of every other month thereafter.

Section 504 of the TRA revises the types of foreign financial institutions and transactions that can be sanctioned under section 1245(d)(1) of the NDAA. Specifically, section 504(a)(1)(A) of the TRA amends the limitation on the imposition of sanctions in section 1245(d)(3) of the NDAA so that it only applies to foreign central banks and not to other government-owned or -controlled foreign financial institutions. As a result, foreign financial institutions owned or controlled by the government of a foreign country, other than central banks, are subject to sanctions under section 1245(d)(1) of the NDAA (with certain exceptions, including the sale of agricultural commodities, food, medicine and medical devices) with respect to any significant financial transaction conducted or facilitated on or after February 6, 2013, including transactions that are not for the sale or purchase of petroleum or petroleum products to or from Iran.

Section 504(a)(1)(B) of the TRA amends section 1245(d)(4)(D) of the NDAA to limit the exception from sanctions imposed pursuant to section 1245(d)(1) previously available for countries determined to have significantly reduced their crude oil purchases from Iran to certain transactions conducted or facilitated by foreign financial institutions located in significantly reducing jurisdictions. This amendment applies with respect to financial transactions conducted or facilitated on or after February 6, 2013. As amended, the exception from sanctions set forth in NDAA section 1245(d)(4)(D) applies to a financial transaction conducted or facilitated by a foreign financial institution if (1) the financial transaction is only for bilateral trade in goods or services between the country with primary jurisdiction over the foreign financial institution and Iran; and (2) any funds owed to Iran as a result of such trade are credited to an account located in the country with primary jurisdiction over the foreign financial institution. Furthermore, in order for this exception to apply to the financial transaction, there must be in effect a determination from the President either that the country with primary jurisdiction over the foreign financial institution has significantly reduced its crude oil purchases from Iran; or, in the case of a country that has previously received an exception under section 1245(d)(4)(D) of the NDAA, that, after receiving the exception, it has reduced its crude oil purchases from Iran to zero.

In addition, section 504 of the TRA amends section 1245(h) of the NDAA by adding a definition of the terms "reduce significantly," "significant reduction," and "significantly reduced." The definition provides that these terms, used with respect to purchases from Iran of petroleum and petroleum products, include a reduction in such purchases in terms of price or volume toward a complete cessation of such purchases.

Today, OFAC is making a number of changes to the IFSR to implement the amendments to section 1245(d) of the NDAA made by sections 503 and 504 of the TRA, as well as to implement section 1 and related provisions of E.O. 13622. …

* * * *

Effective March 14, 2013, the State Department imposed additional sanctions pursuant to ISA and TRA. 78 Fed. Reg. 21,183 (Apr. 9, 2013). Specifically, Dimitris Cambis and Impire Shipping were sanctioned pursuant to section 5(a)(8) of ISA, as amended (pertaining to the Iranian petroleum sector). And Kish Protection and Indemnity ("P&I") and Bimeh Markazi-Central Insurance of Iran ("CII") were sanctioned pursuant to section 212 of the TRA, which pertains to those providing insurance or underwriting services to certain Iranian oil or tanker companies. The specific sanctions imposed on each of these persons are listed in the Federal Register notice. A March 14, 2013 State Department press statement, available at *www.state.gov/r/pa/prs/ps/2013/03/206268.htm*, provides information about these persons' activities leading to the imposition of sanctions:

> According to information available to the U.S. government, Dr. Cambis, president of Impire Shipping, helped the National Iranian Tanker Company (NITC) obtain eight tankers in late 2012. While these vessels were purchased and are controlled by Dr. Cambis and Impire Shipping, they are operated on behalf of NITC. U.S. law prohibits knowingly owning or controlling a vessel that operates in a manner that conceals the Iranian origin of crude oil by obscuring or concealing the ownership, operation, or control of the vessel by NITC.
>
> Kish P&I provides insurance for NITC, the main carrier of Iranian petroleum. Kish P&I is reinsured by CII, thus CII is providing reinsurance services for NITC. U.S. law provides for sanctions on persons knowingly providing insurance or reinsurance for NITC.

Effective May 31, 2013, the State Department imposed sanctions on Ferland Company Limited pursuant to section 5(a)(8) of the ISA, as amended, and also sanctioned Jam Petrochemical Company and Niksima Food and Beverage JLT under E.O. 13622. 78 Fed. Reg. 35,351 (June 12, 2013).

The Iran Freedom and Counter-Proliferation Act of 2012, discussed in section 16A.1.c.(5) *infra*, also requires the President to impose sanctions set forth in ISA on persons determined to have engaged in certain activities on or after July 1, 2013, including activities in connection with the energy, shipping, or shipbuilding sectors of Iran.

(4) E.O. 13628

As discussed in *Digest 2012* at 514-15, President Obama issued 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" in 2012.

On February 6, 2013, OFAC designated one individual and four entities Pursuant to E.O. 13628: Ezzatollah ZARGHAMI; Iranian Communications Regulatory Authority; Iranian Cyber Police; Islamic Republic of Iran Broadcasting; and Iran Electronics Industries. 78 Fed. Reg. 11,275 (Feb. 15, 2013).

On May 30, 2013, OFAC designated the Committee to Determine Instances of Criminal Content ("CDICC") and Ofogh Saberin Engineering Development Company pursuant to E.O. 13628 due to their involvement in suppressing freedom of expression in Iran. 78 Fed. Reg. 34,706 (June 10, 2013). These sanctions were announced in conjunction with the issuance of a General License aimed at increasing access by Iranians to personal communications technology and services to enhance their freedom of expression. See section A.1.c.(6), *infra*. For further information about CDICC and Ofogh Saberin, see the May 30, 2013 State Department press statement, available at *www.state.gov/r/pa/prs/ps/2013/05/210102.htm*.

(5) Iran Freedom and Counter-Proliferation Act

The National Defense Authorization Act for Fiscal Year 2013 (signed January 2, 2013) includes a subtitle, the "Iran Freedom and Counter-Proliferation Act of 2012" ("IFCA"), that sets out a number of new sanctions related to Iran. A State Department fact sheet summarizing the IFCA sanctions is available at *www.state.gov/documents/organization/208111.pdf*. On June 3, 2013, the President delegated many of the authorities in the IFCA to the Secretary of State. Daily Comp. Pres. Docs. DCPD No. 00385 (June 3, 2013).

Section 1244(c) of IFCA requires the imposition of sanctions on persons that engage in various transactions involving Iran, including significant transactions, support, or the provision of goods or services with persons in the energy, shipping, or shipbuilding sector of Iran, port operators in Iran, and most Iranian persons on the SDN List. Section 1244(d) of IFCA also requires the imposition of sanctions on persons that sell, supply, or transfer to or from Iran significant goods or services used in connection with the energy, shipping, or shipbuilding sector of Iran and on foreign financial institutions that conduct or facilitate such transactions. Section 1245 requires the imposition of sanctions on persons that sell, supply, or transfer, directly or indirectly, to or from Iran, precious metals and certain other industrial metals. Additional sanctionable activity under IFCA includes sanctions in section 1246 on persons that provide insurance, reinsurance, or underwriting services for activity sanctionable under the Iran sanctions regime or for any Iranian on the SDN List. Foreign financial institutions are also subject to sanctions under section 1247 of IFCA if they conduct or facilitate a significant financial transaction on behalf of most Iranians on the SDN List. Finally, IFCA also requires the President to designate the Islamic Republic of Iran

Broadcasting (IRIB), and Ezzatollah Zargami, its President, for the imposition of sanctions, and to place both the IRIB and Zargami on the SDN List.

On June 5, 2013, President Obama issued Executive Order 13645, "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions With Respect To Iran." 78 Fed. Reg. 33,945 (June 5, 2013). Section 1 of E.O. 13645 authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to sanction foreign financial institutions upon determining that the institution has:

> (i) knowingly conducted or facilitated any significant transaction related to the purchase or sale of Iranian rials or a derivative, swap, future, forward, or other similar contract whose value is based on the exchange rate of the Iranian rial; or
> (ii) maintained significant funds or accounts outside the territory of Iran denominated in the Iranian rial.

The authorized sanctions include prohibitions or limitations on correspondent accounts or payable-through accounts in the United States and blocking of property.

Section 2 authorizes blocking the property of a person determined to have "materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any Iranian person included on the list of Specially Designated Nationals and Blocked Persons maintained by the Office of Foreign Assets Control.

Section 3 authorizes sanctions on foreign financial institutions that knowingly conduct or facilitate financial transactions either (i) on behalf of Iranian persons on the SDN list or (ii) for the sale of goods or services connected with the automotive industry in Iran. Such financial institutions are subject to the prohibition or limitations on maintaining correspondent or payable-through accounts in the United States. Sections 5, 6, and 7 provide for further sanctions targeting the Iranian automobile sector.

Section 5 authorizes the Secretary of State to impose sanctions on a person after determining that any of four criteria are met: (a) engaging in a transaction of automotive goods or services; (b) successor to persons identified in (a); (c) owned or controlled by a person identified in (a) and had knowledge about the transaction; (d) owned or controlled by a person identified in (a) and participated in the transaction.

On December 12, 2013, the U.S. Departments of the Treasury and State announced the designation of a number of companies and individuals for evading international sanctions against Iran and for providing support for Iran's nuclear program. A State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/218637.htm*, provides background on the designated persons. Singapore-based Mid Oil Asia was designated pursuant to E.O. 13645 for providing material support to the National Iranian Tanker Company ("NITC"). Singapore-based Singa Tankers was likewise designated pursuant to E.O. 13645 for providing material support to NITC. Siqiriya Maritime Corporation was also designated pursuant to E.O. 13645 for providing material support to NITC and three vessels were identified as

property in which Siqiriya has an interest: Anthem, Jaffna, and Olysa. Also designated pursuant to E.O. 13645 for its support to NITC was Ferland Company Limited, an entity previously sanctioned pursuant to ISA and E.O. 13608. The General Manager of Ferland, Vitaly Sokolenko, was also designated pursuant to E.O. 13645.

(6) Section 1245 of the 2012 National Defense Authorization Act

Section 1245(d) of the NDAA requires the U.S. Government to report to Congress on the availability of petroleum and petroleum products in countries other than Iran and determine 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. See *Digest 2012* at 506-7. On June 5, 2013 and November 29, 2013 President Obama again made the determination, required every six months, that there was 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. 78 Fed. Reg. 35,537 (June 12, 2013); 78 Fed. Reg. 76,717 (Dec. 18, 2013); 79 Fed. Reg. 2746 (Jan. 15, 2013).

On March 13, 2013 and September 6, 2013, Secretary Kerry announced that Japan had qualified again, after each 180 day period, for an exception to sanctions based on additional significant reductions in the volume of its crude oil purchases from Iran. See March press statement, available at *www.state.gov/secretary/remarks/2013/03/206125.htm*; September press statement, available at *www.state.gov/secretary/remarks/2013/09/213890.htm*. In addition, EU countries (Belgium, the Czech Republic, France, Germany, Greece, Italy, Netherlands, Poland, Spain, and the United Kingdom) which had ceased purchasing Iranian oil in July 1, 2012, were granted a renewed exception to sanctions upon expiration of each 180 day period in 2013.

Another group of countries and economies was separately determined to qualify for the exception to sanctions every 180 days in 2013: China, India, Malaysia, Republic of Korea, Singapore, South Africa, Sri Lanka, Turkey, and Taiwan. See, *e.g.*, June 5, 2013 press statement, available at *www.state.gov/secretary/remarks/2013/06/210321.htm*; 79 Fed. Reg. 2746 (Jan. 15, 2014) (providing notice that the Secretary of State determined, on November 29, 2013, pursuant to Section 1245(d)(4)(D), that as of November 29, 2013, India, Malaysia, the People's Republic of China, the Republic of Korea, Singapore, South Africa, Sri Lanka, Taiwan, and Turkey each qualified for the 180-day exception).

In all, twenty countries and economies continued to significantly reduce the volume of their crude oil purchases from Iran in 2013. After the P5+1 and Iran agreed to the Joint Plan of Action in November, the United States paused for six months the efforts to further reduce Iran's crude oil sales. The JPOA does not offer relief from sanctions with respect to any increases in Iranian crude oil purchases by existing

customers or any purchases by new customers. See November 29, 2013 remarks by Secretary Kerry, "Regarding Significant Reductions of Iranian Crude Oil Purchases," available at *www.state.gov/secretary/remarks/2013/11/218131.htm*.

(7) Modification of sanctions

On April 12, 2013, the United States lifted sanctions imposed under the Iran Sanctions Act in May 2011 on Tanker Pacific Management ("TPM"), Société Anonyme Monégasque D'Administration Maritime Et Aérienne ("SAMAMA"), and Allvale Maritime Inc. ("AMI"). 78 Fed. 23,624 (Apr. 19, 2013). A State Department press statement on that date, available at *www.state.gov/r/pa/prs/ps/2013/04/207440.htm*, describes the grounds for delisting the companies and the activities that originally triggered sanctions:

> All three companies have been engaged in extensive consultations with the State Department and have provided reliable assurances that they will not knowingly engage in such sanctionable activity in the future.
>
> The three companies were sanctioned in May 2011 for their respective roles in a September 2010 transaction that provided a tanker valued at $8.65 million to the Islamic Republic of Iran Shipping Lines (IRISL), an entity that has been designated by the United States and the European Union for its role in supporting Iran's proliferation activities. Since sanctions were applied, these companies have taken significant steps to ensure that their operations are in compliance with U.S. sanctions law and policy, and have provided reliable assurances that they will not knowingly engage in such sanctionable activity in the future. As a result, the Secretary of State has decided to lift sanctions at this time.

On May 30, 2013, the Department of the Treasury, in consultation with the Department of State, issued a General License authorizing the exportation to Iran of certain services, software, and hardware incident to personal communications. As explained in a State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/05/210102.htm*:

> This license allows U.S. persons to provide the Iranian people with safer, more sophisticated personal communications equipment to communicate with each other and with the outside world. This General License aims to empower the Iranian people as their government intensifies its efforts to stifle their access to information. The General License would not authorize the export of any equipment to the Iranian government or to any individual or entity on the Specially Designated Nationals (SDN) list.

2. Syria

a. Imposition and removal of sanctions pursuant to Executive Orders

On May 16, 2013, OFAC designated Syrian Arab Airlines pursuant to both E.O. 13224 of 2001 (relating to terrorism) and E.O. 13582 of 2011 (relating to Syria), and identified 38 aircraft associated with Syrian Arab Airlines pursuant to E.O. 13224 and E.O. 13582. 78 Fed. Reg. 32,304 (May 29, 2013). Also on May 16, 2013, OFAC designated three individuals as senior officials of the government of Syria under E.O. 13573: Najm Hamad Al-Ahmad, Sa'ad Abdel-Salam Al-Nayef, and Adnan Abdo Al-Sukhni. 78 Fed. Reg. 31,631 (May 24, 2013). And on May 16, 2013, OFAC also designated one entity (Al-Dunya Television) pursuant to E.O. 13582 (78 Fed. Reg. 31,630 (May 24, 2013)) and one individual (Fahd Jassem AL-A-FREIJ) pursuant to E.O. 13582 (78 Fed. Reg. 31,631 (May 24, 2013)).

In a July 19, 2013 Federal Register notice, OFAC announced the designations of one individual (Ayman JABER) and one entity (Shabiha) pursuant to E.O. 13572 (relating to human rights abuses in Syria) and two individuals (Mohammad JABER and Ayman JABER) and two entities (Jaysh Al-Sha'bi and Shabiha) pursuant to E.O. 13582. 78 Fed. Reg. 43,277 (July 19, 2013).

OFAC removed Nabil Rafik AL-KUZBARI from the list of those designated under E.O. 13572, effective April 18, 2013. 78 Fed. Reg. 24,468 (Apr. 25, 2013). Effective May 16, 2013, OFAC removed Dawood RAJIHA from the list of those designated under E.O. 13573. 78 Fed. Reg. 31,632 (May 24, 2013).

b. Easing sanctions affecting the opposition in Syria

On June 12, 2013, the U.S. Government took actions to ease sanctions in the areas of Syria under opposition control. State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/06/210577.htm*. First, Secretary Kerry signed a limited waiver of the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 ("SAA"), consistent with Section 5(b) of the Act. The waiver authorizes the export and re-export, subject to case-by-case review, of certain U.S.-origin items to liberated areas of Syria for the benefit of the Syrian people. The waiver will authorize the Department of Commerce to process license applications for export and re-exports of commodities, software, and technology, including but not limited to those related to water supply and sanitation; agricultural production and food processing; power generation; oil and gas production; construction and engineering; transportation; and educational infrastructure. These items are intended to help address the critical needs of the Syrian people and facilitate reconstruction in liberated areas. Of note, the export of food and medicine does not currently require a license and medical devices are covered under an existing waiver.

Second, OFAC issued a Statement of Licensing Policy ("SLP") inviting U.S. persons to apply for specific licenses to engage in oil-related transactions that benefit the National Coalition of Syrian Revolutionary and Opposition Forces, or its supporters, and transactions involving Syria's agricultural and telecommunications sectors. U.S. persons wishing to engage in other economic activities in Syria, particularly in liberated areas, that are within the scope of the SLP, are also invited to apply to OFAC for a specific license.

Third, OFAC also amended Syria General License 11 to authorize the exportation of services and funds transfers in support of not-for-profit activities to preserve Syria's cultural heritage sites. These actions are described in a briefing by senior government officials, available at *www.state.gov/r/pa/prs/ps/2013/06/210588.htm*, excerpted below.

---

* * * *

…The Department of State, the Department of Treasury, and the Department of Commerce are taking three actions today to ease the economic sanctions in those opposition areas of Syria. The first action we're taking today is that Secretary of State John Kerry signed a limited waiver of the Syria Accountability Act which will authorize the export or re-export of certain U.S.-origin items to liberated areas of Syria for the benefit of the Syrian people.

Currently from the United States you can export certain food and medicine to Syria. The action we're taking today will allow U.S. companies and persons to export, subject to case by case review by the Commerce Department, a wide range of reconstruction-related equipment to opposition areas. Some examples of the kinds of equipment that could be authorized for export include a variety of agricultural equipment, equipment related for power generation, as well as water supply and sanitation type equipment to those liberated areas. This is not a general license we're taking today, but rather U.S. companies interested in engaging in these kinds of exports will be able to apply to the Department of Commerce for license to export those kinds of goods. We see this action as a way of providing some concrete material benefit to people in those liberated areas because of the needs for reconstruction in those areas.

Related to that action today, Treasury Department's Office of Foreign Assets Control, OFAC, is issuing a Statement of Licensing Policy which will allow—encourages U.S. people to apply to OFAC for specific licenses that'll enable U.S. persons to engage in certain activities in Syria. In particular, the Statement of Licensing Policy invites people to apply for licenses to engage in oil-related transactions for the benefit of Syrian opposition, including facilitating the export of oil from Syria for the benefit of the Syrian opposition, also to provide support to Syria's agricultural and telecommunications sectors. People wishing to engage in other kinds of transactions, particularly in liberated areas, within the scope of the Statement of Licensing Policy, are also invited to apply for licenses.

And finally, we're amending a general license, General License 11, that'll authorize additional NGOs to engage in activities to preserve cultural heritage sites and the cultural patrimony of Syria.

I think, broadly speaking, we see the actions we're taking today as providing an important benefit for the people of Syria and for the Syrian Opposition Coalition and the

opposition within Syria. As I said, the actions we're taking today do still require companies interested in engaging in these transactions to come in and get specific licenses. That ensures that relevant U.S. governments can review specific transactions to make sure that specifically sanctioned entities aren't able to participate in those transactions and that those transactions are actually for the benefit of the Syrian people.

* * * *

c. Sanctions under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991

See Chapter 19.F.1. for a discussion of the U.S. government determination regarding sanctions under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 as a consequence of the Government of Syria's use of chemical weapons in 2013.

3. Nonproliferation

a. Democratic People's Republic of Korea

(1) UN sanctions

The UN Security Council adopted two new resolutions on North Korea in 2013. On January 22, 2013, the Council unanimously adopted Resolution 2087, condemning North Korea's December 12, 2012 rocket launch, which used ballistic missile technology and violated Resolutions 1718 and 1874. Ambassador Rice's remarks following adoption of Resolution 2087 are excerpted below and available at *http://usun.state.gov/briefing/statements/203135.htm*.

_____

* * * *

The resolution adopted today condemns the launch and imposes important new sanctions on North Korea, on its companies and government agencies, including North Korea's space agency, which was responsible for the launch, a bank, and North Korean individuals. It also updates current lists of nuclear and ballistic missile technology banned for transfer to and from the DPRK, helping ensure that North Korea is unable to procure or proliferate the most sensitive technology. It includes several new provisions targeting North Korea's illicit procurement efforts, in particular its smuggling of sensitive items that could contribute to prohibited programs, and it has new financial provisions that help to increase vigilance and monitoring over North Korean financial activities.

This resolution demonstrates to North Korea that there are unanimous and significant consequences for its flagrant violation of its obligations under previous resolutions. More

importantly, the provisions of this resolution—both new sanctions and the tightening and expanding of existing measures—concretely help to impede the growth of North Korea's WMD program and reduce the threat of proliferation by targeting entities and individuals directly involved in these programs.

Today's resolution also makes clear that if North Korea chooses again to defy the international community, such as by conducting another launch or a nuclear test, then the Council will take significant action.

We believe that today's resolution is a firm, united, and appropriate response to North Korea's reckless act and that strict enforcement of sanctions is essential to address the threat posed by North Korea's nuclear and missile programs. We remain committed, nonetheless, to resolving our concerns about these programs through authentic and credible negotiations to the greatest extent possible.

As the President noted in his speech last November in Rangoon, the United States is willing to extend its hand should the leadership in Pyongyang opt for the path of peace and progress by choosing to let go of its nuclear weapons, but today's resolution makes clear that there will be an increasingly steep price to pay if North Korea again chooses confrontation with this Council and the international community.

* * * *

The US mission to the UN released a fact sheet on January 23, 3013 on Resolution 2087, available at *http://usun.state.gov/briefing/statements/203171.htm*, and excerpted below.

* * * *

In response to North Korea's December 12 launch, the UN Security Council adopted Resolution 2087 to condemn the launch and impose new sanctions, including asset freezes and travel bans on critical North Korean companies and officials. Additionally, Resolution 2087 strengthens and expands the scope of existing sanctions, making them more effective and far-reaching.

By limiting North Korea's ability to procure funds, send agents abroad, transfer dual-use items or smuggle other goods, these provisions will make it harder for North Korea to proceed with its nuclear and missile programs. Combined with the measures in Resolutions 1718 and 1874, the Security Council has further strengthened the robust and stringent sanctions regime imposed on Pyongyang.

Resolution 2087:

- Condemns North Korea's launch as a violation of previous Security Council resolutions and reiterates the Security Council's previous demands that North Korea not conduct any further launch and that it comply fully with its obligations with respect to its nuclear and ballistic missile programs.
- Imposes new sanctions on several North Korean companies and government agencies, including North Korea's space agency responsible for the launch, as well as on the Bank of East Land and several individuals. These six entities and four individuals will have their assets frozen and be prohibited from engaging in financial transactions. The individuals—including banking agents and space

agency officials—will be subject to a travel ban, limiting their ability to procure technology and know-how or strike commercial deals abroad.

- Updates current lists of nuclear and ballistic missile technology banned for transfer to and from the DPRK, helping ensure that North Korea is unable to procure or proliferate the most sensitive technology.
- Addresses North Korea's illicit financial activities, including through enhanced vigilance and monitoring of a broad range of financial activities and actors, as well as by spotlighting the problem of North Korea's smuggling of bulk cash.
- Directs the Security Council's North Korea Sanctions Committee to issue public guidance for cargo interdiction for situations when suspicious vessels refuse to be inspected.
- Provides additional guidance to states on how to seize and dispose of illicit items discovered during cargo inspections.
- Clarifies existing sanctions to ensure states prohibit the transfer of any item if a UN-designated North Korean individual or entity is the originator, intended recipient or facilitator.
- Underscores the importance of states' taking action with respect to preventing the transfer of dual-use goods that could contribute to North Korea's violations.
- Calls on states to limit the travel of certain North Korea agents, many of whom are engaged in illegal activities abroad.
- Expands sanctions designation criteria to allow the Security Council's North Korea Sanctions Committee to impose sanctions on sanctions violators.
- Includes new language to improve sanctions implementation, including a force majeure clause to facilitate lawful interdiction of cargo by states; urges states to report on implementation; encourages international agencies to make sure their activities do not violate sanctions.

This resolution reaffirms the Council's desire for a peaceful, diplomatic and political solution to the situation in North Korea and reaffirms its support to the Six Party Talks. It also expresses the Council's readiness to strengthen or modify the sanctions imposed on North Korea and, in this regard, expresses the Council's determination to take "significant action" in the event of a further nuclear test or launch.

* * * *

On March 7, 2013, the UN Security Council unanimously adopted a new resolution to impose additional sanctions on North Korea in response to that country's February 12 announcement of a nuclear test. A March 7, 2013 fact sheet on Resolution 2094 on North Korea, released by the U.S. Mission to the UN, is excerpted below and available at *http://usun.state.gov/briefing/statements/205698.htm*.

* * * *

The new sanctions contained in this resolution will significantly impede North Korea's ability to develop further its illicit nuclear and ballistic missile programs, as well as its proliferation

activities. These strong sanctions—in addition to the commitment to take additional measures in the event of a further launch or nuclear test—demonstrate to North Korea that there are real costs for its continued violations of its international obligations.

2094 Highlights

• Condemns in the strongest terms North Korea's ongoing nuclear activities, including its uranium enrichment program, and reaffirms the obligation on North Korea to abandon all existing nuclear, other weapons of mass destruction and ballistic missile programs.

• Imposes new financial sanctions to block financial transactions in support of illicit DPRK activity, crack down on bulk cash transfers, and further restrict ties to North Korea's financial sector, if there is a link to illicit DPRK activity;

• Strengthens states' authority to inspect suspicious cargo and deny port and over flight access to DPRK-affiliated shipments where warranted;

• Enables stronger enforcement of existing sanctions by UN Member States.

• Sanctions new individuals and entities;

• Adds new items to the Security Council sanctions list.

Financial Sanctions

• Requires states to freeze or block any financial transaction or financial service that could contribute to North Korea's illicit programs or the violation of Security Council resolutions.

• Calls on states to prohibit the opening of North Korean bank branches on their territories if there is a link to North Korea's illicit programs or the violation of Security Council resolutions.

• Calls on states to prohibit their financial institutions from opening offices in North Korea if there is a link to North Korea's illicit programs or the violation of Security Council resolutions.

• Determines that financial sanctions apply to bulk cash transfers, including through cash couriers (a common way that North Korea has moved illicit funds).

• Requires states not to provide public financial support for trade with North Korea (e.g., export credits or insurance) if there is a link to North Korea's illicit programs or the violation of Security Council resolutions.

• Urges states to implement guidance from the Financial Action Task Force (a multilateral organization) involving proliferation finance.

Interdiction

• Requires states to inspect cargo on their territories, if the state has reasonable grounds to believe the cargo contains prohibited items (e.g., conventional arms, nuclear- or ballistic missile-related items, etc.).

• Requires states to deny port access to any North Korean vessel that refuses to be inspected or any other vessel that has refused an inspection authorized by that vessel's flag state.

• Calls on states to deny permission to any aircraft to take off, land in or overfly their territory if the aircraft is suspected of transporting prohibited items.

• Prompts states to provide information to the Security Council's North Korea Sanctions Committee regarding activity by North Korean aircraft or vessels to evade sanctions (e.g., renaming, re-registering).

Other Measures

• Determines that existing sanctions prohibit brokering sales of prohibited items (e.g., conventional arms, nuclear- and ballistic missile-related items).

• Expands the scope of the existing asset freeze to cover the subsidiaries and front companies of entities that have already been designated for targeted sanctions.

• Requires states to prohibit the travel of any individual determined to be working for a designated individual or entity or who is violating existing sanctions. If the individual is North Korean, then States are required to expel him or her back to North Korea.

• Calls on states to exercise enhanced vigilance over North Korean diplomats to prevent them from contributing to North Korea's nuclear or ballistic missile-programs, engaging in other activities prohibited by Security Council resolutions or evading sanctions.

• Directs the Sanctions Committee to update annually the lists of nuclear and ballistic missile technology that is prohibited for transfer to or from North Korea.

• Calls on and authorizes states to prevent the transfer to or from North Korea of any item that could contribute to North Korea's nuclear or ballistic missile programs or any other violation of Security Council resolutions.

• Specifies that prohibited luxury goods are banned for transfer to North Korea, including certain kinds of jewelry and precious stones, yachts, luxury automobiles and racing cars.

Sanctions Implementation

• Calls on states to report to the Security Council within ninety days on steps taken to implement these sanctions and to supply information regarding sanctions violations.

• Directs the Sanctions Committee to respond to sanctions violations by imposing targeted sanctions on individuals and entities responsible for such violations.

• Renews the mandate of the UN's Panel of Experts (a sanctions monitoring team) and expands the size of the group from seven to eight members.

• Applies force majeure to enable states to enforce the sanctions without fear of being sued.

* * * *

On March 7, 2013, Ambassador Rice delivered remarks to the Security Council on the adoption of Resolution 2094. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/205792.htm*.

* * * *

… Resolution 2094 imposes tough new financial sanctions. When North Korea tries to move money to pay for its nuclear and ballistic missile programs, countries must now block those transfers, even if the money is being carried in suitcases full of bulk cash. Likewise North Korean banks will find it much harder to launder money for the DPRK nuclear program. Today's resolution also imposes new travel restrictions. If, for example, a North Korean agent is caught making arms deals or selling nuclear technology, countries will be required to expel that agent. Countries must also now prevent the travel of people working for designated companies involved in the nuclear and missile programs.

States will now have new authorities to inspect cargo and stop North Korean arms smuggling and proliferation. If a country has cargo on its territory that might be carrying [prohibited] items, like conventional arms or nuclear or ballistic materials, this resolution requires that the cargo be inspected. It will also make it harder for North Korean vessels to

offload such prohibited cargo if a ship refuses inspection on the high seas, thus forcing it to return to its port of origin. And airplanes carrying smuggled items can find themselves grounded.

This resolution will also counter North Korean efforts to abuse diplomatic privileges to advance its nuclear and ballistic missile activities. It will now be much harder for such diplomats to procure technology or divert funds to the nuclear program without being detected and expelled. Resolution 2094 further bans the transfer to and from North Korea of specific ballistic missile, nuclear, and chemical weapons-related technology. It lists new prohibited items and calls on states to block any item at all that could contribute to these activities. It names additional North Koreans and North Korean companies whose assets will be frozen, and those individuals will also be subject to a travel ban.

This resolution lists a number of luxury goods that cannot be sold to North Korea. As a result, North Korea's ruling elite—who have been living large while impoverishing their people—will pay a direct price for this nuclear test. A detailed fact sheet [outlining] all key measures in UN resolution 2094 can be found on the U.S. Mission's website: *http://usun.state.gov*.

Taken together, these sanctions will bite and bite hard. They increase North Korea's isolation and raise the cost to North Korea's leaders of defying the international community. The entire world stands united in our commitment to the denuclearization of the Korean Peninsula and in our demand that North Korea comply with its international obligations. If it does not, then the Security Council committed today, in this resolution, to take further significant measures if there is another nuclear test or missile launch. We regret that North Korea has again chosen the path of provocation instead of the path of peace. Far from achieving its stated goal of becoming a strong and prosperous nation, North Korea has instead again opted to further impoverish its people and increase its isolation. We hope instead that North Korea will heed President Obama's call to choose the path of peace and come into compliance with its international obligations.

* * * *

On October 29, 2013, the United States submitted to the UN Security Council Committee established pursuant to resolution 1718 its national implementation report regarding resolution 2094. U.N. Doc. S/AC.49/2013/24. The U.S. national implementation report is excerpted below and available at *www.un.org/ga/search/view_doc.asp?symbol=S/AC.49/2013/24*.

* * * *

Following the adoption of resolutions 1874 (2009) and 2094 (2013), the United States, in March 2013, designated, pursuant to Executive Order 13382, the three individuals listed in annex I to resolution 2094 (2013): Mun Cho'ng-Ch'o'l, a Tanchon Commercial Bank representative who served in Beijing; and Yo'n Cho'ng-Nam and Ko Ch'o'l-Chae, both based in Dalian, China, and representatives of the Korea Mining Development Trading Corporation. The Second Academy of Natural Sciences and Korea Complex Equipment Import Corporation, listed in annex II to the resolution, were previously designated pursuant to Executive Order 13382, in August 2010 and October 2005, respectively.

In order to implement the requirement to freeze the assets of any individuals or entities acting on behalf or at the direction of any designated entity or individual imposed by paragraph 8, the United States has taken action against a number of additional entities and individuals. For example, in March 2013, pursuant to Executive Order 13382, the United States designated four senior members of the North Korean Government: Paek Se-Bong, Chairman of the Second Economic Committee; Pak To-Chun, Secretary of the United States and European Union designated Munitions Industry Department; Chu Kyu-Chang, Director of the Munitions Industry Department; and O Kuk-Ryol, Vice-Chairman of the North Korean National Defence Commission. The Foreign Trade Bank acts as North Korea's primary foreign exchange bank and has provided key financial support to the Korea Kwangson Banking Corporation. The Korea Kwangson Banking Corporation was designated under Executive Order 13382 in August 2009 for providing financial services in support of the entities Tanchon Commercial Bank and the Korea Hyoksin Trading Corporation, both of which were designated by the Committee established pursuant to resolution 1718 (2006). The Foreign Trade Bank has also facilitated millions of dollars in transactions that have benefited the Korea Mining Development Trading Corporation—North Korea's premier arms dealer—and its financial arm, Tanchon Commercial Bank. North Korea's Second Economic Committee oversees the production of North Korea's ballistic missiles and directs the activities of the Korea Mining Development Trading Corporation. In April 2009, Tanchon Commercial Bank, the Korea Mining Development Trading Corporation, and the Korea Hyoksin Trading Corporation were designated by the Security Council Committee established pursuant to resolution 1718 (2006).

Additionally, in June 2013, the United States designated Daedong Credit Bank (DCB), together with DCB Finance Limited—a DCB front company—and DCB representative Kim Chol Sam pursuant to Executive Order 13382. The financial operations carried out by DCB, DCB Finance Limited and Kim Chol Sam are responsible for managing millions of dollars of transactions in support of the North Korean regime's destabilizing activities.

Also, designated under Executive Order 13882 was Son Mun San, the External Affairs Bureau Chief of North Korea's General Bureau of Atomic Energy, for his work directing North Korea's nuclear-related research efforts. The General Bureau of Atomic Energy, which was previously designated by the United States and the United Nations, is responsible for North Korea's nuclear programme.

* * * *

The United States Department of the Treasury, through its Financial Crimes Enforcement Network, issued an advisory to United States financial institutions in April 2013 regarding North Korean illicit financial activities. The advisory (FIN-2013-A004) provides guidance to United States financial institutions on implementing the financial provisions in resolution 1718 (2006), resolution 1874 (2009), resolution 2087 (2013) and resolution 2094 (2013). It sets forth United States concerns regarding the use of deceptive financial practices by North Korea and North Korean entities, as well as those acting for or on their behalf, to hide illicit conduct, including proliferation activities. It advises United States financial institutions to take commensurate risk mitigation measures.

The advisory incorporates the recent guidance issued by the Financial Action Task Force on the implementation of financial provisions in WMD-related Security Council resolutions and includes specific risk indicators to assist financial institutions in identifying high-risk customers and transactions associated with illicit activity of the Democratic People's Republic of Korea.

The advisory encourages financial institutions to apply corresponding enhanced due diligence with high-risk customers to ensure that financial institutions do not facilitate transactions related to prohibited activities. Possible due diligence measures include obtaining additional information regarding the customer and transaction, such as the nature, end-use or end-user of the item, as well as export control information, such as copies of export control or other licences issued by the national export control authorities, and end-user certification.

The advisory also notes that there is an increased likelihood that correspondent accounts held for North Korean financial institutions, as well as their foreign branches and subsidiaries, may be used to hide illicit conduct and related financial proceeds in an attempt to circumvent existing sanctions. A list of some North Korean banks is included in the advisory for ease of reference. Finally, the advisory also highlights the risk that North Korea may rely on cash transactions to evade the provisions of Security Council resolutions, and urges financial institutions to remain vigilant of large cash deposits, particularly when associated with other risk factors related to North Korea and prohibited activities.

* * * *

In July 2013, a North Korea-flagged ship named the Chong Chon Gang was detained and inspected by authorities in Panama based on suspicion it was transporting illicit cargo. On July 16, 2013, a spokesperson for the State Department responded to questions about the incident. Excerpts follow from the July 16, 2013 daily press briefing, available at *www.state.gov/r/pa/prs/dpb/2013/07/212040.htm*.

* * * *

[T]he United States strongly supports Panama's sovereign decision to inspect the D.P.R.K.-flagged vessel. The U.S. commends the actions that the Government of Panama has taken in this case. Panama, as you know, is a close partner of the United States. We stand ready to cooperate with Panama should they request our assistance. …

* * * *

… this is a vessel, as we understand, that the Panamanians inspected because it might be smuggling narcotics, and they utilized their resident domestic authorities to make that inspection. And this ship—this is called the MV Chong Chon Gang—has a history of involvement in drug smuggling. Public reports from 2010 and also a UN panel of experts report from 2012 cite this history. So this vessel has a well-known history in this regard.

* * * *

…In terms of UN Security Council resolutions, if indeed there were a shipment of arms on board of this vessel, any shipment of arms or related materiel would violate UN Security Council Resolutions 1718, 1874, and 2094.

* * * *

Well, again, we've had broad cooperation with Panama. Just to remind people that they're one of 102 countries that are part of our Proliferation Security Initiative. So they've made a public commitment to stop transfers of weapons of mass destruction, related material, and their delivery systems to and from state and non-state actors of proliferation concern.

* * * *

(2) U.S. sanctions

Many of the sanctions imposed by the United States in 2013 pursuant to E.O. 13382 are directed at individuals and entities involved in North Korea's weapons of mass destruction ("WMD") and ballistic missile programs and serve to implement U.S. obligations under UN Security Council resolutions. See Section A.3.c., *infra*, for designations made in 2013 pursuant to E.O. 13382.

Within days of the adoption of Resolution 2087, the United States announced that it was implementing the resolution via new designations by the State Department and OFAC under E.O. 13382 of entities and individuals tied to North Korea's proliferation activities. A January 24, 2013 media note, available at *www.state.gov/r/pa/prs/ps/2013/01/203236.htm*, identifies the Korean Committee for Space Technology ("KCST"), KCST senior official Paek Chang-Ho, and General Manager of the Sohae Satellite Launching Station, Chang Myong-Chin, as the State designees. Information about OFAC's designations is available at *www.treasury.gov/press-center/press-releases/Pages/default.aspx*.

Designations made by the Department of State and OFAC on March 7 and 11, 2013 relate to North Korea's WMD and missile programs and implement UN Security Council Resolution 2094. See the March 11, 2013 State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/03/205953.htm*. A March 8, 2013 State Department fact sheet, available at *www.state.gov/t/isn/205879.htm*, specifies that sanctions determinations made on March 7, 2013 by OFAC would implement the asset freeze provisions of resolution 2094 by designating Mun Cho'ng-Ch'o'l, a Tanchon Commercial Bank ("TCB") representative who served in Beijing, China; and Yo'n Cho'ng-Nam and Ko Ch'o'l-Chae, both based in Dalian, China, and representatives of Korea Mining Development Corporation ("KOMID"), pursuant to Executive Order (E.O.) 13382. The fact sheet further identifies the Second Academy of Natural Sciences and Korea Complex Equipment Import Corporation, also listed in Resolution 2094, as entities previously designated pursuant to E.O. 13382 in August 2010 and October 2005 respectively.

b. Iran, North Korea, and Syria Nonproliferation Act

On December 20, 2012, the Department of State made a determination to impose sanctions under the Iran, North Korea, and Syria Nonproliferation Act, Pub. L. No. 106-

178 (2000), as amended ("INKSNA"), on two entities in Belarus, four in China, two in Iran, two in Sudan, and one in each of Syria and Venezuela as well as individuals in China and Iran. The sanctions took effect February 5, 2013. 78 Fed. Reg. 9769 (Feb. 11, 2013). A February 11, 2013 media note, available at *www.state.gov/r/pa/prs/ps/2013/02/204013.htm*, explains:

> INKSNA sanctions were imposed on these entities and individuals because there was credible information indicating they had transferred to, or acquired from, Iran, North Korea, or Syria, equipment and technology listed on multilateral export control lists (Australia Group, Chemical Weapons Convention, Missile Technology Control Regime, Nuclear Suppliers Group, Wassenaar Arrangement), or items that are not listed, but nevertheless, could materially contribute to a weapons of mass destruction (WMD) or cruise or ballistic missile program.

The Federal Register notice sets forth the sanctions, which were imposed for a period of two years:

> 1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of any goods, technology, or services from these foreign persons, except to the extent that the Secretary of State otherwise may have determined;
>
> 2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government, except to the extent that the Secretary of State otherwise may have determined;
>
> 3. No United States Government sales to the foreign persons of any item on the United States Munitions List are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and
>
> 4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

c. Executive Order 13382

On January 24, 2013, OFAC designated one entity and two individuals pursuant to E.O. 13382 "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters": Leader (Hong Kong) International Trading Ltd., Kwang-Il KIM, and Kyong-Su RA. 78 Fed. Reg. 8221 (Feb. 5, 2013). On the same date, January 24, 2013, the Department of State determined that the Korean Committee for Space Technology, as

well as two individuals, Paek Chang-Ho and Chang Myong-Chin, had engaged, or attempted to engage, in activities triggering the imposition of sanctions pursuant to E.O. 13382. 78 Fed. Reg. 13,139 (Feb. 26, 2013).

On March 7, 2013, OFAC designated three individuals pursuant to E.O. 13382: Ch'o'l-Chae KO, Cho'ng-Nam YO'N, and Cho'ng-Ch'o'l MUN, all North Korean nationals. 78 Fed. Reg. 17,996 (Mar. 25, 2013). On March 11, 2013, OFAC designated one entity and one individual: Foreign Trade Bank of the Democratic People's Republic of Korea and Se-Bong PAEK. 78 Fed. Reg. 17,997 (Mar. 25, 2013).

Also on March 11, 2013, the State Department designated three individuals. 78 Fed. Reg. 17,992 (Mar. 25, 2013). These individuals' roles in North Korea's WMD program are described in a March 11, 2013 media note, available at *www.state.gov/r/pa/prs/ps/2013/03/205953.htm*:

> Pak To-Chun is the head of U.S.- and European Union-designated Munitions Industry Department, which manages North Korea's weapons production and arms exports; he succeeded EU-designated Jon Pyong-Ho. Pak is a full member of the Korean Worker Party's (KWP) Political Bureau, its highest decision-making body, as well the National Defense Commission, which, among other things, oversees several elements of North Korea's security apparatus.
>
> Chu Kyu-Chang is a KWP Political Bureau (alternate) member and directs the Munitions Industry Department. He formerly headed the U.S.-designated Second Academy of Natural Sciences (SANS) and the Second Economic Committee (SEC). SANS is a national-level organization responsible for research and development of North Korea's advanced weapons systems, including missiles and probably nuclear weapons. SEC is responsible for overseeing the production of North Korea's ballistic missiles and directs activities of the United Nations-, European Union-, and U.S.-designated Korea Mining Development Trading Corporation (KOMID).
>
> O Kuk-Ryol is a Vice Chairman of the North Korean National Defense Commission. He previously headed the KWP Operations Department, where he ordered the establishment of a nuclear research and development organization directly under his control.

On April 11, 2013, OFAC designated six entities and one individual pursuant to Executive Order 13382: Babak Morteza ZANJANI; First Islamic Investment Bank Ltd.; International Safe Oil; Kont Investment Bank; Kont Kosmetik; Naftiran Intertrade Co. (NICO) Limited; and Sorinet Commercial Trust (SCT) Bankers. 78 Fed. Reg. 25,532 (May 1, 2013).

On May 9, 2013, OFAC designated one individual and five entities pursuant to Executive Order 13382: Parviz KHAKI; Taghtiran Kashan Company; Aluminat; Par Amayesh Sanaat Kish; Pishro Systems Research Company; and Iranian-Venezuelan Bi-National Bank. 78 Fed. Reg. 28,702 (May 15, 2013). A May 9, 2013 State Department press statement, available at *www.state.gov/r/pa/prs/ps/2013/03/205953.htm*,

provides some background on each of these persons, who were sanctioned "because they provide the Iranian government goods, technology, and services that increase Iran's ability to enrich uranium and/or construct a heavy water moderated research reactor, both of which are activities prohibited by UN Security Council Resolutions."

On May 10, 2013, OFAC designated one individual and one entity pursuant to Executive Order 13382: Wen-Fu CHANG; and Trans Multi Mechanics Co. Ltd. 78 Fed. Reg. 32,303 (May 29, 2013). On May 15, 2013, OFAC designated two additional entities: Al Fida International General Trading and Al Hilal Exchange. 78 Fed. Reg. 30,396 (May 22, 2013). On May 23, 2013, OFAC designated six individuals and eight entities pursuant to E.O. 13382 based on their activities associated with Iran's nuclear or weapons programs: Reza MOZAFFARINIA; Ali MAHDAVI; Farhad Ali PARVARESH; Hossein Nosratollah VAZIRI; Bahareh Mirza Hossein YAZDI; Farhad BUJAR; Aban Air; DFS Worldwide; Energy Global International FZE; Everex; Global Sea Line Co. Ltd.; Petro Green; Andisheh Zolal; and Zolal Iran Company. 78 Fed. Reg. 33,471 (June 4, 2013). On May 31, 2013, OFAC designated one entity, Pryvatne Aktsionerne Tovarystvo Aviakompaniya, and six of its aircraft, pursuant to E.O. 13382. 78 Fed. Reg. 34,707 (June 10, 2013).

On June 27, 2013, OFAC designated two entities and two individuals pursuant to E.O. 13382: Daedong Credit Bank, DCB Finance Ltd., Chol Sam KIM, and Mun San SON, all of North Korea. 78 Fed. Reg. 41,995 (July 12, 2013).

The State Department designated four Iranian entities and one Iranian individual on May 7, 2013 pursuant to E.O. 13382. 78 Fed. Reg. 42,584 (July 16, 2013). The Department determined that Aluminat, Pars Amayesh Sanaat Kish, Parviz Khaki, Pishro Systems Research Company, and Taghtiran Kashan Company "have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern." *Id*.

The Department of State imposed sanctions pursuant to E.O. 13382 on December 12, 2013 on five Iranian entities engaged in providing the Iranian government goods, technology, and services that materially contribute to or pose a risk of materially contributing to Iran's ability to enrich uranium, construct a heavy water-moderated research reactor, and develop its ballistic missile capabilities, all of which are prohibited by UN Security Council resolutions. A State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/218637.htm*, provides background on the designated entities. Eyvaz Technic Manufacturing Company ("Eyvaz") is involved in the procurement of sensitive items for use in Iran's centrifuge program. The Exploration and Nuclear Raw Materials Production Company ("EMKA") is a subsidiary organization of the Atomic Energy Organization of Iran ("AEOI"), which oversees uranium discovery, mining, and mineral processing operations in Iran. Maro Sanat Company ("Maro Sanat") has worked for Iran's Nuclear Reactors Fuel Company ("SUREH") to acquire necessary items

for the organization's facilities. Navid Composite Material Company ("Navid Composite") is an Iran-based subsidiary of U.S.- and UN-designated Sanam Industrial Group, which was designated for its involvement in Iran's ballistic missile program. Negin Parto Khavar ("Negin Parto") is a key participant in a nuclear procurement network that brokers items for Iran's proscribed nuclear program, including for UN-designated entities

Also on December 12, 2013, OFAC designated several proliferators headed by Iran's Ministry of Defense for Armed Forces Logistics ("MODAFL"), which oversees Iran's ballistic missile program: Qods Aviation Industries; Iran Aviation Industries Organization; Reza Amidi, Fan Pardazan, and Ertebat Gostar Novin. OFAC also designated officials (Iradj Mohammadi Kahvarin and Mahmoud Mohammadi Dayeni) from and aliases (Kia Nirou, Block Nirou Sun Co., BNSA Co., and Neku Nirou Tavan Co.) for the Iranian nuclear procurement firm Neka Novin. 78 Fed. Reg. 77,203 (Dec. 20, 2013).

d. Executive Order 12938

Effective February 11, 2013, the U.S. Department of State imposed sanctions on Chinese and Iranian foreign persons based on a determination on December 21, 2012 that the Chinese and Iranian foreign persons had engaged in proliferation activities that warrant the imposition of measures pursuant to sections 4(b), 4(c), and 4(d) of Executive Order 12938. 78 Fed. Reg. 9769 (Feb. 11, 2013). The sanctioned persons are: Dalian Sunny Industries (China); Li Fangwei (China) [also known as: Karl Lee]; Ministry of Defense and Armed Forces Logistics (MODAFL) (Iran); Shahid Bakeri Industrial Group (SBIG) (Iran); and Shahid Sattari Ground Equipment Industries (Iran). *Id*. The measures imposed include a procurement ban, an assistance ban, an import ban, and suspension from participating in any export or licensed activities pursuant to the Arms Export Control Act. The measures are imposed for a period of two years.

e. Chemical and biological weapons proliferation sanctions

On June 21, 2013, the State Department determined that lifting sanctions on five Chinese entities, imposed on July 9, 2002 pursuant to Section 81(e) of the Arms Export Control Act (22 U.S.C. 2798(d)) and Section 11C(e) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2410c(d)), is important to the national security interests of the United States. 78 Fed. Reg. 38,782 (June 27, 2013). The five are: China Machinery and Equipment Import Export Corporation, China National Machinery and Equipment Import Export Corporation, CMEC Machinery and Electric Equipment Import and Export Company Ltd., CMEC Machinery and Electrical Import Export Company, Ltd., and China Machinery and Electric Equipment Import and Export Company.

f. Missile sanctions

On February 5, 2013, the State Department imposed sanctions on two Chinese persons for engaging in missile proliferation activities. 78 Fed. Reg. 9768 (Feb. 11, 2013). The sanctions were imposed pursuant to the Arms Export Control Act, as amended, and the Export Administration Act of 1979, as amended (as carried out under Executive Order 13222 of August 17, 2001). The persons sanctioned are Dalian Sunny Industries and Li Fangwei [also known as Karl Lee]. For two years, export licenses for export to these persons of MTCR annex items shall be denied and U.S. Government contracts relating to MTCR annex items shall be denied.

4. Terrorism

a. Security Council actions

On December 17, 2013, the Security Council adopted resolution 2129, extending the mandate of the Counter-Terrorism Committee Executive Directorate ("CTED") until December 31, 2017, under the guidance of the Counter-Terrorism Committee ("CTC"). U.N. Doc. S/RES/2129. The CTC was established pursuant to resolution 1373 (2001) in the wake of the September 11 attacks. CTED was established pursuant to resolution 1535 (2004) to advise the CTC and facilitate technical assistance for national efforts to implement resolution 1371.

b. U.S. targeted financial sanctions implementing Security Council resolutions

(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 Resolutions 2083 (2012), 1988 (2011), 1989 (2011), and 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 2013, the Department of State announced the Secretary of State's designation of nine entities and fifteen individuals (including their known aliases) pursuant to E.O. 13224.

In a Federal Register notice dated January 29, 2013, the Department announced the designation (made on December 21, 2012) of Ahmed Abdullah Saleh al-Khazmari al-Zahrani. 78 Fed. Reg. 6172 (Jan. 29, 2013). The State Department issued a media note, available at *www.state.gov/r/pa/prs/ps/2013/01/203238.htm*, identifying al-Zahrani as a senior member of al-Qa'ida, a Saudi citizen, and wanted by the Kingdom of Saudi Arabia for participation in terrorist activities. On January 8, 2013, the Department designated Michel Samaha. 78 Fed. Reg. 3496 (Jan. 16, 2013).

On February 26, 2013, the Department announced the designation of the Commander Nazir Group ("CNG") and its sub-commander Malang Wazir in a media note, available at *www.state.gov/r/pa/prs/ps/2013/02/205195.htm*. 78 Fed. Reg. 13,931 (Mar. 1, 2013). The media note provides this information about CNG and Malang:

> Since 2006, CNG has run training camps, dispatched suicide bombers, provided safe haven for al-Qa'ida fighters, and conducted cross-border operations in Afghanistan against the United States and its allies. In addition to its attacks against international forces in Afghanistan, CNG is also responsible for assassinations and intimidation operations against civilians in Afghanistan and Pakistan.
>
> CNG leader Commander Nazir died in early-January 2013, but the group has since chosen a new leader, and in a statement vowed to continue the group's activities, including supporting al-Qa'ida and conducting attacks in Afghanistan. In the same statement, Malang was named as a part of CNG's top leadership. Acting as a sub-commander for CNG, Malang has overseen training centers and has been known to send fighters to Afghanistan to support the Taliban.
>
> Although CNG and Malang have been behind numerous attacks against international forces in Afghanistan, the group has also been known to attack targets in Pakistan. For example, Malang claimed CNG responsibility for a March 2008 vehicle-borne improvised explosive device attack in front of an army brigade headquarters in Zari Noor, South Waziristan, Pakistan, which killed five Pakistani soldiers and injured 11 more. In May 2011, CNG broke a ceasefire agreement and attacked a Pakistani army camp in Wana, Pakistan, with missiles

and rockets.

Also on February 26, the Department announced that it had designated Iyad ag Ghali of Mali. See media note, available at *www.state.gov/r/pa/prs/ps/2013/02/205196.htm*. 78 Fed. Reg. 13,931 (Mar. 1, 2013). The media note provides the following information about Ghali:

> Ghali is also listed by the United Nations 1267/1989 al-Qa'ida Sanctions Committee. The UN listing requires all member states to implement an assets freeze, a travel ban, and an arms embargo against Ghali. The UN action demonstrates international resolve in eliminating Ghali's violent activities in Mali and the surrounding region.
>
> Iyad ag Ghali is the leader of Ansar al-Dine (AAD), an organization operating in Mali which cooperates closely with al-Qa'ida in the Islamic Maghreb (AQIM), a designated Foreign Terrorist Organization. Ghali created AAD in late 2011 because his effort to take over a secular Tuareg organization failed due to his extremist views.

On March 11, 2013, the Department designated Ansar al-Dine pursuant to E.O. 13224. 78 Fed. Reg. 17,745 (Mar. 22, 2013). A March 21013 State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/03/206493.htm*, includes the following further information about Ansar al-Dine:

> AAD has also been listed by the United Nations 1267/1989 al-Qa'ida Sanctions Committee. …
>
> Ansar al-Dine is an organization operating in Mali which cooperates closely with al-Qa'ida in the Islamic Maghreb (AQIM), a designated Foreign Terrorist Organization. AAD was created in late 2011 after AAD's leader, Iyad ag Ghali, failed in an attempt to take over a secular Tuareg organization due to his extremist views. Ghali was designated by the Department of State under E.O. 13224 on February 26, 2013.
>
> AAD has received support from AQIM since its inception in late 2011, and continues to maintain close ties to the group. AAD has received backing from AQIM in its fight against Malian and French forces, most notably in the capture of the Malian towns of Agulhok, Tessalit, Kidal, Gao, and Timbuktu, between January and April 2012. In AAD's March 2012 attack against the town of Aguelhok, the group executed 82 Malian soldiers and kidnapped 30 more. Before the French intervention in January 2013, Malian citizens in towns under AAD's control who did not comply with AAD's laws faced harassment, torture, or execution.

On April 16, 2013, the Department designated Abu Muhammad al-Jawlani. 78 Fed. Reg. 29,200 (May 17, 2013). On May 16, 2013, the Department announced the

designation of al-Jawlani, leader of the al-Nusrah Front, in a media note available at *www.state.gov/r/pa/prs/ps/2013/05/209499.htm*. The State Department had amended the designations of al-Qa'ida in Iraq ("AQI") under Executive Order 13224 in 2012 to include al-Nusrah Front as an alias. See *Digest 2012* at 526-27.

On June 20, 2013, the Department designated Abd Al-Ra'Ouf Abu Zaid Mohamed Hamza. 78 Fed. Reg. 40,545 (July 5, 2013). A July 3, 2013 State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/07/211513.htm*, explains that Hamza, with three co-conspirators, had participated in an armed attack in Khartoum, Sudan in 2008 resulting resulted in the deaths of a U.S. diplomat and a locally employed U.S. Embassy staff member.

On July 18, 2013, the Department designated Bahawal Khan. 78 Fed. Reg. 48,539 (Aug. 8, 2013). On August 26, 2013, the Department announced the designation of Bahawal Khan in a media note available at *www.state.gov/r/pa/prs/ps/2013/08/212730.htm*. As explained in the media note, Khan was appointed as new leader of the Commander Nazir Group in January 2013. As discussed, *supra*, the Department designated the Commander Nazir Group under E.O. 13224 in February 2013.

On July 24, 2013, the Department announced the designation of Bulut Yayla in a media note available at *www.state.gov/r/pa/prs/ps/2013/07/212372.htm*. Bulut Yayla is a trained operative of the Revolutionary People's Liberation Party/Front ("DHKP/C"), a Marxist terrorist organization which seeks the overthrow of the Turkish government and, among other terrorist acts, used a suicide bomber to attack U.S. Embassy Ankara on February 1, 2013. Notice of Yayla's designation appeared in the Federal Register on July 25, 2013. 78 Fed. Reg. 45,011 (July 25, 2013).

On August 2, 2013, the Department designated Mohamed Lahbous under E.O. 13224. 78 Fed. Reg. 52,230 (Aug. 22, 2013). The Department designated the Muhammad Jamal Network (a.k.a. al-Qa'ida in Egypt) as well as Muhammad Jamal individually under E.O. 13224 on August 28, 2013. 78 Fed. Reg. 62,002 (Oct. 10, 2013). An October 7, 2013 media note about the designations, available at *www.state.gov/r/pa/prs/ps/2013/10/215171.htm*, describes some of Jamal and his group's actions that form the basis of the designations:

> Muhammad Jamal journeyed to Afghanistan in the late 1980s where he trained with al-Qa'ida (AQ) and learned how to construct bombs. Upon returning to Egypt in the 1990s, Muhammad Jamal became a top military commander and head of the operational wing of Egyptian Islamic Jihad (EIJ), then headed by AQ leader Ayman al-Zawahiri. Jamal has been arrested multiple times by Egyptian authorities for terrorist activities and was incarcerated for years in Egypt. Muhammad Jamal has developed connections with al-Qa'ida in the Islamic Maghreb (AQIM), AQ senior leadership, and al-Qa'ida in the Arabian Peninsula (AQAP) leadership including Nasir 'Abd-al-Karim 'Abdullah al-Wahishi and Qasim Yahya Mahdi al-Rimi.
>
> Jamal formed the MJN after his release from Egyptian prison in 2011 and

> established several terrorist training camps in Egypt and Libya. AQAP has provided funding to the MJN and Jamal has used the AQAP network to smuggle fighters into training camps. Suicide bombers have trained at MJN training camps, and Jamal established links with terrorists in Europe.

On October 30, 2013, the Department designated Qari Saifullah pursuant to E.O. 13224. 79 Fed. Reg. 1666 (Jan. 9, 2014).

On November 13, 2013, the Department announced the designations of two entities, Boko Haram and Ansaru, under section 1(b) of Executive Order 13224. 78 Fed. Reg. 68,500 (Nov. 14, 2013); see also media note available at *www.state.gov/r/pa/prs/ps/2013/11/217509.htm*. Boko Haram is a Nigeria-based militant group with links to al-Qa'ida in the Islamic Maghreb ("AQIM") that is responsible for thousands of deaths in northeast and central Nigeria over the last several years including targeted killings of civilians. Ansaru is a splinter faction of Boko Haram that kidnapped and executed seven international construction workers earlier in 2013.

On December 18, 2013, the Department announced the designation of Usamah Amin al-Shihabi under E.O. 13224 in a media note, available at *www.state.gov/r/pa/prs/ps/2013/218883.htm*. As described in the media note, Al-Shihabi is a key leader of Fatah al-Islam ("FAI"), a Lebanese-based militant group, and also the head of Syria-based al-Nusrah Front's Palestinian wing in Lebanon. 78 Fed. Reg. 77,773 (Dec. 24, 2013). Also on December 18, the Department announced the designation of the al-Mulathamun Battalion in a media note available at *www.state.gov/r/pa/prs/ps/2013/218880.htm*. 78 Fed. Reg. 76,888 (Dec. 19, 2013). The media note explains that the designated entity broke off from al-Qa'ida in the Islamic Maghreb ("AQIM") in 2012 and also includes the sub-group "Those Who Sign in Blood," and the recently created new entity "al-Murabitoun." This entity, under its various aliases, is responsible for multiple fatal terrorist attacks. On December 31, 2013, the Department designated three individuals, Ahmed Abu Khattalah, Abu Sufian Ibrahim Ahmed Hamuda bin Qumu, and Saifallah Ben Hassin as well as three organizations Ansar al-Shari'a in Tunisia, Ansar al-Shari'a in Darnah, and Ansar al-Shari'a in Benghazi under E.O. 13224. 79 Fed. Reg. 2241, 2242, 2243 (Jan. 13, 2014).

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 (Afghanistan/Taliban) 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 four individuals who had been designated under E.O. 13224. On June 19, 2013, the Department revoked the designations of Nayif Bin-Muhammad al-Qahtani and Eric Breininger. 78 Fed. Reg. 39,057 (June 28, 2013). On

September 20, 2013, the State Department revoked the designations of Fahd Mohammed Ahmed al-Quso and Badruddin Haqqani as Specially Designated Global Terrorists pursuant to Section 1(b) of E.O. 13224. 78 Fed. Reg. 59,751 (Sept. 27, 2013).

(3) OFAC

(i) OFAC designations

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2013. 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 78 Fed. Reg. 14,622 (Mar. 6, 2013) (one individual—Mullah Ahmed Shah NOORZAI); 78 Fed. Reg. 15,124 (Mar. 8, 2013) (one individual—Yahya Abu HAMMAM); 78 Fed. Reg. 34,705 (June. 10, 2013) (three individuals— Rodrigue Elias MERHEJ, Lidia KIM, and Hamid ARABNEJAD—and ten entities—Ukrainian-Mediterranean Airlines, UR-CJW, UR-CKF, UR-CKG, UR-CKJ, UR-CKX, UR-CKY, UR-CKZ, Kyrgyz Trans Avia, and Sirjanco Trading L.L.C); 78 Fed. Reg. 36,302 (June 17, 2013) (four individuals—Ali Ibrahim AL-WATFA, Ali Ahmad CHEHADE, Abbas Loutfe FAWAZ, and Hicham Nmer KHANAFER); 78 Fed. Reg. 36,827 (June 19, 2013) (one individual—'Abd-al-Hamid AL–MASLI); 78 Fed. Reg. 52,823 (Aug. 26, 2013) (one individual—Umar Siddique Kathio AZMARAI—and one entity, Jamia Taleem-Ul-Quran-Wal-Hadith Madrassa); 78 Fed. Reg. 53,193 (Aug. 28, 2013) (four individuals—Khalil Yusif HARB, Muhammad Yusuf Ahmad MANSUR, Muhammad QABALAN, and Muhammad KAWTHARANI); 78 Fed. Reg. 59,097 (Sept. 25, 2013) (two individuals—Afif ABDUL MAJID and Said Ahmad SUNGKAR); 78 Fed. Reg. 79,078 (Dec. 27, 2013) (two individuals—'Abd al-Wahhab Muhammad 'Abd al-Rahman AL-HUMAYQANI and 'Abd al-Rahman bin 'Umayr AL-NU'AYMI).

During 2013 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 2013, OFAC determined that eight 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. 78 Fed. Reg. 10,000 (Feb. 12, 2013) (five individuals); 78 Fed. Reg. 23,332 (Apr. 18, 2013) (one individual); 78 Fed. Reg. 26,424 (May 6, 2013) (one individual); 78 Fed. Reg. 79,078 (Dec. 27, 2013) (one individual).

5. Magnitsky Act

In 2013, the U.S. Government began implementation of the Sergei Magnitsky Rule of Law Accountability Act of 2012 ("Magnistky Act"). On April 12, 2013, the State Department submitted to Congress the first list of persons determined to meet the criteria in the Magnitsky Act, which include responsibility for the detention, abuse, or death of Sergei Magnitsky, or involvement in certain other gross human rights violations in Russia. See April 12, 2013 Department press statement, available at *www.state.gov/r/pa/prs/ps/2013/04/207436.htm*. The names of those on the first "Magnitsky list" are available at *www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20130412.aspx*. Senior State Department officials discussed the list—which included 18 people: 16 associated with the persecution and death of Sergei Magnitsky and two associated with other killings—in a background briefing, available at *www.state.gov/r/pa/prs/ps/2013/04/207460.htm*. Excerpts follow from the April 12, 2013 briefing.

* * * *

Those 18 people were placed on the list following a thorough process of collecting information, including from NGOs, from Congress, and from our own sources, and then a process by which agencies of the U.S. Government, including especially OFAC from the Treasury Department, reviewed the information about them to determine whether we had met a reasonable standard to include them on this list.

As of today, the people on this list will have any assets in the United States blocked… and they will not be able to receive a visa.

Putting a name on this list is a serious undertaking. It has legal ramifications. Whenever you are freezing the assets of individuals, you better know what you're doing and why, and you better have a reasonable, demonstrable basis for doing so. We believe we have that basis. We think that the purposes of the Magnitsky Act are the support of human rights. We applaud those purposes. Human rights is part of our relationship with the Russians. It is sometimes a difficult part, but we have implemented this law in a fair spirit and diligently.

We have notified the Congress both in writing and in person. We are going to be notifying the Russians, although the list is now public and I'm sure the Russian blogosphere is lit up with discussion of the names.

The names include six persons who were placed there because of their position in the initial investigation and arrest of Magnitsky. They were senior investigators, supervisorial, and other personnel of the Interior Ministry; one from the General Prosecutors Office; four judges from the Tverskoy court; two prison officials, one from the Matrosskaya Tishina prison, the head of the pre-trial prison detention facility there, the other the head of the pre-trial detention facility at Butyrka prison; plus two heads of tax authority offices. They were associated—these people—with various stages of the campaign against Sergei Magnitsky.

The standard that applied to the review of these and the determination under the Magnitsky Act is the same standard that applies to other economic sanctions determinations of individuals. And for those of you interested, the relevant standard is spelled out in the Administrative Procedures Act. It is an across-the-government standard and it's important that that standard be maintained.

* * * *

6. Threats to Democratic Process

a. Burma

In 2013, the United States continued to modify sanctions in response to the government of Burma's implementation of democratic reforms, while maintaining targeted sanctions on those who pose a threat to Burma's peace and stability.

(1) New executive order prohibiting importation of jadeite and rubies from Burma

On August 6, 2013, President Obama issued Executive Order 13651, "Prohibiting Certain Imports of Burmese Jadeite and Rubies." 78 Fed. Reg. 48,793 (Aug. 9, 2013). The E.O. was issued pursuant to IEEPA, the NEA, the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (Public Law 110-286) (the "JADE Act'"), and section 301 of title 3, United States Code. In Section 1, the E.O. prohibits the importation into the United States of any jadeite or rubies mined or extracted from Burma and any articles of jewelry containing jadeite or rubies mined or extracted from Burma. Section 7 authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to implement the import prohibition. On December 3, 2013, OFAC implemented E.O. 13651 in part by removing the "JADE Act" tag from the list of Specially Designated Nationals ("SDNs"). 78 Fed. Reg. 78,515 (Dec. 26, 2013). As explained in the Federal Register notice:

> …[A]s of August 7, the effective date of E.O. 13651, the financial and blocking provisions of section 5(b) of the JADE Act do not apply. Except as authorized or exempt, transactions with persons included on the Specially Designated Nationals and Blocked Persons List ("SDN List") continue to be prohibited pursuant to the International Emergency Economic Powers Act ("IEEPA"). Accordingly, while OFAC is updating the SDN List to remove the [JADE Act] tag that had publicly identified the following individuals and entities as subject to the financial and blocking provisions of Section 5(b) of the JADE Act, transactions and dealings with these individuals and entities continue to be prohibited pursuant to IEEPA…

(2) E.O. 13619

As discussed in *Digest 2012* at 535-39, President Obama issued Executive Order 13619 "Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma," on July 11, 2012. On July 2, 2013, the State Department designated Thein HTAY, Chief of Defence Industries and Chief of Army Ordnance Industries in Burma, pursuant to E.O. 13619. 78 Fed. Reg. 41,995 (July 12, 2013). On December 17, 2013, OFAC designated Kyaw Nyunt OO; Asia Metal Company Ltd.; Excellence Mineral Manufacturing Co., Ltd.; and Soe Min Htaik Co. Ltd. 78 Fed. Reg. 78,514 (Dec. 26, 2013).

(3) E.O. 13448

As discussed in *Digest 2007* at 807-11, President Bush signed Executive Order 13448, "Blocking Property and Prohibiting Certain Transactions Related to Burma" in 2007. On January 24, 2013, OFAC removed and unblocked from the list of those designated under E.O. 13448 one individual, U Kyaw THEIN. 78 Fed. Reg. 6179 (Jan. 29, 2013). On February 22, 2013, OFAC designated an additional entity pursuant to E.O. 13448, Ayeyarwady Bank. 78 Fed. Reg. 13,761 (Feb. 28, 2013).

(4) Reporting requirements for responsible investment in Burma

In 2013, the reporting requirements for U.S. investment in Burma, announced in 2012, took effect. See *Digest 2012* at 538 for a description of the requirements. The State Department announced on May 23, 2013 in a media note available at *www.state.gov/r/pa/prs/ps/2013/05/209869.htm*, that the Office of Management and Budget had given final approval to the reporting requirements and that the first reports would be due July 1, 2013. The May 23 media note further explains:

> U.S. persons are required to report on a range of policies and procedures with respect to their investments in Burma, including human rights, labor rights, land rights, community consultations and stakeholder engagement, environmental stewardship, anti-corruption, arrangements with security service providers, risk and impact assessment and mitigation, payments to the government, any investments with the Myanmar Oil and Gas Enterprise (MOGE), and contact with the military or non-state armed groups.
>
> The Department of State will use the information collected as a basis to conduct informed consultations with U.S. businesses to encourage and assist them to develop robust policies and procedures to address a range of impacts resulting from their investments and operations in Burma. We also intend the public report to empower civil society to take an active role in monitoring investment in Burma and to work with companies to promote investments that

will enhance broad-based development and reinforce political and economic reform.

b. Mali

After the inauguration of the new president of the Republic of Mali in September 2013, the United States lifted restrictions on assistance to the government of Mali, which had been imposed since the March 2012 coup in that country. A September 6, 2013 State Department press statement, available at *www.state.gov/r/pa/prs/ps/2013/09/213910.htm*, explains that the resumption of assistance followed a determination that a democratically-elected government had taken office in Mali.

For discussion of terrorism-related sanctions on persons in Mali, see Section A.4.b.(2), *supra*.

c. Zimbabwe

On April 24, 2013, OFAC issued General License No. 1 under the Zimbabwe sanctions program. The general license authorizes all transactions involving Agricultural Development Bank of Zimbabwe and Infrastructure Development Bank of Zimbabwe, subject to certain limitations. 78 Fed. Reg. 41,192 (July 9, 2013).

Effective May 2, 2013, OFAC removed from its list of those designated under the Zimbabwe sanctions program the names of eight individuals and one entity whose property and interests in property were unblocked pursuant to Executive Order 13288 of March 6, 2003, "Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe," as amended by Executive Order 13391 of November 22, 2005, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." 78 Fed. Reg. 28,290 (May 14, 2013).

d. Cuba

On January 31, 2013, President Obama delegated to the Secretary of State the authority to suspend the provisions of Title III of the Cuban Liberty and Democratic Solidarity ("LIBERTAD") Act of 1996 (Public Law 104-114; 22 U.S.C. §§ 6021-6091). 78 Fed. Reg. 9573 (Feb. 8, 2013). Under this authority, the Secretary of State may suspend the right to bring an action against those who traffic in property confiscated by the Cuban government for six-month periods if suspension "is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." 22 U.S.C. § 6085(c)(2). The suspension has occurred every six months since August 1, 1996.

7. Armed Conflict: Restoration of Peace and Security

a. Democratic Republic of the Congo

Effective January 3, 2013, OFAC designated two individuals pursuant to E.O. 13413, "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of Congo": Colonel Innocent KAINA; and Colonel Baudoin NGARUYE. 78 Fed. Reg. 2722 (Jan. 14, 2013). Also on January 3, 2013, OFAC designated two entities pursuant to E.O. 13413: Forces Democratiques de Liberation du Rwanda; and M23. On January 24, 2013, OFAC designated Jean-Marie Rugerero RUNIGA and Eric BADEGE. 78 Fed. Reg. 6180 (Jan. 29, 2013).

b. Liberia

On July 22, 2004, President Bush issued Executive Order 13348 to address the actions of former Liberian President Charles Taylor and others. See *Digest 2004* at 919-22. On April 2, 2013, OFAC determined that circumstances no longer warranted the imposition of sanctions on 12 persons previously designated under E.O. 13348. 78 Fed. Reg. 21,007 Apr. 8, 2013).

On December 10, 2013, the UN Security Council adopted resolution 2128, renewing the sanctions regime relating to Liberia as established by resolution 1521. U.N. Doc. S/RES/2128.

c. Central African Republic

See Chapter 17.B.5 for a discussion of UN Security Council resolution 2127 on the Central African Republic, adopted on December 5, 2013. The resolution establishes a sanctions regime and an arms embargo.

d. Somalia

See Chapter 17.B.7 for a discussion of UN Security Council resolution 2093, adopted on March 6, 2013, which partially lifted the arms embargo on the government of Somalia. The Security Council also adopted resolution 2111 on Somalia on July 24, 2013, renewing the mandate of the Somalia and Eritrea Monitoring Group which monitors sanctions imposed on Somalia. U.N. Doc. S/RES/2111. Resolution 2111 also further modifies the arms embargo on Somalia with regard to certain equipment for Somalia's security forces and supplies to UNISOM and its partners as well as UN and humanitarian groups.

e. Côte d'Ivoire

On April 25, 2013, the Security Council adopted resolution 2101, extending the arms embargo and financial and travel restrictions against Côte d'Ivoire until April 30, 2014. U.N. Doc. S/RES/2101. Resolution 2101 also extends the mandate of the Group of Experts monitoring sanctions and other measures on Côte d'Ivoire.

f. Libya

On March 14, 2013, the Security Council adopted resolution 2095 modifying the arms embargo on Libya. U.N. Doc. S/RES/2095.

g. Iraq

(1) UN Security Council resolution 2107

On June 27, 2013, the UN Security Council unanimously adopted resolution 2107, which removes from Iraq most of its obligations under Chapter VII of the UN Charter. The obligations removed from Iraq include those concerning the return of remains and property of Kuwaiti and third-country nationals. The resolution calls on the Iraqi Government to continue cooperation with the International Committee of the Red Cross ("ICRC") by providing information on the Kuwaiti and third-country nationals and facilitating the ICRC's search for missing persons, and to continue efforts to search for missing Kuwaiti property. The resolution also tasks the Special Representative of the Secretary-General and the Head of the United Nations Assistance Mission for Iraq ("UNAMI") with further facilitating the return of such remains and property. Iraq remains under the obligation to pay outstanding U.N. Compensation Commission awards, which Iraq is anticipated to complete in 2015. On June 28, 2013, Secretary Kerry made the following statement, available at *http://iraq.usembassy.gov/pr-062813.html*, welcoming the steps that led to the conclusion of resolution 2107:

> The United States congratulates the Governments of Iraq and Kuwait on successfully resolving key bilateral and international issues over the past year, which helped result in today's milestone decision by the UN Security Council. It's testament to the commitment of two neighbors to a new relationship that we're witnessing the transfer of the Chapter VII mandate and responsibilities of the UN High-Level Coordinator for Gulf War Missing Kuwaiti and Third-Country Nationals and the Return of Kuwaiti Property to the UN Assistance Mission in Iraq.
>
> We further welcome the completion of the border maintenance work and the establishment of technical arrangements between Iraq and Kuwait as recommended by the United Nations Iraq-Kuwait Boundary Demarcation Commission. As I discussed during my visit to Kuwait yesterday, we will continue

to support both Kuwait and Iraq so they continue to build further confidence and cooperation, strengthen their relationship, and enhance regional stability.

(2) Continuation of national emergency

As discussed in *Digest 2011* at 508-09, President Obama has annually continued the national emergency declared by Executive Order 13303 with respect to the stabilization of Iraq. The President continued the national emergency again in 2013. 78 Fed. Reg. 30,195 (May 21, 2013). By continuing the national emergency, the President also extended the extraordinary immunities for the Development Fund for Iraq another year, though both countries agreed that it would be the final such extension. See Chapter 18.A.3.a. for a discussion of the meetings of the U.S.-Iraqi Political and Diplomatic Joint Coordination Committee ("PDJCC").

8. Transnational Crime

On January 23, 2013, OFAC designated eight individuals and one entity pursuant to Executive Order 13581 of July 24, 2011, "Blocking Property of Transnational Criminal Organizations": Marina Samuilovna Goldberg; Jiro Kiyota; Kazuo Uchibori; Antonio Zagaria; Carmine Zagaria; Nicola Zagaria; Pasquale Zagaria; and Inagawa-Kai. 78 Fed. Reg. 7485 (Feb. 1, 2013).

On July 24, 2013, OFAC designated five individuals and two entities pursuant to E.O. 13581: Marco Di Lauro; Mario Riccio; Antonio Mennetta; Mariano Abete, Rosario Guarino; Avuar OOO, and Guga Arm SRO. 78 Fed. Reg. 49,334 (Aug. 13, 2013).

On October 30, 2013, OFAC designated six individuals and four entities pursuant to E.O. 13581: Artur Badalyan; Grigory Victorovich Lepsveridze; Vadim Mikhaylovich Lyalin; Igor Leonidovich Shlykov; Sergey Yevgeniyevich Moskalenko; Yakov Rybalskiy; Gurgen House FZCO; Fasten Tourism LLC; M S Group Invest OOO; and Meridian Jet Management GMBH. 78 Fed. Reg. 66,989 (Nov. 7, 2013).

On December 19, 2013, OFAC designated four individuals pursuant to E.O. 13581: Hirofumi Hashimoto; Tadashi Irie; Shoroku Ishida; and Toshio Masaki. 78 Fed. Reg. 79,726 (Dec. 31, 2013).

B. EXPORT CONTROLS

1. Resolution of Export Control Violations

a. Raytheon

On April 30, 2013, the State Department announced the resolution of an enforcement action against Raytheon Company. A Department media note, available at *www.state.gov/r/pa/prs/ps/2013/04/208655.htm*, summarizes the administrative

agreement reached with Raytheon to address its violations of the Arms Export Control Act ("AECA") (22 U.S.C. § 2778) and the International Traffic in Arms Regulations ("ITAR")(22 C.F.R. parts 120-130), including the payment of $8 million in civil penalties and remedial expenditures:

> The Department's Office of Defense Trade Controls Compliance in the Bureau of Political-Military Affairs determined that Raytheon's numerous violations demonstrated a recurring, corporate-wide weakness in maintaining effective ITAR controls. Over the course of many years, Raytheon business units have disclosed to the Department hundreds of ITAR violations, largely consisting of failures to properly manage Department-authorized agreements and temporary import and export authorizations. The violations included inaccurate tracking, valuation and documentation of temporary exports and imports of controlled hardware, manufacture of such hardware by Raytheon's foreign partners in excess of the approved amounts, and failures to timely obtain and submit required documents. Raytheon repeatedly discovered and disclosed such violations to the Department, in some cases finding that previously reported remedial measures failed to prevent or detect additional similar violations subsequently disclosed.
>
> Under the terms of a four year Consent Agreement with the Department, Raytheon will pay a civil penalty of $8 million. The State Department agreed to suspend $4 million of this amount on the condition that the funds have or will be used for Department-approved pre- and post-Consent Agreement remedial compliance measures. In addition, an external Special Compliance Official will be engaged by Raytheon to oversee the Consent Agreement, which will also require the company to conduct two external audits of its compliance program during the Agreement term as well as implement additional compliance measures.
>
> Raytheon disclosed nearly all of the ITAR violations resolved in this settlement voluntarily to the Department, acknowledged their serious nature, cooperated with Department reviews, and implemented or has planned extensive remedial measures. For these reasons, the Department has determined that an administrative debarment of Raytheon is not appropriate at this time.

b. Aeroflex

On August 9, 2013, the State Department announced that it had entered into a consent agreement with Aeroflex Incorporated of Plainview, New York. A Department media note, available at *www.state.gov/r/pa/prs/ps/2013/08/213002.htm*, provides information about the administrative settlement, which addressed alleged violations of the AECA and ITAR:

The settlement was reached after an extensive compliance review by the State Department's Office of Defense Trade Controls Compliance in the Bureau of Political-Military Affairs and addresses hundreds of alleged civil violations of the AECA and ITAR. This settlement highlights the Department's responsibility to protect sensitive U.S. defense hardware and technology from unauthorized use.

The Office of Defense Trade Controls Compliance determined that Aeroflex demonstrated inadequate corporate oversight and a systemic and corporate-wide failure to properly determine export control jurisdiction over commodities, leading to numerous violations during the period of 1999-2009. Over the course of many years, Aeroflex business units disclosed to the Department hundreds of ITAR violations, largely consisting of unauthorized exports resulting from the failure to properly establish jurisdiction over defense articles and technical data. The violations included unauthorized exports and re-exports of ITAR-controlled electronics, microelectronics, and associated technical data and causing unauthorized exports of ITAR-controlled microelectronics by domestic purchasers.

Under the terms of the two-year Consent Agreement with the Department, Aeroflex will pay a civil penalty of $8 million. The State Department agreed to suspend $4 million of this amount on the condition the Department approves expenditures for self-initiated, pre-Consent Agreement remedial compliance measures and Consent Agreement-authorized remedial compliance costs. In addition, an Internal Special Compliance Official will be engaged by Aeroflex to oversee the Consent Agreement, which will also require the company to conduct two audits of its compliance program during the Agreement term as well as implement additional compliance measures, such as improved policies and procedures, and additional training for staff and principals.

Aeroflex disclosed nearly all of the ITAR violations resolved in this settlement voluntarily to the Department, acknowledged their serious nature, cooperated with Department reviews, and since 2008 has implemented or has planned extensive remedial measures, including the restructuring of its compliance organization, the institution of a new testing protocol of its commodities, and a revised company-wide ITAR compliance program. For these reasons, the Department determined that an administrative debarment of Aeroflex was not appropriate at this time.

c. Meggitt-USA, Inc.

On August 23, 2013, the State Department announced the conclusion of an administrative settlement with Meggitt-USA, Inc. to resolve alleged violations of the AECA and ITAR. A Department media note, available at *www.state.gov/r/pa/prs/ps/2013/08/213483.htm*, provides further information about the settlement:

> Over the course of several years, Meggitt subsidiaries and business units disclosed to the Department hundreds of ITAR violations beginning in the mid-1990s, largely involving the unauthorized export of defense articles, including technical data, the unauthorized provision of defense services, violation of the terms of provisos or other limitations of license authorizations, and the failure to maintain specific records involving ITAR-controlled transactions.
>
> Under the terms of the 30-month consent agreement with the Department, Meggit is assessed a civil penalty of $25 million, of which $3 million will be paid in installments and the remainder suspended on the condition the Department approves expenditures for self-initiated, pre-consent agreement remedial compliance measures and consent agreement-authorized remedial compliance costs. In addition, an Internal Special Compliance Official will be engaged by Meggitt to oversee the consent agreement, which will also require the company to implement additional compliance measures, including enhanced policies and procedures, to review external audit programs and conduct audit measures pursuant to the agreement, to review jurisdictional determinations of commodities, and report on system upgrades and improvements.
>
> Meggitt disclosed nearly all of the ITAR violations resolved in this settlement voluntarily to the Department, … and implemented or has planned extensive remedial measures throughout its subsidiaries. For these reasons, the Department determined that an administrative debarment or suspension of Meggitt was not appropriate at this time.

d. Debarment

On February 5, 2013, the State Department published in the Federal Register a list of 22 persons subject to statutory debarment under the AECA and ITAR. 78 Fed. Reg. 8218 (Feb. 5, 2013). On November 7, 2013, the State Department published in the Federal Register a list of 37 persons subject to statutory debarment under the AECA and ITAR. 78 Fed. Reg. 66,984 (Nov. 7, 2013). Section 127.7(c) of ITAR subjects persons convicted of violating, or conspiring to violate, section 38 of the AECA to statutory debarment. Persons subject to statutory debarment are prohibited from participating directly or indirectly in the export of defense articles or the furnishing of defense services, for which a license is required. Statutory debarment is based on conviction in a criminal proceeding, conducted by a United States Court. The Federal Register notice identifies for each debarred individual the court in which the criminal proceeding occurred as well as other identifying information. Debarment is for an initial three-year period, after which the identified persons/entities remain debarred unless export privileges are reinstated.

On November 27, 2013, the State Department announced the administrative debarment of LeAnne Lesmeister, a former employee of Honeywell International, in a media note available at *www.state.gov/t/pm/rls/prsrl/2013/218216*. As explained in the media note, Honeywell had voluntarily disclosed ITAR violations carried out by Lesmeister, its former senior export compliance officer in its Clearwater, Florida site,

between 2008 and 2012. Lesmeister fabricated various export control documents on which Honeywell relied, resulting in the export of defense articles, technical data, and defense services without State Department approval. The Department initiated an administrative proceeding before an Administrative Law Judge relating to the violations. The former Honeywell employee failed to answer the formal charges, resulting in the administrative debarment. The debarment is for three years after which an application for reinstatement may be submitted. No civil penalties were assessed. Notice of the debarment was published in the Federal Register on December 3, 2013. 78 Fed. Reg. 72,745 (Dec. 3, 2013).

2. Export Control Reform

On April 16, 2013, the Department of State announced that the U.S. Government had issued the first in a series of new rules regarding the export of munitions and commercial items with military applications. See State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/04/207597.htm*. The first set of new rules define items regulated for export under the U.S. Munitions List's Category VIII—Aircraft and Associated Equipment, and Category XIX—Gas Turbine Engines. The Federal Register Notice of the final rule, "Amendment to the International Traffic in Arms Regulations: Initial Implementation of Export Control Reform," was published on April 16, 2013 with an effective date of October 15, 2013. 78 Fed. Reg. 22,740 (Apr. 16, 2013). In total, 19 categories of the U.S. Munitions List will be revised under Export Control Reform. The April 16 media note explains further:

> Based on a multi-year series of technical and policy reviews by representatives of the Departments of State, Defense, Commerce, and other agencies, these reforms will move less sensitive items, such as parts and components, from the State Department's U.S. Munitions List to the Commerce Control List. The revised control lists have been developed in close consultation with the private sector and Congress. Each revised category will become effective 180 days after it is published in the Federal Register to allow companies and their customers time to adapt their internal business practices to the new controls. Work on the remaining categories is ongoing and they will similarly be notified to Congress and published over the coming months.

On July 10, 2013, the State Department announced the issuance of the second set of new final rules redefining how the United States protects sensitive technology. See July 10, 2013 State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/07/211747.htm*. The second set of rules relate to four categories on the U.S. Munitions List administered by the State Department: Category VI—Vessels of War and Special Naval Equipment; Category VII—Ground Vehicles; Category XIII—Materials and Miscellaneous Articles; and Category XX—Submersible

Vessels and Related Articles; and those lesser sensitive items previously controlled in these categories that are moved to the Commerce Control List.

On July 24, 2013, Beth M. McCormick, Deputy Assistant Secretary of State for the Bureau of Political-Military Affairs provided an update on the Export Control Reform process at a conference held by the U.S. Department of Commerce, Bureau of Industry and Security. Her remarks are available at *www.state.gov/t/pm/rls/rm/2013/212545.htm*.

The Department of Commerce issued a final rule, effective October 15, 2013, revising the Export Administration Regulations ("EAR") to make the Commerce Control List ("CCL") clearer as part of President Obama's overall export control reform initiative. 78 Fed. Reg. 61,874 (Oct. 4, 2013)

Cross References

Foreign terrorist organizations, **Chapter 3.B.1.c.**
Institutions of primary money laundering concern, **Chapter 3.B.4.a.**
Organized crime, **Chapter 3.B.5.**
UN Third Committee resolutions on human rights abuses in Syria, Iran, North Korea, and Burma, **Chapter 6.A.2.**
HRC actions on Syria, **Chapter 6.A.4.b.**
Designations under the Child Soldiers Prevention Act, **Chapter 6.C.3.b.**
Attachment of blocked assets, **Chapter 10.A.2.a.**
Syria, **Chapter 17.B.1.**
Democratic Republic of Congo, **Chapter 17.B.2.**
Central African Republic, **Chapter 17.B.5.**
Somalia, **Chapter 17.B.7.**
DPRK, **Chapter 19.B.6.a.**
Iran, **Chapter 19.B.6.b.**
Implementation of UNSCR 1540, **Chapter 19.D.**

CHAPTER 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

On July 19, 2013, United States Secretary of State John Kerry announced that the Israelis and Palestinians had reached an agreement that establishes a basis for resuming direct final status negotiations. On July 23, 2013 at a Security Council debate on the Middle East, Acting U.S. Permanent Representative to the UN, Rosemary A. DiCarlo remarked on the Middle East Peace Process, emphasizing that certain recent actions at the UN by the Palestinians do not contribute to the process. Her remarks are excerpted below and available in full at *http://usun.state.gov/briefing/statements/212299.htm*. For further discussion about Palestinian actions at the UN, see Chapter 7.

* * * *

The United States is deeply committed to a just and lasting peace with Israelis and Palestinians living side by side in peace and security. This is why Secretary of State Kerry has made repeated visits to the region and focused so heavily on this effort. Last week, after his sixth trip to the region as Secretary, he was able to announce that the Parties had reached an agreement that establishes a basis for resuming direct final status negotiations.

He also stressed that the agreement was in the process of being formalized and that, in the meantime, none of the parties would be making public comments about the negotiations so as to improve the likelihood that the talks could indeed succeed.

As Secretary Kerry noted, everyone is aware that this process will not be easy. And no one believes that the longstanding differences between the parties can be resolved overnight or just wiped away. We know that the challenges require some very tough choices in the days ahead. Today, however, we are hopeful, because the representatives of two proud people have decided that the difficult road ahead is worth traveling and that the daunting challenges that we face are worth tackling. So they have courageously recognized that in order for Israelis and

Palestinians to live together side by side in peace and security, they must begin by sitting at the table together in direct talks.

It is important to note that this diplomatic effort would not have been possible without strong international support. The Arab Peace Initiative Follow-Up Committee, the Quartet envoys, and many others played a vital role in supporting the resumption of negotiations. The Secretary General, European partners and others around the world also weighed in with strong statements of support.

We should now continue to urge all sides to avoid taking unilateral actions, including steps at the United Nations. Our shared objective at this critical moment must be on building the trust and confidence necessary for a lasting peace. In this regard, the United States' position remains that UNGA resolution 67/19 did not establish that "Palestine" is a state. The United States is committed to helping bring about a viable Palestinian state through bilateral negotiations with their Israeli counterparts. This is the only real path to genuine statehood for the Palestinian people, as repeatedly affirmed by both sides and endorsed by the international community.

In the end, those who are most responsible for this process are the parties themselves. We applaud the courageous leadership shown by President Abbas and Prime Minister Netanyahu in taking this step forward. As the parties work through the complicated issues they face, we should encourage them with all possible support.

* * * *

On July 29, 2013, President Obama issued a statement, below, on the resumption of peace negotiations between Israel and the Palestinian Authority. Daily Comp. Pres. Docs., 2013 DCPD No. 00536, p. 1 (July 29, 2013).

---

* * * *

I am pleased that Prime Minister Netanyahu and President Abbas have accepted Secretary Kerry's invitation to formally resume direct final status negotiations and have sent senior negotiating teams to Washington for the first round of meetings. This is a promising step forward, though hard work and hard choices remain ahead.

During my March visit to the region, I experienced firsthand the profound desire for peace among both Israelis and Palestinians, which reinforced my belief that peace is both possible and necessary. I deeply appreciate Secretary Kerry's tireless work with the parties to develop a common basis for resuming direct talks and commend both Prime Minister Netanyahu and President Abbas for their leadership in coming to the table.

The most difficult work of these negotiations is ahead, and I am hopeful that both the Israelis and Palestinians will approach these talks in good faith and with sustained focus and determination. The United States stands ready to support them throughout these negotiations, with the goal of achieving two states living side by side in peace and security.

I am pleased that Ambassador Martin Indyk will lead the U.S. negotiating team as U.S. Special Envoy for Israeli-Palestinian Negotiations. Ambassador Indyk brings unique experience

and insight to this role, which will allow him to contribute immediately as the parties begin down the tough, but necessary, path of negotiations.

* * * *

B. PEACEKEEPING AND CONFLICT RESOLUTION

1. Syria

a. Security Council

On May 15, 2013, Ambassador DiCarlo delivered a statement on a draft resolution on Syria that was co-sponsored by the United States. Like previous efforts to pass a strong Syria resolution at the Security Council, this one was unsuccessful. Ambasssador DiCarlo's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/209430.htm.*

* * * *

…Over the last 26 months we have witnessed a brutal conflict in Syria. The Assad regime, drawing upon an arsenal of heavy weapons, aircraft, ballistic missiles, and—potentially—chemical weapons, has killed or injured untold numbers of civilians who for many months manifested their opposition purely through peaceful protest. The sustained violence has created a severe humanitarian crisis with more than 1.4 million refugees and 4.25 million internally displaced persons within Syria.

The consequences of this crisis are growing more dire not only within Syria, but across the region. The generosity of the governments and people of Lebanon, Jordan, Turkey, Iraq and others who host large numbers of refugees has been extraordinary, but these countries now face grave threats to their security and an overwhelming economic burden. It is clear that we need a Syrian-led peaceful political transition.

With this in mind, the United States and the Russian Federation announced on May 7 an initiative to bring the Syrian regime and the opposition together in an effort to try to advance a political solution under the framework agreed to in Geneva in June 2012. In our view, the resolution before you is consistent with this latest initiative. Adopting this resolution will send a clear message that the political solution we all seek is the best way to end the suffering of the people of Syria.

We support this resolution, have co-sponsored it, and urge member states to vote in favor of it.

* * * *

In September, in briefings with international partners at the UN and at a Security Council session on Syria, the United States presented its conclusion that the Assad regime had carried out a mass casualty chemical weapons attack against the Syrian people on August 21, 2013. Ambassador Power's remarks at the Security Council on

September 5, 2013 are excerpted below and available at *http://usun.state.gov/briefing/statements/213849.htm*. For further discussion of the UN Security Council's actions on Syria's chemical weapons, see Chapter 19.F.1.

---

* * * *

As part of the United States' ongoing consultations with international partners, allies, and the broader international community, today the U.S. Mission hosted a series of briefings for Member States regarding the use of chemical weapons by the Syrian regime on August 21st. Today's briefings presented our assessment regarding the events of August 21 in the suburbs of Damascus, which overwhelmingly point to one stark conclusion: the Assad regime perpetrated a large-scale and indiscriminate attack against its own people using chemical weapons.

The actions of the Assad regime are morally reprehensible and they violate clearly established international norms. The use of chemical weapons is not America's redline. As President Obama said yesterday, "This is the world's red line." 189 countries, representing 98% of the world's population, and all 15 members of the UN Security Council, agree that the use of chemical weapons is abhorrent and we have all collectively approved a treaty forbidding their use even when countries are engaged in war.

Let me address now an issue on many on your minds. We in the United States agree with the view that—at times like this—the Security Council should live up to its obligations and should act. That is why for two and a half years we have brought press statements, presidential statements, resolutions, and a whole host of Syria-related concerns to the UN Security Council, each time hoping that our common security and our common humanity might prevail, each time making the case that countries on the Council should be motivated by our shared interest in international peace and security, in protecting civilians, but also in preventing extremism, regional spillover, and chemical weapons use.

Unfortunately, for the past two and a half years, the system devised in 1945 precisely to deal with threats of this nature did not work as it was supposed to. It has not protected peace and security for the hundreds of Syrian children who were gassed to death on August 21. It is not protecting the stability of the region. It is not standing behind now an internationally accepted ban on the use of chemical weapons. Instead, the system has protected the prerogatives of Russia, the patron of a regime that would brazenly stage the world's largest chemical weapons attack in a quarter century—while chemical weapons inspectors sent by the United Nations were just across town. And even in the wake of the flagrant shattering of the international norm against chemical weapons use, Russia continues to hold the Council hostage and shirk its international responsibilities, including as a party to the Chemical Weapons Convention.

What we have learned—what the Syrian people have learned—is that the Security Council the world needs to deal with this crisis is not the Security Council we have. Nonetheless, as the Secretary General himself has stressed, chemical weapons must "not become a tool of war or terror in the twenty-first century." It is in our interest—and the interest of all member states of the UN—to respond decisively to this horrific attack.

* * * *

On October 2, 2013, the president of the UN Security Council issued a statement on Syria on behalf of the Council. U.N. Doc. S/PRST/2013/15. The October 2 presidential statement urges in particular that the Syrian regime allow unhindered access for humanitarian relief activities for the Syrian people.

b. International cooperation outside of the Security Council

As Ambassador DiCarlo mentioned in her statement above, the initiative to advance a political solution to the Syria crisis under the framework agreed to in Geneva in June 2012 continued in 2013. On May 7, 2013, after meetings in Moscow with Russian Foreign Minister Sergei Lavrov, Secretary Kerry announced the shared intention of the governments of Russia and the United States to convene "Geneva II," a follow-on conference to advance the goals of the 2012 Geneva communique.[*] Secretary Kerry's remarks are excerpted below and available in full at *www.state.gov/secretary/remarks/2013/05/209117.htm*.

* * * *

We believe that the Geneva communique is the important track to end the bloodshed in Syria, and it should not be a piece of paper. It should not be a forgotten communique of diplomacy. It should be the roadmap, the implemented manner by which the people of Syria could find their way to the new Syria, and by which the bloodshed, the killing, the massacres can end. Encouraging the stated intentions of the Syrian Government and the opposition groups to find a political solution, both have said they want to, both are committed to it. And recently, the opposition came to Istanbul and signed a set of declarations regarding its embrace of the Geneva communique.

And so to that end, Foreign Minister Lavrov and I have agreed that as soon as is practical, possibly and hopefully by the end of this month, we will convene—seek to convene an international conference as a follow-on to last summer's Geneva conference. And the specific work of this next conference will be to bring representatives of the government and the opposition together to determine how we can fully implement the means of the communique, understanding that the communique's language specifically says that the Government of Syria and the opposition have to put together, by mutual consent, the parties that will then become the transitional government itself.

Our two countries, the United States and Russia, reiterate our commitment to the sovereignty and the territorial unity of Syria, and to the full implementation of the Geneva communique, recognizing this requires the mutual consent of both parties. Therefore, we have agreed to use our good offices, both of us, to bring both sides to the table working with our other core coalition partners and other allies and interested parties to bring both sides to the table in

[*] Editor's note: The Geneva II conference eventually took place in January 2014 and will be discussed further in *Digest 2014*.

partnership with the concerned foreign countries that are committed themselves to helping the Syrians to find a promising political solution within the Geneva framework.

We've also affirmed our commitment to a negotiated settlement as the essential means of ending the bloodshed, addressing humanitarian disaster in Syria, and addressing the problem of the security of chemical weapons and forestalling further regional instability. We believe that full implementation of the Geneva communique calls for a transition governing body as specifically set forth in the language of the communique, which is formed by mutual consent with the support of the international community and enjoying full executive authority—that means the full authority to run and manage the government, including the military and security services, and then doing so as soon as we can possibly implement it is the best way to resolve the crisis in Syria.

* * * *

On May 22, 2013, several countries participating in a ministerial meeting in Amman, Jordan issued a joint statement on Syria, which appears below as part of a State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/05/209820.htm*.

---

* * * *

The Prime Minister and Minister of Foreign Affairs of Qatar and the Foreign Ministers of Egypt, France, Germany, Italy, Saudi Arabia, Turkey, U.A.E., U.K., USA and Jordan came together in Amman on May 22nd 2013 to deliberate on the developments in Syria and to reemphasize their support to find a political solution to the crisis in Syria. The representatives from the leadership of the Syrian National Coalition of the Revolutionary and Opposition Forces also attended part of the meeting, and briefed the Ministers on the situation inside Syria.

The Ministers reviewed their discussions in the Rome meeting of February 28th 2013, and recalled the joint statement of Istanbul of April 20th 2013 that supports a political solution in Syria on the basis of the Geneva Communique of June 30th 2012.

The Ministers supported the participation in the Geneva meeting for the purpose of the full implementation of the outcomes of the first Geneva meeting to end the bloodshed, fulfill the legitimate aspirations of the Syrian people, preserve the territorial integrity of the country, and strengthen the national unity amongst all components of the Syrian national fabric. The Ministers emphasized the central role of the United Nations Security Council in the realization of this effort.

The Ministers condemned in the strongest terms the use of heavy weapons including ballistic missiles against the people, and deplored the ethnic cleansing that the regime is pursuing as seen recently in Banias, and declared that such crimes will not go unpunished.

The Ministers stressed that the political process to reflect positively and tangibly on the daily lives of the Syrian civilian population, including the release of prisoners, the delivery of humanitarian assistance and end the killing of civilians.

The Ministers identified as the corner stone of a political solution the formation of a transitional governing body through mutual consent, within a defined and agreed upon timeframe, to assume full executive authority, including all powers of the Presidency in addition

to control over the armed forces and the security and intelligence apparatuses, for an agreed upon and defined timeframe for the transitional period. The Ministers affirmed that the final objective of the transitional period should include the adoption of a new Syrian constitution that guarantees the equal rights of all citizens.

The Ministers underlined that the attainment of the political solution that meets the aspirations of the Syrian people means, as stated in the Abu Dhabi joint statement of the May 13th 2013, that Assad, his regime, and his close associates with blood on their hands cannot play any role in the future of Syria.

The Ministers reiterated their support to the Syrian National Coalition of the Revolutionary and Opposition Forces and welcomed the efforts by the Coalition to expand their base of representation to include all components of Syrian society, and emphasized the central and leading role of the Coalition in the opposition delegation to the anticipated international conference on Syria. Furthermore, the Ministers reiterated the right to self defense of the Syrian people, and committed to offer additional support to reinforce the role and capacity of the Supreme Military Council (SMC).

The Ministers expressed their strong concern over the increasing presence and growing radicalism on both sides of the conflict and terrorist elements in Syria; a matter that deepens the concerns for the future of Syria, threatens the security of neighboring countries and risks destabilizing the wider region and the world.

The Ministers denounced the intervention of foreign combatants fighting on behalf of the regime, and consider their presence a flagrant intervention on Syrian territory and a serious threat to regional stability. In this context, the Ministers stressed in particular the operations conducted by Hezbollah in Qusair and elsewhere and called for the immediate withdrawal of Hezbollah, fighters from Iran, and other regime allied foreign fighters from Syrian territory.

The Ministers expressed their deep concern over the deteriorating humanitarian conditions in Syria, as well as the threat they pose to the stability and security of neighboring countries hosting Syrian refugees. They underlined the importance of cross border humanitarian operations and called upon the international community to support host countries to address the pressures arising from hosting refugees based on the principles of burden sharing and to prevent any implications for international peace and security.

The Ministers viewed with extreme concern the growing number of reports and strong indications of the use of chemical weapons by the regime in Syria. The Ministers emphasized the importance of enabling the UN to conduct a comprehensive investigation regarding the use of such weapons. The Ministers stressed that there will be severe consequences if these reports are confirmed.

The Ministers also emphasized that until such time as the Geneva meeting produces a transitional government, they will further increase their support for the opposition and take all other steps as necessary.

Finally, the Ministers agreed to strengthen cooperation and coordination among themselves and with international partners to ensure the successful convening of the international conference leading to a political solution to the Syrian crisis.

* * * *

c. Syria Justice and Accountability Center

On February 20, 2013, the State Department issued a fact sheet, available at *http://usun.state.gov/briefing/statements/205075.htm*, describing the Syria Justice and Accountability Center ("SJAC"). Excerpts follow from the fact sheet, explaining its mission and its reliance on the Rome Statute.

* * * *

The Syria Justice and Accountability Center (SJAC) is an independent entity that focuses on: 1) Collection and analysis of documentation related to ongoing violations of human rights and international humanitarian law (IHL) in Syria; 2) Coordination of Syrian and international actors working on documentation and transitional justice efforts; and 3) Education and outreach on transitional justice concepts and processes.

* * * *

The SJAC is multilateral initiative, supported by the United States along with 40 other governments and international organizations.

The SJAC is categorizing information based on international crimes (genocide, crimes against humanity, and war crimes) listed under the Rome Statute of the International Criminal Court (often referred to as the Rome Statute).

Project Background:

The SJAC operationalizes the commitment made by many states to support the documentation of human rights violations in Syria at the second Friends of the Syrian People (FOSP) meeting in Istanbul on April 1, 2012.

* * * *

The official SJAC website is *www.syriaaccountability.org*.

The SJAC website features an interactive map that allows users to view statistics about human rights violations committed across various categories: massacres, indiscriminate killings, torture and detention, and property damage. All of the data displayed on the site is downloadable and includes links to the original sources of information. The SJAC website is updated regularly to include the latest reporting from the latest sources of information on the conflict in Syria.

International Support:

Under the sponsorship of Morocco and the United States, and the co-chairmanship of the Moroccan Organization for Human Rights and the Syria Justice & Accountability Center (SJAC), a donor conference in support of the SJAC was held in Rabat, Morocco on September 14, 2012.

* * * *

Relationship to UN Commission of Inquiry:

The SJAC complements but does not supplant the efforts of the UN Human Rights Council's Commission of Inquiry (COI) on Syria. SJAC staff has met with the COI and are in regular communication as the SJAC is implemented.

* * * *

2. Democratic Republic of Congo

On February 24, 2013, the President of the Democratic Republic of the Congo ("DRC") and ten other African heads of state signed the Peace, Security, and Cooperation Framework for the Democratic Republic of Congo. U.S. Ambassador to the UN Susan E. Rice[**] delivered remarks welcoming the framework agreement. Ambassador Rice's comments are excerpted below and available at *http://usun.state.gov/briefing/statements/205141.htm*.

---

* * * *

The United States welcomes today's signing of the Peace, Security, and Cooperation Framework for the Democratic Republic of Congo (DRC) and the Region, a significant step toward promoting long-term peace in the Great Lakes. We applaud the leadership of Presidents Kabila, Kagame, and Museveni in advancing the peace process; the personal engagement of UN Secretary-General Ban Ki-moon and his chef de cabinet, Susana Malcorra; and the constructive role played by the International Conference on the Great Lakes Region (ICGLR), the African Union (AU), and the Southern African Development Community (SADC).

This agreement is only a beginning. States in the region must now work to elaborate detailed agreements that address the root causes of the cycle of violence. For decades, civilians in the Great Lakes region, particularly in eastern DRC, have been killed, raped, abused, displaced, and otherwise victimized on a horrific scale. They deserve the full commitment of regional governments and the international community to ending the violence once and for all.

The United States urges the DRC to seize the opportunity of renewed international engagement to uphold its commitments to an extension of state authority in the east, to security sector reform, and to improved governance. It is equally imperative that the DRC's neighbors respect its sovereignty and territorial integrity by preventing external support to armed groups, which is a violation of international obligations. We also urge the parties to address collectively the egregious use of sexual violence as a tactic of war, impunity for human rights abusers, the illegal exploitation of minerals, the prevention of further population displacements, and land issues.

We further believe the crisis in eastern DRC is an opportunity for the UN Security Council to completely reassess MONUSCO's mandate to enhance the Mission's effectiveness.

[**] Editor's Note: Susan Rice left her post as U.S. Ambassador to the UN on June 25, 2013 to become National Security Adviser to President Obama. On August 5, 2013 Samantha Power was sworn in as U.S. Ambassador to the UN.

* * * *

On February 25, 2013, the Department of State issued a press statement on the signing of the Framework Agreement, excerpted below and available at *www.state.gov/r/pa/prs/ps/2013/02/205161.htm*.

---

* * * *

The United States strongly supports the initiative of the President of the Democratic Republic of the Congo (DRC) and ten other African heads of state in signing the Peace, Security, and Cooperation Framework for the DRC and the Region, witnessed by three African regional bodies and the United Nations.

The continuing security and humanitarian crisis in eastern DRC highlights the urgent need for accelerated reforms within the DRC and increased cooperation among key countries in the Great Lakes region, particularly the DRC, Rwanda, and Uganda. We commend all the signatories for acknowledging their essential responsibilities in promoting regional peace and security. We urge the DRC to seize the opportunity to uphold its commitments to an extension of state authority in the east, to security sector reform, and to improved governance. It is equally imperative that the DRC's neighbors respect its sovereignty and territorial integrity by preventing external support to armed groups. We encourage all parties to live up to the spirit and letter of their joint framework agreement.

The framework needs to be a foundation, both within the DRC and in the region, for a sustained and serious dialogue to ensure that the signatories hold each other accountable for their commitments. The United States urges the signatories to quickly establish concrete follow-up mechanisms for implementing the framework at the national and regional level, and with the participation of key stakeholders, including the international community, local communities, and civil society. We are prepared to support this process. In this regard, we look forward to the appointment of a high-level UN envoy to lead international support for the framework's implementation. We also support a close and comprehensive review by the Security Council of the UN peacekeeping operation in the DRC, which will also have a critical role in supporting dialogue and security.

Both the region and the international community must support the Congolese people and the region in breaking the long cycle of conflict and violence. We urge all parties to take advantage of this opportunity to ensure that the future of the DRC and the region is more peaceful and prosperous than the past.

* * * *

On March 28, 2013, the UN Security Council adopted resolution 2098 on the Democratic Republic of the Congo. U.N. Doc. S/RES/2098. Among other things, resolution 2098 extends the mandate of MONUSCO and authorizes an "Intervention Brigade," to neutralize armed groups. Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative to the United Nations for Special Political Affairs, delivered the

explanation of vote for the United States at the adoption of the resolution. Ambassador DeLaurentis's statement is excerpted below and available at *http://usun.state.gov/briefing/statements/206774.htm*.

---

* * * *

…Following the signing of the regional framework agreement, we find ourselves at a key turning point in the DRC.

The framework process, which included personal engagement from Secretary-General Ban, has breathed new life into efforts to find a durable peace in eastern DRC, where over 5 million have lost their lives since 1998.

In light of the renewed commitments from the DRC, its neighbors, and the international community laid out in the framework, the Security Council has acted today to ensure that MONUSCO's mandate supports the framework agreement in its efforts to address the root causes of conflict.

Given the introduction of the Intervention Brigade, the United States has been particularly mindful of the need to "set MONUSCO up for success" by streamlining the other tasks that MONUSCO—particularly its military component—are tasked to. We underscore today that efforts to protect civilians and neutralize armed groups must remain at the forefront of tasks for MONUSCO, and are duties that all MONUSCO peacekeepers must do their utmost to perform.

We recognize the need for continued coordination with the civilian side in these efforts, particularly to ensure the protection of children and women, and to prevent continuation of the horrible streak of sexual violence in the DRC. In this regard, we fully support MONUSCO's continued role in human rights monitoring, which we see as a key part of protecting civilians.

The Security Council has demonstrated its commitment to achieving peace in the DRC by authorizing the Intervention Brigade today. We call on the DRC government to meet its commitment to the parameters in the framework, particularly in implementing credible Security Sector Reform. We also call on the DRC's neighbors to meet their commitments in the Framework agreement.

As we look ahead, we welcome the Secretary-General's appointment of Mary Robinson as his Special Envoy for the Great Lakes Region and will support her efforts to craft and ensure implementation of a political process that complements the work of MONUSCO to bring lasting peace to the citizens of eastern DRC.

* * * *

3. Lebanon

In July 2013, when the United States held the presidency of the UN Security Council, the Security Council issued a presidential statement on Lebanon, excerpted below and available in full at *http://usun.state.gov/briefing/statements/211756.htm*.

---

* * * *

The Security Council is encouraged by the calm that continues to prevail across the Blue Line and in the United Nations Interim Force in Lebanon's (UNIFIL) area of operations. It urges all parties to make every effort to ensure that the cessation of hostilities is sustained, and emphasizes the need for them to continue working with the Special Coordinator and UNIFIL, including through the tripartite mechanism, to focus again on the goal of a permanent ceasefire and to reflect positively on ways forward on all outstanding issues in the implementation of Security Council resolutions 1701 (2006), 1680 (2006), and 1559 (2004) and other relevant Security Council resolutions. The Council also recalls the necessity for all parties to ensure the security of the contributing troops and that the freedom of movement of UNIFIL is fully respected and unimpeded.

The Security Council expresses deep concern at all violations of Lebanon's sovereignty and calls on all parties to fully respect Lebanon's sovereignty, territorial integrity, unity and political independence within its internationally recognized borders, in accordance with the relevant Security Council resolutions.

As the impact of the Syrian crisis on Lebanon's stability and security becomes more and more apparent, the Security Council underscores its growing concern at the marked increase of cross-border fire from the Syrian Arab Republic into Lebanon, which caused death and injury among the Lebanese population, as well as incursions, abductions, and arms trafficking across the Lebanese-Syrian border. The Security Council also expresses its concern at all other border violations. The Security Council echoes President Michel Sleiman's protest, in his letter of June 18, 2013 at such repeated shelling from the conflicting parties, including by the Syrian Arab armed Forces and Syrian armed opposition groups, that violate Lebanon's sovereignty and territorial integrity.

The Security Council further notes with deep concern new developments with regard to the involvement of Lebanese parties in the fighting in Syria. The Security Council calls upon all Lebanese parties to recommit to Lebanon's policy of disassociation, to stand united behind President Michel Sleiman in this regard and to step back from any involvement in the Syrian crisis, consistent with their commitment in the Baabda Declaration of 12th of June 2012. The Security Council further echoes President Sleiman's call on the parties in Syria to avoid military action near the Lebanese border.

In the face of attempts to undermine the country's stability, the Security Council encourages all parties in Lebanon to demonstrate renewed unity and determination to resist a slide into conflict and commends in this regard the continued efforts of President Michel Sleiman to preserve Lebanon's unity and stability and underlines that continued broad political support is needed for the institutions of the State.

The Council urges all parties in Lebanon to continue to engage with Prime Minister designate Tammam Salam so as to allow the urgent formation of a government. The Security Council further encourages all Lebanese leaders to resume efforts to agree arrangements for parliamentary elections, consistent with Lebanon's long standing democratic tradition and in conformity with the legal and constitutional framework.

The Security Council also stresses the need to support the security and judicial authorities so as to combat impunity in respects of acts of violence. It also recalls the need to put an end to impunity in Lebanon and reiterates its full support for the work of the Special Tribunal for

Lebanon and urges the Lebanese authorities to continue meeting their international obligations in this regard, including on financial matters. The Council calls upon all parties to fully cooperate with the Tribunal.

The Security Council also condemns recent violence by armed groups across Lebanon, including those in Tripoli and Sidon, the latter of which left at least 16 soldiers dead and over 50 others wounded and expresses condolences to the families of the victims. The Security Council also acknowledges the crucial role played by the Lebanese security and armed forces in extending and sustaining the authority of the State and responding to new security challenges. The Council calls on Lebanon's leaders across the whole spectrum and Lebanese of all communities to offer every possible support to the Lebanese Armed Forces as a national and neutral institution and central pillar of the country's stability.

The Security Council is gravely concerned at the dramatic influx of refugees fleeing violence in Syria, now totalling over 587,000 Syrian refugees and an additional 65,500 Palestinian refugees in Lebanon. The Council commends Lebanon's generous efforts in hosting and assisting those refugees and encourages the establishment of fully empowered institutional structures to carry out planning, delivery and coordination responsibilities.

The Security Council stresses the need for strong, coordinated international support for Lebanon to help it continue to withstand the multiple current challenges to its security and stability. It encourages increased international support to the Lebanese Armed Forces, in response to their recently launched capabilities development plan as well as in the context of the Strategic Dialogue between the Lebanese Armed Forces and UNIFIL. It notes the particular urgency of assistance which would strengthen the Lebanese Armed Forces' capabilities with respect to border control.

As for the refugee crisis, the Security Council underlines the need for assistance on an unprecedented scale, both to meet the needs of the refugees and of host communities, and to assist the Lebanese authorities who face extraordinary financial and structural challenges as a result of the refugee influx. The Council calls in this regard upon the international community to provide the required assistance as swiftly as possible to the latest joint appeal of the United Nations and the Government of Lebanon and in this regard urges those Member States which committed themselves to providing funds to live up to their pledges.

* * * *

4. Lord's Resistance Army

On May 29, 2013, Ambassador Rice delivered remarks at a Security Council briefing by Abou Moussa, Special Representative of the UN Secretary General ("SRSG") and Head of the United Nations Regional Office for Central Africa ("UNOCA"). Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/210048.htm*.

---

* * * *

For almost three decades, the Lord's Resistance Army has wreaked havoc and perpetrated mass atrocities on the people of Central Africa and the Great Lakes region. The LRA has killed, maimed, and displaced thousands. It has abducted children and forced them to commit unspeakable horrors. It has destroyed families and communities. Its acts are unconscionable and must be stopped once and for all.

This Council has repeatedly condemned the LRA's atrocities and supported decisive measures to end them. Our goal of permanently ending the LRA threat is within reach, but it will require sustained regional leadership and international support. The United States commends the African Union and governments in the region, particularly Uganda, for their concerted and continuing efforts to neutralize the LRA threat. The United States has provided significant assistance to support these regional efforts, including by sending U.S. military advisors to enhance the capacity of regional forces to pursue top LRA commanders and protect local populations.

Our common commitment has resulted in notable progress. OCHA reports that, overall, there was a significant drop in the number of LRA attacks in 2012, compared to 2011. Some of those displaced by the LRA in South Sudan have begun to return home. And two of the LRA's most senior commanders, Ceasar Acellam and Vincent "Binany" Okumu, have been removed from the battlefield while scores of LRA members have defected or been released. To help bring the LRA's top commanders to justice, the United States, through the War Crimes Rewards Program, is offering rewards of up to $5 million for information leading to the arrest, transfer, or conviction of LRA leaders Joseph Kony, Okot Odhiambo, and Dominic Ongwen.

Nevertheless, the LRA remains a regional threat with an outsized impact because of its brutality and reach. Joseph Kony is still at large, and the LRA continues to conduct attacks and commit abductions. Hundreds of thousands of people remain displaced throughout central Africa because of the LRA.

Instability across the region, particularly in the Central African Republic, threatens to halt and potentially reverse progress in the fight against the LRA. The United States believes that counter-LRA operations under the AU's Regional Task Force should resume as soon as possible. We welcome the CAR transitional government's assurances that counter-LRA operations will continue through the AU Regional Task Force. Further suspension of military operations in the CAR could allow the LRA to reorganize and further endanger civilians.

Meanwhile, the LRA continues to wreak havoc in other countries in the region, especially the Democratic Republic of Congo. According to OCHA, the DRC suffered 54 LRA attacks between January and March of this year—the most among LRA-affected countries in the region. FARDC and MONUSCO forces operating in northeastern DRC should renew their efforts to combat the LRA through expanded, more targeted patrols and increased information-sharing.

Furthermore, UN missions in the region and the AU-RTF need to develop a common picture of the LRA's operating disposition and investigate the LRA's logistical networks and possible sources of illicit financing.

The UN's comprehensive regional strategy is critical to coordinating UN and AU action to protect civilians from the LRA and strengthen the resilience of local communities. The United States fully supports this strategy and welcomes the new implementation plan produced by SRSG Moussa and UNOCA. We hope this translates swiftly into action in the region and, in particular, we urge rapid implementation of the DDRRR standard operating procedures and greater focus on roads and infrastructure projects to increase humanitarian access in the region.

We request the Secretary-General to ensure that UNOCA has the staffing, particularly the technical experts, it needs to do so.

As we work to end the LRA's campaign of terror, we must also address the crisis in the Central African Republic, where the breakdown of law and order, ongoing human rights abuses, and the dire humanitarian situation pose a serious threat to regional stability. The United States applauds and appreciates the efforts of UN agencies and NGOs to ameliorate the humanitarian suffering amidst a challenging operating environment. CAR authorities, however, bear primary responsibility for protecting civilians and must do much more in this regard, particularly for women and children. They need to bring the Séléka fighters under control immediately, facilitate humanitarian access throughout the country, and enable a political transition. And perpetrators of human rights violations committed by both sides during the recent fighting must be held to account.

In addition to the LRA and instability in the Central African Republic, piracy and maritime armed robbery in the Gulf of Guinea remain serious security concerns for the region. The United States values UNOCA's support for regional coordination and capacity-building to combat these threats and looks forward to the regional Summit of Heads of State and Government this June where countries can demonstrate their leadership in addressing them.

We also welcome UNOCA's important preventive diplomacy and peacebuilding efforts to promote regional stability and urge UNOCA's continued attention to the challenges faced by women and girls in the sub-region, including female genital mutilation, early forced marriage, denial of access to education, and low political participation.

* * * *

5. Central African Republic

On December 5, 2013, the UN Security Council adopted a resolution on the crisis in the Central African Republic. U.N. Doc. S/RES/2127. Ambassador Power delivered remarks on the resolution at a Security Council stakeout on December 5th. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/218372.htm*.

---

* * * *

Today's UN resolution marks a very important moment in the Council's response to the crisis in the Central African Republic. It reflects our shared belief that immediate action is required to avert a humanitarian catastrophe in the Central African Republic. Let me begin by thanking the African Union and the French government. One cannot overstate how important French leadership and this new military contribution is going to be. We commend and we support the robust efforts that are being made by countries who are putting their troops on the line to try to prevent atrocities and save lives in the CAR.

The U.S. government is deeply disturbed by the ongoing reports of brutality in the Central African Republic, including some of the instances that you all have referenced already,

the horrific reports of violence overnight. Just yesterday, as you know, there were reports of gruesome machete attacks north of Bangui.

We have heard the accounts of tens of thousands of Christians sheltering in a church outside Bossangoa, with thousands of their Muslim neighbors huddled similarly in a nearby mosque, all of them fearing the possibility of an attack on their lives.

We know there are nearly 400,000 people displaced by violence—that's almost 10 percent of the country's total population—and we know that nearly half the population is affected by this crisis. It is clear that urgent action is required to save lives.

There are—these are the harrowing facts that this Security Council has deliberated in considering how best to move out in saving lives and how best to address the country's immediate needs as quickly as possible. Achieving these goals requires a credible military force with a robust mandate to engage in peace enforcement activities. Today's resolution gives us that. The deployment of MISCA and French forces with a Chapter VII mandate provides the most immediate vehicle to protect civilians, prevent atrocities, and restore humanitarian access that has been lost.

The Security Council has rightly recognized that the situation in CAR is desperate and it is dynamic. What is necessary today may not be what is necessary tomorrow. As such, this resolution asks the UN Secretary General to begin contingency planning on the possible transition from MISCA to a UN peacekeeping operation if conditions warrant.

Some seem to hold the view that this Council is faced with deciding between the deployment of an African mission on the one hand or a UN mission on the other. This is a false choice. The fact is that should a UN peacekeeping mission be required in the future, the core of those forces are likely to be formed of the same African peacekeepers who have put their troops forward to try to save lives now. It is essential that these troops—the troops on the ground and the troops that are coming in to the Central African Republic—be properly equipped and properly mandated.

With that in mind, the United States pressed for, and achieved together with the Council, a resolution that strengthens the AU mission and joins it with this new infusion of French troops. The United States has already pledged an initial $40 million in support to MISCA. We now call once more on others to join in pledging the required financial and logistic support required for MISCA to ensure it has what it needs to protect civilians.

Beyond the CAR's immediate needs, I am pleased that this resolution also reflects broad U.S. thinking on other tracks that will stabilize the situation and promote accountability for atrocities over the long-term. The resolution puts in a place a sanctions regime that establishes an arms embargo and that lays down a marker that the Council is prepared to impose measures that target both political spoilers and human rights abusers. The resolution also establishes a Commission of Inquiry, which should gather information that could point to criminal responsibility for use in future judicial cases.

Let us be clear here. This is an atrocities prevention situation, and our response will be based on what is most appropriate for saving lives. What matters right now to the civilians whose lives are hanging in the balance is actually not the color of the helmet of those tasked to protect them. What matters is whether the troops there move out aggressively to protect civilians and to restore security.

We need to employ the option today that will halt the carnage in the CAR the most quickly. We believe that involves giving our full support to our African and French colleagues who are stepping up to do so.

* * * *

6. Sudan and South Sudan

In 2013, problems persisted with implementation of the Comprehensive Peace Agreement of 2005 ("CPA") in Sudan and South Sudan. The UN Security Council adopted several resolutions on Sudan and South Sudan in 2013. U.N. Doc. S/RES/2091; U.N. Doc. S/RES/2104; U.N. Doc. S/RES/2109; U.N. Doc. S/RES/2113; U.N. Doc. S/RES/2126; see also Ambassador Rice's remarks on resolution 2104, available at *http://usun.state.gov/briefing/statements/210047.htm*. In March 2013, the presidents of Sudan and South Sudan worked out detailed arrangements to implement agreements they had previously signed in 2012. Ambassador Rice welcomed these implementation plans in remarks at the Security Council, but pointed out that "there have been many agreements signed but too few actually implemented." Ambassador Rice urged implementation of the agreements and also urged the parties to address outstanding issues such as the situations in Southern Kordofan and Blue Nile and Abyei. Ambassador Rice's March 12, 2013 remarks are available at *http://usun.state.gov/briefing/statements/205992.htm*. The United States, Norway, and the United Kingdom (the "troika") issued a ministerial joint statement on March 13, 2013 regarding this implementation plan. The joint statement is excerpted below and available at *http://usun.state.gov/briefing/statements/206176.htm*.

* * * *

We welcome the detailed arrangements approved by the Governments of Sudan and South Sudan this week to implement all nine agreements signed by Presidents Kiir and Bashir on 27 September 2012.

Most importantly, the new arrangements set clear deadlines for the withdrawal of forces from the disputed border and the establishment of a Joint Border Verification and Monitoring Mechanism operating within a Safe Demilitarized Border Zone, and they commit the parties to the resumption of oil production and the opening of the border for trade, which will provide such a vital boost to the economies of both countries.

We call on the parties to begin implementation of all aspects of these agreements immediately and unconditionally, as required by UN Security Council Resolution 2046. This spirit of cooperation should also create the conditions for the parties to make progress on all other unresolved issues, to include Abyei.

At the same time we remain deeply concerned by the security and humanitarian situation in Southern Kordofan and Blue Nile states in Sudan. It is imperative that both Sudan and the Sudan People's Liberation Movement North (SPLM-N) seize the opportunity of direct talks to

address the urgent need for a cessation of hostilities, humanitarian access to all areas, and the longer-term political solution. We welcome SPLM-N's acceptance of the invitation to direct talks and urge the Government of Sudan to do the same, without pre-conditions.

We underline our continued support for the unceasing efforts of President Mbeki and the African Union High-Level Implementation Panel.

* * * *

Tensions worsened in Sudan and South Sudan as 2013 went on. On June 14, 2013, the troika issued another joint statement, excerpted below and available at *www.state.gov/r/pa/prs/ps/2013/06/210637.htm*.

---

* * * *

We are deeply concerned at the heightened tension between the Governments of Sudan and South Sudan. We call on both governments to comply fully with all of their September 27 agreements, including ceasing any support to rebel movements in each other's territories and withdrawing their forces fully from the Safe Demilitarized Border Zone. The Government of Sudan's announcement that it intends to stop the flow of South Sudanese oil transported via Sudan's pipeline is in contravention of these agreements. We urge the Government of Sudan to reconsider its position and call on both governments to continue constructive dialogue on implementation of these agreements, especially on oil and security.

The Troika reminds both sides of the commitment they made to a peaceful resolution of their disputes in signing the Addis Ababa agreements on 27 September 2012 and calls on them to cease their increasingly hostile rhetoric. Full implementation of all agreements, without conditionality, as well as progress on unresolved issues such as Abyei, presents the best path toward realizing these goals. We call on both governments to cease any interference in the internal affairs of the other state. In particular, we condemn any military support being provided to rebel movements in Sudan or South Sudan. Such support is clearly in breach of both the spirit and the letter of the Addis agreements and should end immediately.

We remind both governments that they committed under the Addis agreements to withdraw forces fully from the Safe Demilitarized Border Zone consistent with the African Union map which they have both accepted, and as called for by UN Security Council Resolution 2046. The UN Security Council has made a substantive commitment to support border security arrangements, by increasing the force levels of the UN Interim Security Force in Abyei for its participation in the Joint Border Verification and Monitoring Mechanism. We urge both governments to resolve their concerns through the Joint Political Security Mechanism, the Petroleum Monitoring Committee and the other established bilateral mechanisms.

Abandoning internationally-supported security mechanisms and unilaterally shutting down oil will have serious implications for the viability of both states. We call on the two governments to recover their spirit of cooperation exhibited in past months and to commit to overcoming their differences. President Mbeki and the AU High-Level Implementation Panel have now proposed to the Heads of State practical measures to help the parties honor the

commitments that they have already made to each other. The Troika supports these next steps as the only viable way forward and repeats our rejection of unilateral actions in word or deed that would damage our collective goal of lasting peace.

* * * *

7. Somalia

On March 6, 2013, the UN Security Council adopted Resolution 2093 on Somalia. The U.S. Mission to the UN issued the following statement, available at *http://usun.state.gov/briefing/statements/205683.htm*, on adoption of Resolution 2093:

> Today, the UN Security Council sent a clear signal of support to the new Somali Government. Resolution 2093 answers President Hassan Sheikh Mohamed's call for "one door to knock on," by unifying UN development and humanitarian work under the UN Special Representative's direction. It also aligns UN support to assist the Somali Government in delivering services to its citizens.
>
> Importantly, in recognition of the Somali government's progress, the Security Council has agreed to suspend the arms embargo on the government of Somalia while providing safeguards to ensure responsible development of the security sector and leaving the ban on Al Shabaab and other terrorist and extremist groups in place. We will continue to work to support the Government of Somalia as they endeavor to turn the page on two decades of civil war by maintaining recent progress and working closely with regional and international partners to improve the lives of all Somalis.

C. CONFLICT AVOIDANCE

1. Implementation of the National Action Plan on Women, Peace, and Security

On September 23, 2013, Secretary Kerry announced a new initiative to address gender-based violence in global humanitarian emergencies. The media note making the announcement is excerpted below and available at *www.state.gov/r/pa/prs/ps/2013/09/214552.htm.* The issues of women, peace, and security and sexual violence in conflict are also discussed in Chapter 6.B.2.

---

* * * *

Secretary of State John Kerry announced Monday the provision of $10 million in funding for a new U.S. initiative, *Safe from the Start*, to prevent and respond to gender-based violence in

humanitarian emergencies worldwide. Secretary Kerry emphasized that in the face of conflict and disaster, we should strive to protect women and girls from sexual assault and other violence.

Safe from the Start's initial commitment of $10 million will allow the UN High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC), and other humanitarian agencies and organizations to hire specialized staff, launch new programs, and develop innovative methods to protect women and girls at the onset of emergencies around the world. The United States will also coordinate with other donors and stakeholders to develop a framework for action and accountability to ensure efforts to address gender-based violence are routinely prioritized as a life-saving intervention along with other vital humanitarian assistance.

This initiative builds on the framework established by the U.S. National Action Plan on Women, Peace and Security and the U.S. Strategy to Prevent and Respond to Gender-based Violence Globally. It will be led by the State Department's Bureau of Population, Refugees, and Migration (PRM) and the U.S. Agency for International Development (USAID) Bureau of Democracy, Conflict, and Humanitarian Assistance.

* * * *

2. Post-Conflict Peacebuilding

On April 25, 2013, Ambassador DiCarlo addressed a briefing at the UN on post-conflict peacebuilding. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/208002.htm*.

---

* * * *

The United States appreciates the contributions of the Peacebuilding Commission, Peacebuilding Fund, and Peacebuilding Support Office and recognizes the PBC's value as a common platform for international actors working in support of sustainable peace and development. From mobilizing resources to developing partnerships to building bridges among different UN entities in support of peacebuilding objectives, the PBC continues to evolve to reach its full potential. We share the Secretary General's view that strong national ownership of the peacebuilding process, a closer relationship between headquarters and UN actors in the field, and prioritization of resources are essential to the PBC's success.

In this regard, I'd like to focus on three areas where the PBC has great opportunity for added value: political governance, economic governance, and justice and security sector reform.

Mr. President, peace and security require basic political agreement on the structures of government and the rules of politics. Effective, resilient, and inclusive governance institutions are essential to ending recurring conflict and enabling long-term, broad-based economic growth and development. As President Obama said in 2009, "Good governance is the ingredient that can unlock Africa's enormous potential." Following successful national elections in Sierra Leone, for example, the PBC's role in developing coherent short- and long-term peacebuilding objectives and identifying national capacity gaps, particularly related to governance, is increasingly important.

International support, however, cannot substitute for the national government nor overcome the absence of a durable political settlement. We note that PBC engagement in Guinea-Bissau is suspended following the April 2012 coup d'état, and the Central African Republic has started down a similarly troubling path. Before the CAR can stabilize and develop, constitutional order must be restored and the Libreville and N'Djamena agreements must be implemented. The Commission must be prepared to step in and facilitate international support for effective government institutions once conditions allow. Unlocking the vast untapped potential of women as political leaders and in building governance institutions is also essential. Every effort must be made to ensure that women are included and supported as the PBC helps national actors interface with the UN system, mobilize the appropriate resources, and generate momentum for further support and positive action.

Economic governance is equally important for post-conflict peacebuilding and recovery. Partnerships with the World Bank, the IMF, and regional development banks are critical since they have the tools and expertise to build the capacity of institutions of public finance. In Burundi, the PBC's engagement with international financial institutions led to the inclusion of peacebuilding priorities in its second generation poverty reduction strategy. Furthermore, thanks in no small part to the efforts of Ambassador Seger and the country configuration, more than $2.5 billion was pledged at the October 2012 Burundi partners' conference. Indeed, the PBC's ability to mobilize resources and to ensure inclusivity of women and underrepresented groups is crucial for countries transitioning from conflict to development phases, but donors must have confidence in a country's capacity to absorb and manage its contributions responsibly.

Beyond the necessity of capable political and economic governance, ordinary citizens must feel safe and secure in their daily lives for peacebuilding to succeed. They need to be able to trust in the rule of law and the state's security forces. Yet, in the aftermath of conflict, there is usually a need to build up the justice sector while the security sector is typically in need of reform and downsizing. Women need to take part and be included in reforming the institutions of law and security so that the needs of the entire society are met.

The PBC can and should help sustain political momentum for such efforts. In Liberia, the PBC not only facilitated the participation of key stakeholders to establish justice hubs to bring security and justice services to Liberians outside of the capital but helped to enable a structured roadmap that kept the project on track and coordinated. We understand the first hub is already providing essential services, including counseling for victims of sexual and gender-based violence.

Mr. President, too often, our attention is focused acutely on ending the fighting and stopping the bloodshed. But when the guns fall silent, the wounds of war are far from healed and the causes of conflict far from resolved. For this reason, the PBC remains important and must continue to improve its effectiveness in catalyzing political momentum and mobilizing the resources needed to assist countries transitioning from conflict to peace.

* * * *

3. Responsibility to Protect

On September 11, 2013, Ambassador Power addressed an informal interactive dialogue on the responsibility to protect at the UN. Her statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/214066.htm*.

---

* * * *

We are here today because in 2005 the nations of the world met in this Assembly and reached a consensus that the protection of civilians against the most horrific crimes known to man presents an urgent summons to each and all of us. All governments have a responsibility to protect their people from these crimes, and all nations have a stake in helping them meet that responsibility.

Having joined that consensus, it is appalling to see what the Syrian government has wrought on its own people over the last two years. And yet even against this murderous backdrop, the events of August 21 stand out. On that day, the world watched with horror as the Assad regime deployed chemical weapons against its own people, poisoning over 1,000 men, women and children—hundreds of children—with a chemical nerve agent as many of them slept.

When we focus on this attack, as we have of late, the question invariably arises: What about the tens of thousands of civilians who have died through more conventional means? Were they owed any less protection? Of course not. The mother who has to live without her five year-old daughter because she was killed by a sniper feels the pain no less searingly than the father whose five year-old son was asphyxiated in a sarin attack. All attacks on civilians are an outrage that should shock the conscience. We must also recognize that the use of chemical weapons crosses a line. These weapons are particularly grotesque, efficient, and indiscriminate. Their use can't be reconciled with basic principles of humanity that apply, even in wartime. And their proliferation poses a correspondingly high risk to international peace and security, but, more concretely, to citizens in all countries. When the norm is violated, as it was on August 21, the violation cannot go unanswered, unless we are willing to see these weapons used again. And on this my government has spoken clearly: we are not.

The consensus reached in September 2005 should not be code for necessitating military intervention. But R2P is a doctrine for prevention.

It should have compelled Assad to protect his people rather than attack them, and it should have compelled his partners in the international community to step in earlier, lend advice and assistance, and prevent the situation from reaching its current metastatic proportions. It should have. Clearly, it is the understatement of the year to say we still have work to do.

In the area of prevention there is much we can do. To offer some examples, we can prioritize atrocity prevention at the national level. For R2P to mean anything, governments must go beyond their general support for the World Summit outcome document and make it clear—from the Head of State downward—that the protection of civilians is a priority. This focus for us has clarified—this leadership by President Obama has clarified—the way in which we have worked to meet crises, from the Kivus to Rakhine State in Burma.

Governments can organize to make sure that all of our national capabilities—diplomatic, development, financial, justice, and defense—are being honed and used to best effect in the service of atrocity prevention. Much has been made of President Obama's Atrocity Prevention

Board, but it is simply a high-level vehicle to press the rest of the government to help ensure we are working to deploy the full range of preventative tools we have to ensure civilians are protected.

We can multilateralize our efforts. As I noted earlier, R2P recognizes that the prevention of atrocities is a matter of international concern. That's why the recently adopted Arms Trade Treaty, which will help prevent the illicit flow of arms to atrocity perpetrators, is so important. It's why peacekeeping missions should have the training and mandates they need, and it's why we each need to support the UN Secretariat—including our dynamic colleague, UN Special Adviser on the Prevention of Genocide, Adama Dieng. Given the important role that UN mediation capacity plays, I am pleased that the Friends of Mediation, which the U.S. recently joined, will be meeting at the ministerial level on the margins of the General Assembly opening session to advance support for this critical function.

In conclusion, these are just three ideas—prioritize, organize, multilateralize—but for my government, they have provided an important place to start. I know your governments have your own approaches, and I look forward to hearing about and learning from them. The international consensus around R2P remains a signal achievement of multilateral cooperation and a testament to our common humanity. But as we share ideas, there is one thing on which I hope we can all agree: we have a great deal of work to do. The important framework that the Outcome Document created in 2005 remains more aspirational than it is real. Eight years and countless innocent lives later, we are the ones who have a responsibility to make it real.

* * * *

Cross References

International Criminal Court, **Chapter 3.C.**
Actions at the Human Rights Council regarding Syria, **Chapter 6.A.4.b.**
Sexual violence in conflict, **Chapter 6.B.2.a.**
Palestinian membership efforts at the UN, **Chapter 7.B.**
*Recording Israel as place of birth on passport (*Zivotofsky*)*, **Chapter 9.C.**
Looting of museums and archaeological sites in Syria, **Chapter 14.B.**
Syria-related sanctions, **Chapter 16.A.2.**
Sanctions relating to restoration of peace and security, **Chapter 16.A.7.**
Potential use of force in Syria, **Chapter 18.A.2.**
Syrian chemical weapons, **Chapter 19.F.1.**

CHAPTER 18

Use of Force

A. GENERAL

1. Use of Force Issues Related to Counterterrorism Efforts

a. President Obama's speech at the National Defense University

On May 23, 2013, President Obama delivered remarks at the National Defense University at Fort McNair in Washington, D.C. His remarks addressing the use of force in countering terrorism, excerpted below, are available at *www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university*.

---

* * * *

…[I]n an age when ideas and images can travel the globe in an instant, our response to terrorism can't depend on military or law enforcement alone. We need all elements of national power to win a battle of wills, a battle of ideas. So what I want to discuss here today is the components of such a comprehensive counterterrorism strategy.

First, we must finish the work of defeating al Qaeda and its associated forces.

In Afghanistan, we will complete our transition to Afghan responsibility for that country's security. Our troops will come home. Our combat mission will come to an end. And we will work with the Afghan government to train security forces, and sustain a counterterrorism force, which ensures that al Qaeda can never again establish a safe haven to launch attacks against us or our allies.

Beyond Afghanistan, we must define our effort not as a boundless "global war on terror," but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America. In many cases, this will involve partnerships with other countries. Already, thousands of Pakistani soldiers have lost their lives fighting extremists. In

Yemen, we are supporting security forces that have reclaimed territory from AQAP. In Somalia, we helped a coalition of African nations push al-Shabaab out of its strongholds. In Mali, we're providing military aid to French-led intervention to push back al Qaeda in the Maghreb, and help the people of Mali reclaim their future.

Much of our best counterterrorism cooperation results in the gathering and sharing of intelligence, the arrest and prosecution of terrorists. And that's how a Somali terrorist apprehended off the coast of Yemen is now in a prison in New York. That's how we worked with European allies to disrupt plots from Denmark to Germany to the United Kingdom. That's how intelligence collected with Saudi Arabia helped us stop a cargo plane from being blown up over the Atlantic. These partnerships work.

But despite our strong preference for the detention and prosecution of terrorists, sometimes this approach is foreclosed. Al Qaeda and its affiliates try to gain foothold in some of the most distant and unforgiving places on Earth. They take refuge in remote tribal regions. They hide in caves and walled compounds. They train in empty deserts and rugged mountains.

In some of these places—such as parts of Somalia and Yemen—the state only has the most tenuous reach into the territory. In other cases, the state lacks the capacity or will to take action. And it's also not possible for America to simply deploy a team of Special Forces to capture every terrorist. Even when such an approach may be possible, there are places where it would pose profound risks to our troops and local civilians—where a terrorist compound cannot be breached without triggering a firefight with surrounding tribal communities, for example, that pose no threat to us; times when putting U.S. boots on the ground may trigger a major international crisis.

To put it another way, our operation in Pakistan against Osama bin Laden cannot be the norm. The risks in that case were immense. The likelihood of capture, although that was our preference, was remote given the certainty that our folks would confront resistance. The fact that we did not find ourselves confronted with civilian casualties, or embroiled in an extended firefight, was a testament to the meticulous planning and professionalism of our Special Forces, but it also depended on some luck. And it was supported by massive infrastructure in Afghanistan.

And even then, the cost to our relationship with Pakistan—and the backlash among the Pakistani public over encroachment on their territory—was so severe that we are just now beginning to rebuild this important partnership.

So it is in this context that the United States has taken lethal, targeted action against al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones.

As was true in previous armed conflicts, this new technology raises profound questions—about who is targeted, and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under U.S. and international law; about accountability and morality. So let me address these questions.

To begin with, our actions are effective. Don't take my word for it. In the intelligence gathered at bin Laden's compound, we found that he wrote, "We could lose the reserves to enemy's air strikes. We cannot fight air strikes with explosives." Other communications from al Qaeda operatives confirm this as well. Dozens of highly skilled al Qaeda commanders, trainers,

bomb makers and operatives have been taken off the battlefield. Plots have been disrupted that would have targeted international aviation, U.S. transit systems, European cities and our troops in Afghanistan. Simply put, these strikes have saved lives.

Moreover, America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war—a war waged proportionally, in last resort, and in self-defense.

And yet, as our fight enters a new phase, America's legitimate claim of self-defense cannot be the end of the discussion. To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance. For the same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power—or risk abusing it. And that's why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists—insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance that I signed yesterday.[*]

In the Afghan war theater, we must—and will—continue to support our troops until the transition is complete at the end of 2014. And that means we will continue to take strikes against high value al Qaeda targets, but also against forces that are massing to support attacks on coalition forces. But by the end of 2014, we will no longer have the same need for force protection, and the progress we've made against core al Qaeda will reduce the need for unmanned strikes.

Beyond the Afghan theater, we only target al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute. America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.

America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.

Now, this last point is critical, because much of the criticism about drone strikes—both here at home and abroad—understandably centers on reports of civilian casualties. There's a wide gap between U.S. assessments of such casualties and nongovernmental reports. Nevertheless, it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war. And for the families of those civilians, no words or legal construct can justify their loss. For me, and those in my chain of command, those deaths will haunt us as long as we live, just as we are haunted by the civilian casualties that have occurred throughout conventional fighting in Afghanistan and Iraq.

[*] Editor's note: A White House Fact Sheet summarizing this Presidential Policy Guidance is discussed in section A.1.c., *infra*.

But as Commander-in-Chief, I must weigh these heartbreaking tragedies against the alternatives. To do nothing in the face of terrorist networks would invite far more civilian casualties— not just in our cities at home and our facilities abroad, but also in the very places like Sana'a and Kabul and Mogadishu where terrorists seek a foothold. Remember that the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes. So doing nothing is not an option.

Where foreign governments cannot or will not effectively stop terrorism in their territory, the primary alternative to targeted lethal action would be the use of conventional military options. As I've already said, even small special operations carry enormous risks. Conventional airpower or missiles are far less precise than drones, and are likely to cause more civilian casualties and more local outrage. And invasions of these territories lead us to be viewed as occupying armies, unleash a torrent of unintended consequences, are difficult to contain, result in large numbers of civilian casualties and ultimately empower those who thrive on violent conflict.

So it is false to assert that putting boots on the ground is less likely to result in civilian deaths or less likely to create enemies in the Muslim world. The results would be more U.S. deaths, more Black Hawks down, more confrontations with local populations, and an inevitable mission creep in support of such raids that could easily escalate into new wars.

Yes, the conflict with al Qaeda, like all armed conflict, invites tragedy. But by narrowly targeting our action against those who want to kill us and not the people they hide among, we are choosing the course of action least likely to result in the loss of innocent life.

Our efforts must be measured against the history of putting American troops in distant lands among hostile populations. In Vietnam, hundreds of thousands of civilians died in a war where the boundaries of battle were blurred. In Iraq and Afghanistan, despite the extraordinary courage and discipline of our troops, thousands of civilians have been killed. So neither conventional military action nor waiting for attacks to occur offers moral safe harbor, and neither does a sole reliance on law enforcement in territories that have no functioning police or security services—and indeed, have no functioning law.

Now, this is not to say that the risks are not real. Any U.S. military action in foreign lands risks creating more enemies and impacts public opinion overseas. Moreover, our laws constrain the power of the President even during wartime, and I have taken an oath to defend the Constitution of the United States. The very precision of drone strikes and the necessary secrecy often involved in such actions can end up shielding our government from the public scrutiny that a troop deployment invites. It can also lead a President and his team to view drone strikes as a cure-all for terrorism.

And for this reason, I've insisted on strong oversight of all lethal action. After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: Not only did Congress authorize the use of force, it is briefed on every strike that America takes. Every strike. That includes the one instance when we targeted an American citizen—Anwar Awlaki, the chief of external operations for AQAP.

This week, I authorized the declassification of this action, and the deaths of three other Americans in drone strikes, to facilitate transparency and debate on this issue and to dismiss

some of the more outlandish claims that have been made. For the record, I do not believe it would be constitutional for the government to target and kill any U.S. citizen—with a drone, or with a shotgun—without due process, nor should any President deploy armed drones over U.S. soil.

But when a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States, nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.

That's who Anwar Awlaki was—he was continuously trying to kill people. He helped oversee the 2010 plot to detonate explosive devices on two U.S.-bound cargo planes. He was involved in planning to blow up an airliner in 2009. When Farouk Abdulmutallab—the Christmas Day bomber—went to Yemen in 2009, Awlaki hosted him, approved his suicide operation, helped him tape a martyrdom video to be shown after the attack, and his last instructions were to blow up the airplane when it was over American soil. I would have detained and prosecuted Awlaki if we captured him before he carried out a plot, but we couldn't. And as President, I would have been derelict in my duty had I not authorized the strike that took him out.

Of course, the targeting of any American raises constitutional issues that are not present in other strikes—which is why my administration submitted information about Awlaki to the Department of Justice months before Awlaki was killed, and briefed the Congress before this strike as well. But the high threshold that we've set for taking lethal action applies to all potential terrorist targets, regardless of whether or not they are American citizens. This threshold respects the inherent dignity of every human life. Alongside the decision to put our men and women in uniform in harm's way, the decision to use force against individuals or groups—even against a sworn enemy of the United States—is the hardest thing I do as President. But these decisions must be made, given my responsibility to protect the American people.

Going forward, I've asked my administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress. Each option has virtues in theory, but poses difficulties in practice. For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority. Another idea that's been suggested—the establishment of an independent oversight board in the executive branch—avoids those problems, but may introduce a layer of bureaucracy into national security decision-making, without inspiring additional public confidence in the process. But despite these challenges, I look forward to actively engaging Congress to explore these and other options for increased oversight.

* * * *

… I intend to engage Congress about the existing Authorization to Use Military Force, or AUMF, to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing.

The AUMF is now nearly 12 years old. The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to

the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states.

So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That's what history advises. That's what our democracy demands.

And that brings me to my final topic: the detention of terrorist suspects. I'm going to repeat one more time: As a matter of policy, the preference of the United States is to capture terrorist suspects. When we do detain a suspect, we interrogate them. And if the suspect can be prosecuted, we decide whether to try him in a civilian court or a military commission.

During the past decade, the vast majority of those detained by our military were captured on the battlefield. In Iraq, we turned over thousands of prisoners as we ended the war. In Afghanistan, we have transitioned detention facilities to the Afghans, as part of the process of restoring Afghan sovereignty. So we bring law of war detention to an end, and we are committed to prosecuting terrorists wherever we can.

The glaring exception to this time-tested approach is the detention center at Guantanamo Bay. The original premise for opening GTMO—that detainees would not be able to challenge their detention—was found unconstitutional five years ago. In the meantime, GTMO has become a symbol around the world for an America that flouts the rule of law. Our allies won't cooperate with us if they think a terrorist will end up at GTMO.

During a time of budget cuts, we spend $150 million each year to imprison 166 people -- almost $1 million per prisoner. And the Department of Defense estimates that we must spend another $200 million to keep GTMO open at a time when we're cutting investments in education and research here at home, and when the Pentagon is struggling with sequester and budget cuts.

As President, I have tried to close GTMO. I transferred 67 detainees to other countries before Congress imposed restrictions to effectively prevent us from either transferring detainees to other countries or imprisoning them here in the United States.

These restrictions make no sense.

* * * *

Today, I once again call on Congress to lift the restrictions on detainee transfers from GTMO.

I have asked the Department of Defense to designate a site in the United States where we can hold military commissions. I'm appointing a new senior envoy at the State Department and Defense Department whose sole responsibility will be to achieve the transfer of detainees to third countries.

I am lifting the moratorium on detainee transfers to Yemen so we can review them on a case-by-case basis. To the greatest extent possible, we will transfer detainees who have been cleared to go to other countries.

* * * *

Now, even after we take these steps one issue will remain—just how to deal with those GTMO detainees who we know have participated in dangerous plots or attacks but who cannot be prosecuted, for example, because the evidence against them has been compromised or is inadmissible in a court of law. But once we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.

* * * *

We have prosecuted scores of terrorists in our courts. That includes Umar Farouk Abdulmutallab, who tried to blow up an airplane over Detroit; and Faisal Shahzad, who put a car bomb in Times Square. It's in a court of law that we will try Dzhokhar Tsarnaev, who is accused of bombing the Boston Marathon. Richard Reid, the shoe bomber, is, as we speak, serving a life sentence in a maximum security prison here in the United States. In sentencing Reid, Judge William Young told him, "The way we treat you…is the measure of our own liberties."

* * * *

b. Attorney General Holder's Letter to Congress

On May 22, 2013, U.S. Attorney General Eric Holder sent a letter to the chairman of the judiciary committee of the U.S. Senate and others in the U.S. Congress providing previously classified information about U.S. counterterrorism operations in which U.S. civilians were killed. The letter refers to the speech the Attorney General delivered in 2012 at Northwestern University, discussed in *Digest 2012* at 577-84. Excerpts from the Attorney General's May 22, 2013 letter appear below. The letter is available in full at *www.state.gov/s/l/c8183.htm*.

---

* * * *

…[T]he President has directed me to disclose certain information that until now has been properly classified. You and other Members of your Committee have on numerous occasions expressed a particular interest in the Administration's use of lethal force against U.S. citizens. In light of this fact, I am writing to disclose to you certain information about the number of U.S. citizens who have been killed by U.S. counterterrorism operations outside of areas of active hostilities. Since 2009, the United States, in the conduct of U.S. counterterrorism operations against al-Qa'ida and its associated forces outside of areas of active hostilities, has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi. The United States is further aware of three other U.S. citizens who have been killed in such U.S. counterterrorism operations over that same time period: Samir Khan, 'Abd al-Rahman Anwar al-Aulaqi, and Jude Kenan Mohammed. These individuals were not specifically targeted by the United States.

As I noted in my speech at Northwestern, "it is an unfortunate but undeniable fact" that a "small number" of U.S. citizens "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 the current conflict, it is clear and logical that United States citizenship alone does not make such individuals immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to U.S. citizens—even those who are leading efforts to kill their fellow, innocent Americans. Such considerations allow for the use of lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al- Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans, in the following circumstances: (1) 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; (2) capture is not feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.

These conditions should not come as a surprise: the Administration's legal views on this weighty issue have been clear and consistent over time. The analysis in my speech at Northwestern University Law School is entirely consistent with not only the analysis found in the unclassified white paper the Department of Justice provided to your Committee soon after my speech, but also with the classified analysis the Department shared with other congressional committees in May 2011—months before the operation that resulted in the death of Anwar al-Aulaqi. The analysis in my speech is also entirely consistent with the classified legal advice on this issue the Department of Justice has shared with your Committee more recently. In short, the Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans.

Anwar al-Aulaqi plainly satisfied all of the conditions I outlined in my speech at Northwestern. Let me be more specific. Al-Aulaqi was a senior operational leader of al-Qa'ida in the Arabian Peninsula (AQAP), the most dangerous regional affiliate of al- Qa'ida and a group that has committed numerous terrorist attacks overseas and attempted multiple times to conduct terrorist attacks against the U.S. homeland. And al-Aulaqi was not just a senior leader of AQAP—he was the group's chief of external operations, intimately involved in detailed planning and putting in place plots against U.S. persons.

In this role, al-Aulaqi repeatedly made clear his intent to attack U.S. persons and his hope that these attacks would take American lives. For example, in a message to Muslims living in the United States, he noted that he had come "to the conclusion that *jihad* against America is binding upon myself just as it is binding upon every other able Muslim." But it was not al-Aulaqi's *words* that led the United States to act against him: they only served to demonstrate his intentions and state of mind, that he "pray[ed] that Allah [would] destro[y] America and all its allies." Rather, it was al-Aulaqi's actions—and, in particular, his direct personal involvement in the continued planning and execution of terrorist attacks against the U.S. homeland—that made him a lawful target and led the United States to take action.

For example, when Umar Farouk Abdulmutallab—the individual who attempted to blow up an airplane bound for Detroit on Christmas Day 2009—went to Yemen in 2009, al-Aulaqi arranged an introduction via text message. Abdulmutallab told U.S. officials that he stayed at al-Aulaqi's house for three days, and then spent two weeks at an AQAP training camp. Al-Aulaqi planned a suicide operation for Abdulmutallab, helped Abdulmutallab draft a statement for a martyrdom video to be shown after the attack, and directed him to take down a U.S. airliner. Al-Aulaqi's last instructions were to blow up the airplane when it was over American soil. Al-Aulaqi also played a key role in the October 2010 plot to detonate explosive devices on two U.S.-bound cargo planes: he not only helped plan and oversee the plot, but was also directly involved in the details of its execution—to the point that he took part in the development and testing of the explosive devices that were placed on the planes. Moreover, information that remains classified to protect sensitive sources and methods evidences al-Aulaqi's involvement in the planning of numerous other plots against U.S. and Western interests and makes clear he was continuing to plot attacks when he was killed.

Based on this information, high-level U.S. government officials appropriately concluded that al-Aulaqi posed a continuing and imminent threat of violent attack against the United States. Before carrying out the operation that killed al-Aulaqi, senior officials also determined, based on a careful evaluation of the circumstances at the time, that it was not feasible to capture al-Aulaqi. In addition, senior officials determined that the operation would be conducted consistent with applicable law of war principles, including the cardinal principles of (1) necessity—the requirement that the target have definite military value; (2) distinction—the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted; (3) proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated concrete and direct military advantage; and (4) humanity—a principle that requires us to use weapons that will not inflict unnecessary suffering. The operation was also undertaken consistent with Yemeni sovereignty.

While a substantial amount of information indicated that Anwar al-Aulaqi was a senior AQAP leader actively plotting to kill Americans, the decision that he was a lawful target was not taken lightly. The decision to use lethal force is one of the gravest that our government, at every level, can face. The operation to target Anwar al-Aulaqi was thus subjected to an exceptionally rigorous interagency legal review: not only did I and other Department of Justice lawyers conclude after a thorough and searching review that the operation was lawful, but so too did other departments and agencies within the U.S. government.

The decision to target Anwar al-Aulaqi was additionally subjected to extensive policy review at the highest levels of the U.S. Government, and senior U.S. officials also briefed the appropriate committees of Congress on the possibility of using lethal force against al-Aulaqi. Indeed, the Administration informed the relevant congressional oversight committees that it had approved the use of lethal force against al-Aulaqi in February 2010—well over a year before the operation in question—and the legal justification was subsequently explained in detail to those committees, well before action was taken against Aulaqi. This extensive outreach is consistent with the Administration's strong and continuing commitment to

congressional oversight of our counterterrorism operations—oversight which ensures, as the President stated during his State of the Union address, that our actions are "consistent with our laws and system of checks and balances."

The Supreme Court has long "made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578, 587 (1952). But the Court's case law and longstanding practice and principle also make clear that the Constitution does not prohibit the Government it establishes from taking action to protect the American people from the threats posed by terrorists who hide in faraway countries and continually plan and launch plots against the U.S. homeland.

The decision to target Anwar al-Aulaqi was lawful, it was considered, and it was just.

This letter is only one of a number of steps the Administration will be taking to fulfill the President's State of the Union commitment to engage with Congress and the American people on our counterterrorism efforts. This week the President approved and relevant congressional committees will be notified and briefed on a document that institutionalizes the Administration's exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets outside the United States and areas of active hostilities; these standards and processes are either already in place or are to be transitioned into place. While that document remains classified, it makes clear that a cornerstone of the Administration's policy is one of the principles I noted in my speech at Northwestern: that lethal force should not be used when it is feasible to capture a terrorist suspect. For circumstances in which capture is feasible, the policy outlines standards and procedures to ensure that operations to take into custody a terrorist suspect are conducted in accordance with all applicable law, including the laws of war. When capture is not feasible, the policy provides that lethal force may be used only when a terrorist target poses a continuing, imminent threat to Americans, and when certain other preconditions, including a requirement that no other reasonable alternatives exist to effectively address the threat, are satisfied. And in all circumstances there must be a legal basis for using force against the target. Significantly, the President will soon be speaking publicly in greater detail about our counterterrorism operations and the legal and policy framework that governs those actions.

I recognize that even after the Administration makes unprecedented disclosures like those contained in this letter, some unanswered questions will remain. I assure you that the President and his national security team are mindful of this Administration's pledge to public accountability for our counterterrorism efforts, and we will continue to give careful consideration to whether and how additional information may be declassified and disclosed to the American people without harming our national security.

* * * *

c. Policy and Procedures for Use of Force in Counterterrorism Operations

As mentioned in President Obama's speech discussed in section A.1.a., *supra*, the President signed Policy Guidance on May 22, 2013 that establishes a framework governing the use of force in counterterrorism operations outside the United States and

areas of active hostilities. The White House issued a fact sheet about the Policy Guidance, excerpted below and available in full at *www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf*.

---

* * * *

Since his first day in office, President Obama has been clear that the United States will use all available tools of national power to protect the American people from the terrorist threat posed by al-Qa'ida and its associated forces. The President has also made clear that, in carrying on this fight, we will uphold our laws and values and will share as much information as possible with the American people and the Congress, consistent with our national security needs and the proper functioning of the Executive Branch. To these ends, the President has approved, and senior members of the Executive Branch have briefed to the Congress, written policy standards and procedures that formalize and strengthen the Administration's rigorous process for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities. Additionally, the President has decided to share, in this document, certain key elements of these standards and procedures with the American people so that they can make informed judgments and hold the Executive Branch accountable.

This document provides information regarding counterterrorism policy standards and procedures that are either already in place or will be transitioned into place over time. As Administration officials have stated publicly on numerous occasions, we are continually working to refine, clarify, and strengthen our standards and processes for using force to keep the nation safe from the terrorist threat. One constant is our commitment to conducting counterterrorism operations lawfully. In addition, we consider the separate question of whether force should be used as a matter of policy. The most important policy consideration, particularly when the United States contemplates using lethal force, is whether our actions protect American lives.

Preference for Capture

The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots. Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable law and consistent with our obligations to other sovereign states.

Standards for the Use of Lethal Force

Any decision to use force abroad—even when our adversaries are terrorists dedicated to killing American citizens—is a significant one. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Lethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met:

First, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.

Second, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force.

Third, the following criteria must be met before lethal action may be taken:

1) Near certainty that the terrorist target is present;
2) Near certainty that non-combatants[1] will not be injured or killed;
3) An assessment that capture is not feasible at the time of the operation;
4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.

Finally, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally – and on the way in which the United States can use force. The United States respects national sovereignty and international law.

U.S. Government Coordination and Review

Decisions to capture or otherwise use force against individual terrorists outside the United States and areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise and institutional roles. Senior national security officials—including the deputies and heads of key departments and agencies—will consider proposals to make sure that our policy standards are met, and attorneys—including the senior lawyers of key departments and agencies—will review and determine the legality of proposals.

These decisions will be informed by a broad analysis of an intended target's current and past role in plots threatening U.S. persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on U.S. foreign relations, and on U.S. intelligence collection. Such analysis will inform consideration of whether the individual meets both the legal and policy standards for the operation.

Other Key Elements

U.S. Persons. If the United States considers an operation against a terrorist identified as a U.S. person, the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States.

[1] Non-combatants are individuals who may not be made the object of attack under applicable international law. The term "non-combatant" does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.

Reservation of Authority. These new standards and procedures do not limit the President's authority to take action in extraordinary circumstances when doing so is both lawful and necessary to protect the United States or its allies.

Congressional Notification. Since entering office, the President has made certain that the appropriate Members of Congress have been kept fully informed about our counterterrorism operations. Consistent with this strong and continuing commitment to congressional oversight, appropriate Members of the Congress will be regularly provided with updates identifying any individuals against whom lethal force has been approved. In addition, the appropriate committees of Congress will be notified whenever a counterterrorism operation covered by these standards and procedures has been conducted.

* * * *

2. Potential Use of Force in Syria

After the August 21, 2013 chemical weapons attack by the Syrian government against its own people, the Obama administration stated that it would consider using force to deter future chemical weapons attacks and to degrade Syria's chemical weapons program. On August 31, 2013, President Obama announced that he would seek congressional authorization for such a use of force in Syria. President Obama's statement is excerpted below and available at *www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria*. Secretary Kerry's testimony before the Senate Foreign Relations Committee on September 3, 2013 in support of the authorization of the use of military force in Syria is available at *www.state.gov/secretary/remarks/2013/09/212603.htm*. Secretary Kerry's testimony before the House Foreign Affairs Committee on September 4, 2013 is available at *www.state.gov/secretary/remarks/2013/09/213787.htm*. As discussed in Chapter 19.F.1, Syria agreed to a proposed framework for eliminating its chemical weapons program in September and the U.S. did not take military action.

---

* * * *

Now, after careful deliberation, I have decided that the United States should take military action against Syrian regime targets. This would not be an open-ended intervention. We would not put boots on the ground. Instead, our action would be designed to be limited in duration and scope. But I'm confident we can hold the Assad regime accountable for their use of chemical weapons, deter this kind of behavior, and degrade their capacity to carry it out.

Our military has positioned assets in the region. The Chairman of the Joint Chiefs has informed me that we are prepared to strike whenever we choose. Moreover, the Chairman has indicated to me that our capacity to execute this mission is not time-sensitive; it will be effective tomorrow, or next week, or one month from now. And I'm prepared to give that order.

But having made my decision as Commander-in-Chief based on what I am convinced is our national security interests, I'm also mindful that I'm the President of the world's oldest constitutional democracy. I've long believed that our power is rooted not just in our military might, but in our example as a government of the people, by the people, and for the people. And that's why I've made a second decision: I will seek authorization for the use of force from the American people's representatives in Congress.

Over the last several days, we've heard from members of Congress who want their voices to be heard. I absolutely agree. So this morning, I spoke with all four congressional leaders, and they've agreed to schedule a debate and then a vote as soon as Congress comes back into session.

In the coming days, my administration stands ready to provide every member with the information they need to understand what happened in Syria and why it has such profound implications for America's national security. And all of us should be accountable as we move forward, and that can only be accomplished with a vote.

I'm confident in the case our government has made without waiting for U.N. inspectors. I'm comfortable going forward without the approval of a United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold Assad accountable. As a consequence, many people have advised against taking this decision to Congress, and undoubtedly, they were impacted by what we saw happen in the United Kingdom this week when the Parliament of our closest ally failed to pass a resolution with a similar goal, even as the Prime Minister supported taking action.

Yet, while I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective. …

A country faces few decisions as grave as using military force, even when that force is limited. I respect the views of those who call for caution, particularly as our country emerges from a time of war that I was elected in part to end. But if we really do want to turn away from taking appropriate action in the face of such an unspeakable outrage, then we must acknowledge the costs of doing nothing.

Here's my question for every member of Congress and every member of the global community: What message will we send if a dictator can gas hundreds of children to death in plain sight and pay no price? What's the purpose of the international system that we've built if a prohibition on the use of chemical weapons that has been agreed to by the governments of 98 percent of the world's people and approved overwhelmingly by the Congress of the United States is not enforced?

Make no mistake—this has implications beyond chemical warfare. If we won't enforce accountability in the face of this heinous act, what does it say about our resolve to stand up to others who flout fundamental international rules? To governments who would choose to build nuclear arms? To terrorist who would spread biological weapons? To armies who carry out genocide?

We cannot raise our children in a world where we will not follow through on the things we say, the accords we sign, the values that define us.

So just as I will take this case to Congress, I will also deliver this message to the world. While the U.N. investigation has some time to report on its findings, we will insist that an atrocity committed with chemical weapons is not simply investigated, it must be confronted.

* * * *

But we are the United States of America, and we cannot and must not turn a blind eye to what happened in Damascus. Out of the ashes of world war, we built an international order and enforced the rules that gave it meaning. And we did so because we believe that the rights of individuals to live in peace and dignity depend on the responsibilities of nations. We aren't perfect, but this nation more than any other has been willing to meet those responsibilities.

* * * *

3. Bilateral Agreements and Arrangements

a. Implementation of Strategic Framework Agreement with Iraq

On August 15, 2013, the U.S.-Iraqi Political and Diplomatic Joint Coordination Committee ("PDJCC") held its fourth meeting in Washington, D.C., where it discussed developments in the U.S.-Iraq bilateral and strategic relationship and implementation of the 2008 U.S.-Iraqi Strategic Framework Agreement ("SFA"). For background on the SFA, see *Digest 2008* at 859-62. A joint statement issued by the participants at the conclusion of that meeting is excerpted below, and available at *www.state.gov/r/pa/prs/ps/2013/08/213169.htm*. The State Department also issued a fact sheet on the implementation of the SFA, available at *www.state.gov/r/pa/prs/ps/2013/08/213170.htm*. The meeting was also preceded by a background brief with a senior administration official, available at *www.state.gov/r/pa/prs/ps/2013/08/213182.htm*.

---

* * * *

The Governments of the Republic of Iraq and the United States of America reaffirmed their strategic partnership during a meeting of the Political and Diplomatic Joint Coordination Committee (JCC) on August 15, in Washington, DC.

This meeting, held at the Department of State, was co-chaired by Secretary Kerry and Iraqi Foreign Minister Hoshyar Zebari. This is the fourth meeting of the Political and Diplomatic JCC since it was established by the 2008 Strategic Framework Agreement (SFA) to strengthen the U.S.-Iraq bilateral and strategic partnership.

The United States offered its full support for Iraq's efforts to strengthen ties within the region. Since the last meeting of this JCC, Iraq and Kuwait made impressive strides before the United Nations, resumed commercial flights between Kuwait City and Baghdad, and completed maintenance of the border pillars along their shared border. The United States was proud to support these diplomatic achievements, which required difficult decisions on both the Iraqi and Kuwaiti sides and have contributed to regional peace and stability.

The United States further reiterated its strong support for Iraq's efforts to increase and deepen dialogue with other regional partners, and emphasized the importance of working together to bolster moderate forces and isolate extremists in the region. The United States also congratulated Iraq on the strong participation by Iraqi Security Forces in joint regional military exercises, such as the recently completed Eager Lion exercise in Jordan. The United States further affirmed its strong commitment to help the Government of Iraq defeat al Qaeda and other terrorist groups that continue to threaten Iraq and the entire Middle East region.

During the meeting, the delegations discussed international efforts to address the ongoing crisis in Syria and explored areas of potential cooperation, particularly on humanitarian issues and consultation on border security to prevent the infiltration of terrorist groups into Iraq. Both sides affirmed their commitment to a Syrian-led political transition leading to a pluralistic political system representing the will of the Syrian people. The United States emphasized the importance of providing refuge and services to those fleeing the violence in Syria. The Iraqi side further reiterated its commitment to deter the transit of weapons through its territory and welcomed in this regard the recent notification to the U.S. Congress of the potential Iraqi purchase of an integrated air defense system to fully protect its sovereign airspace.

Both delegations emphasized their commitment to close and ongoing security cooperation, noting in this regard the Memorandum of Understanding on security cooperation signed at the Defense and Security JCC in December 2012, the inaugural U.S.-Iraq Joint Military Committee (JMC) hosted by U.S. Central Command in June 2013, and the more than $14 billion in equipment, services, and training purchased by Iraq for its military and security forces through the Foreign Military Sales program. Both delegations pledged to enhance this cooperation in pursuit of their joint interests in denying terrorists a safe haven anywhere within Iraqi territory.

The United States noted the provincial elections held in Iraq earlier this year and discussed Iraq's plans for national elections scheduled for 2014. The United States pledged to assist Iraqi implementation of this next essential step in the development of Iraq's democracy, noting its commitment under the SFA to Iraq's democratic development.

The delegations also discussed President Obama's decision to extend extraordinary protections for the Development Fund for Iraq and emphasized the close partnership that exists between Iraq and the United States on macro-economic issues. The Iraqi side affirmed its commitment to resolve outstanding claims over the coming months to set the conditions for those extraordinary protections to expire in 2014. The two sides also discussed the issue of energy diplomacy and the importance to Iraq and to the global economy of ensuring a steady and redundant supply of energy resources to global markets. This topic will be addressed in further detail at the next Energy JCC to be held pursuant to the Strategic Framework Agreement later this year.

The United States praised the Government of Iraq in passing anti-trafficking legislation and pledged its continued support for the Government of Iraq's efforts to combat trafficking in persons as well as security for all Iraqis.

The United States and the Republic of Iraq committed to continue discussions of these issues through working groups and to convene the next Political and Diplomatic JCC in Baghdad.

* * * *

b. Protocol to the Guam International Agreement

On October 3, 2013, Secretaries Kerry and Hagel and their Japanese counterparts signed a Protocol to amend the Guam International Agreement ("GIA") between the United States and Japan, which originally entered into force in 2009. In the original GIA, Japan agreed to contribute up to $2.8 billion (in U.S. fiscal year 2008 dollars) in cash for facilities and infrastructure on Guam to support the move of 8,000 Marines and their dependents from Okinawa to Guam. The GIA also linked the construction of facilities on Guam to Japanese actions to complete the Futenma Replacement Facility ("FRF") on Okinawa. Following changes to plans for the realignment of U.S. troops announced in 2012, the United States and Japan agreed to amend the GIA to delink Guam relocation from progress on the FRF, to update the financial figures and certain logistical details, and to address Japan's funding for the construction of training ranges in Guam and the Commonwealth of the Northern Mariana Islands. The Protocol is available at *www.state.gov/s/l/c8183.htm*.

4. International Humanitarian Law

a. Protection of civilians in armed conflict

On February 12, 2013, U.S. Permanent Representative to the UN Susan E. Rice delivered remarks at a Security Council debate on the protection of civilians in armed conflict. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/204513.htm*.

* * * *

Protecting civilians in armed conflict is a fundamental responsibility of the international community and a core function the UN Security Council in carrying out its charge to safeguard international peace and security. The United States knows that its security is diminished when masses of civilians are slaughtered, refugees flee across borders to escape brutal attacks, and murderers wreak havoc on regional stability and livelihoods. Regrettably, history has taught us that our pursuit of a world where states do not systematically slaughter civilians will not arrive without concerted and coordinated action.

And so, nearly a year ago, President Obama announced at the U.S. Holocaust Memorial Museum new actions the United States is taking to implement his landmark policy directive on atrocity prevention. Under the President's leadership, my government has implemented unprecedented steps to enhance our capabilities and structures for preventing heinous crimes against civilians, from strengthening our early warning and preventive diplomacy to sanctioning perpetrators and pressing for accountability. Our new Atrocities Prevention Board, a committee of senior officials from across the U.S. government, is overseeing this critical work and ensuring

that we are focused on emerging situations of concern. But while national action is necessary, it is not sufficient. International, collective action is required, and we look forward to strengthening our cooperation with the United Nations and member states to that end.

Few are more likely to be the victims of mass atrocities than civilians caught in armed conflict. Time and again—and all too often—the world bears witness to the horror of mass killings, sexual violence and gross human rights abuses of innocents in conflict. Therefore, protecting civilians in armed conflict must remain a top priority of this Council and the United Nations as a whole. Though we must never relent in this effort, we are encouraged that the United Nations has made strides in enhancing UN tools to protect civilians. We commend the Secretariat's efforts to help UN field missions develop operational guidance and mission-wide strategies to implement their civilian protection mandates. The recently-released UN study entitled *Protection of Civilians: Coordination Mechanisms in UN Peacekeeping Missions* highlights several mechanisms for executing protection of civilians mandates successfully. Simple but practical tools—many focused on internal procedures and mission structure—enable mission focal points to integrate mission activities in support of protection mandates. The UN Mission in South Sudan, for example, produced an integrated strategy that led to an innovative early warning system and County Support Bases that enable better protection of rural populations.

Mission-wide strategies depend on missions really understanding the threats and violence civilians face in their area of operation. When peacekeepers know their local environments well, they are better able to protect civilians. Such detailed knowledge requires active and sustained engagement with local populations. We encourage UN missions with protection mandates to assess in their reports and briefings to this Council the threats and vulnerabilities facing civilians in their area of operation. We also urge mission-wide strategies to anticipate and outline steps to counter any escalation in violence against civilians that could culminate in mass atrocities. UN missions should proactively explain their role in protecting civilians to local communities.

Beyond a sophisticated understanding of their areas of operation, peacekeepers need strong training in civilian protection. The United States invests significantly in peacekeeper training, and we urge all peacekeeping training centers to adopt the UN's innovative training guidance on protection of civilians. Such training should be standardized and required for every peacekeeper.

For all that UN peacekeepers and field missions can do, let us not forget that national governments always bear primary responsibility for protecting their own populations. In some countries, governments are manifestly failing in this responsibility, often because of insufficient capacity or will to address the problem. In some countries, moreover, governments condone and even perpetrate atrocities against their own people. Through our statements, resolutions and diplomacy, this Council must continue pressing governments to fulfill their obligations.

In this regard, I want to highlight the horrific attacks by the Syrian regime on the Syrian people, including the widely reported targeting of hospitals and health centers and the use of ballistic missiles against civilian populations. The carnage unleashed by Asad merits universal indignation and strong action from this Council. When the people of Libya were on the verge of being slaughtered by a brutal dictator, this Council acted, prevented a massacre, and saved countless lives. This should remind us that for civilians in conflict, Security Council action can mean the difference between life and death.

In the 2005 World Summit Outcome Document and in UN Security Council resolution 1674, all UN Member States accepted a shared responsibility to protect populations from genocide, ethnic cleansing, crimes against humanity, and war crimes. While we continue to elaborate application of this principle, when governments manifestly fail to protect their civilians, the international community must not dither but rather act decisively to assume its responsibility collectively to protect.

Another fundamental but often overlooked principle of protecting civilians is ensuring humanitarian access. No UN Member State, nor any non-state actor, should ever prevent timely, full, and unimpeded humanitarian access to populations in need of assistance. Yet the Government of Sudan has refused for now a year and a half to permit the safe and unhindered provision of international humanitarian assistance to address the acute humanitarian emergency in Southern Kordofan and Blue Nile states, particularly the SPLM-North controlled areas, which is largely of Khartoum's making. Since 2011, more than 214,000 refugees have crossed into Ethiopia and South Sudan and 695,000 have been displaced within the Two Areas. This is appalling and unacceptable. In this and other such situations, we commend the service and dedication of the humanitarian workers who help the world's most vulnerable at great risk to themselves. Attacks against humanitarian workers are deplorable and should be condemned wherever committed.

Mr. President, we fully support the Secretary-General's call for this Council to be more active in addressing violations of international law and to strengthen accountability. The United States strongly rejects impunity and supports efforts to hold accountable violators of international humanitarian and human rights law. Our longstanding support of international tribunals and efforts to document ongoing atrocities in such places as Syria reflect this commitment. Recent events, including the conviction of Charles Taylor by the Special Court for Sierra Leone and the International Criminal Court's judgment against Thomas Lubanga Dyilo of the Democratic Republic of the Congo, show us that accountability for those who commit atrocities and justice for their victims is possible. Yet, too many perpetrators remain free. This Council needs the facts and strong reporting to help bring to justice the perpetrators of crimes against civilians.

President Obama has declared that preventing mass atrocities is a core national security interest and a core moral responsibility of the United States. The protection of civilians is a fundamental element of the Security Council's obligation to ensure international peace and security. It is clear that we must keep our attention focused squarely on the practical steps we can take to enhance the protection of civilians in armed conflict and redouble our efforts to ensure that this Council is not sitting on the sidelines when civilian populations are in grave danger.

* * * *

On August 19, 2013, U.S. Deputy Permanent Representative to the UN Rosemary DiCarlo addressed a Security Council open debate on the protection of civilians in armed conflict. Her remarks, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/213271.htm*.

---

* * * *

Madam President we see the horrific consequences when access to those in need is blocked, as in Syria; when the government's armed forces and armed rebel groups traumatize civilian populations, as in the Democratic Republic of the Congo; and when impunity prevails and the perpetrators of atrocities are not held accountable, as in the Central African Republic. These devastating situations are particularly acute when community leaders—journalists, activists, religious figures, and scholars—are targeted for the critical work they do to sound the alarm, protect the vulnerable, and foster peace and reconciliation.

Today's discussion is of great importance to the United States. We have made protection of civilians a priority, and, indeed, President Obama has made it clear that for the United States the deterrence of genocide and atrocities is "a core national security interest and core moral responsibility." Too often warring parties fall short or blatantly disregard their obligations altogether. In truly appalling cases, including ongoing tragedies, as in Syria and in Sudan, parties to armed conflict deliberately target civilians. It is clear we must strengthen our commitment in the three key areas that Argentina has rightly highlighted for this debate: enhancing compliance with international humanitarian law; improving humanitarian access to areas in conflict; and ensuring effective accountability mechanisms for suspected war crimes.

Madam President, despite a strong body of international humanitarian law dedicated to protecting civilian populations in armed conflict, the Secretary General notes that most victims in recent armed conflicts have been civilians. In Syria, over 100,000 people have tragically lost their lives. Among these are innocent civilians including women and children who should have been safe from violence. We need to use the tools at hand to improve compliance with IHL to prevent the loss of innocent lives. In the context of this Council work, this means supporting and advancing the tools we have, including the Children and Armed Conflict Action Plans and the "naming and shaming" of perpetrators of sexual violence. It also means supporting the work of organizations like the ICRC, which helps promote IHL compliance and respect for legal and moral norms. And for each of our governments, it means raising awareness—especially through military training—about IHL and supporting the work of internal accountability mechanisms in our own governments and in the governments of other countries to which we offer assistance. This is why the international community's military training work, including in countries like Afghanistan, is a critical component of fostering international peace and security while also ensuring the protection of civilians.

Humanitarian access is critical to protecting civilians. Timely, full, and unimpeded humanitarian access to populations in need of assistance must make the top priority for everyone. This is as true in Syria as it is in Sudan, where millions of vulnerable civilians lack access to food, water, shelter, and medicine. In addition to access, personnel engaged in humanitarian activities should be free from targeting and attack. As we have heard today, attacks against humanitarian personnel have continued unabated around the world. Attacks like the one on the UN compound in Mogadishu in June prevent humanitarian agencies from undertaking their life-saving work and should be condemned wherever and whenever committed.

Finally, without accountability, the cycles of violence continue. The United States strongly rejects impunity and supports the international community's efforts to foster stability and sustainable peace through justice. In this regard, we have worked with national authorities to

strengthen domestic judicial systems in conflict through post-conflict situations, including by funding military justice efforts in the eastern DRC, where rebel groups and the military have used rape as a weapon of war, among other atrocities. We have also strongly supported international justice mechanisms and endorse efforts to expose and document human rights abuses, including through international tribunals and commissions. In Syria, the United States is helping Syrians prepare for accountability by supporting the documentation of violations committed by all sides of the conflict and bolstering the capacity of civil society organizations to build the foundations for lasting peace. In addition, we cooperate with the International Criminal Court on its current cases consistent with U.S. law and policy, including through the recent expansion of our Rewards for Justice Program to include foreign nationals indicted by international criminal tribunals including the ICC.

Madam President, as we have seen from Syria and Sudan to the Sahel and the Great Lakes, failure to protect civilians threatens regional stability as conflicts escalate and populations stream across borders. Protecting civilians is the primary responsibility of states, but it is clear that the international community must keep our attention focused sharply on the practical steps we can take to improve the protection of civilians in armed conflict and we must redouble our efforts to ensure that this Council is not sitting on the sidelines when civilian populations are in grave danger.

* * * *

b. Applicability of international law to conflicts in cyberspace

On June 7, 2013, the State Department issued a press statement on the consensus achieved by the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security. The press statement is excerpted below and available in full at *www.state.gov/r/pa/prs/ps/2013/06/210418.htm*. The report of the Group of Governmental Experts is U.N. Doc. A/68/98.

---

* * * *

Through these discussions, the United States sought to achieve common understanding on cyber issues of critical national and international significance, particularly: the need to promote international stability, transparency and confidence in cyberspace; that existing international law should guide state behavior with regard to the use of cyberspace; and how the international community can help build the cybersecurity capacity of less-developed states. Our delegation leaves New York confident that the consensus report issued by the Group makes substantial progress on all these issues.

The Group agreed that confidence building measures, such as high-level communication and timely information sharing, can enhance trust and assurance among states and help reduce the risk of conflict by increasing predictability and reducing misperception. The Group agreed on the vital importance of capacity building to enhance global cooperation in securing cyberspace.

The Group reaffirmed the importance of an open and accessible cyberspace, as it enables economic and social development. And, the Group agreed that the combination of all these efforts support a more secure cyberspace.

Furthermore, the Group affirmed that international law, especially the UN Charter, applies in cyberspace.

All UN member states share a common commitment to the pursuit of peace. We are all parties to the UN Charter, which seeks to prevent war of all kinds. We also subscribe to the Geneva Conventions and the Law of Armed Conflict, which are aimed at minimizing civilian suffering when armed conflict occurs. These norms are a cornerstone of international relations and are particularly important for cyberspace, where state-on-state activities are becoming more prevalent.

The United States is pleased to join consensus to affirm the applicability of international law to cyberspace. With that clear affirmation, this consensus report sends a strong signal: states must act in cyberspace under the established international rules and principles that have guided their actions for decades—in peacetime and during conflict.

The United States looks forward to future dialogue on these issues with the international community.

* * * *

On June 17, 2013, the White House released the Joint Statement by the Presidents of the United States of America and the Russian Federation on a New Field of Cooperation in Confidence Building. The Joint Statement appears below and is available at *www.whitehouse.gov/the-press-office/2013/06/17/joint-statement-on-a-new-field-of-cooperation-in-confidence-building*.

---

* * * *

We, the Presidents of the United States of America and the Russian Federation, recognize the unprecedented progress in the use of Information and Communications Technologies (ICTs), the new capacity they create for the economies and societies of our countries, and the increasing interdependence of the modern world.

We recognize that threats to or in the use of ICTs include political-military and criminal threats, as well as threats of a terrorist nature, and are some of the most serious national and international security challenges we face in the 21st Century. We affirm the importance of cooperation between the United States of America and the Russian Federation for the purpose of enhancing bilateral understanding in this area. We view this cooperation as essential to safeguarding the security of our countries, and to achieving security and reliability in the use of ICTs that are essential to innovation and global interoperability.

Demonstrating our commitment to promoting international peace and security, today we affirm the completion of landmark steps designed to strengthen relations, increase transparency, and build confidence between our two nations:

- To create a mechanism for information sharing in order to better protect critical information systems, we have established a communication channel and information sharing arrangements between our computer emergency response teams;
- To facilitate the exchange of urgent communications that can reduce the risk of misperception, escalation and conflict, we have authorized the use of the direct communications link between our Nuclear Risk Reduction Centers for this purpose;
- Finally, we have directed officials in the White House and the Kremlin to establish a direct communication link between high-level officials to manage potentially dangerous situations arising from events that may carry security threats to or in the use of ICTs.

We have decided to create (in the framework of the U.S.-Russia Bilateral Presidential Commission) a bilateral working group on issues of threats to or in the use of ICTs in the context of international security that is to meet on a regular basis to consult on issues of mutual interest and concern. This working group is to assess emerging threats, elaborate, propose and coordinate concrete joint measures to address such threats as well as strengthen confidence. This group should be created within the next month and should immediately start its practical activities.

These steps are necessary in order to meet our national and broader international interests. They are important practical measures which can help to further the advancement of norms of peaceful and just interstate conduct with respect to the use of ICTs. To further deepen our relationship, relevant agencies of our countries plan to continue their regular dialogue and to identify additional areas for mutually-beneficial cooperation in combating threats to or in the use of ICTs.

* * * *

The White House also issued a fact sheet on June 17, 2013 regarding the confidence building measures relating to security in cyberspace undertaken with Russia. The fact sheet is excerpted below and available at *www.whitehouse.gov/the-press-office/2013/06/17/fact-sheet-us-russian-cooperation-information-and-communications-technol*.

---

* * * *

The United States and the Russian Federation have also concluded a range of steps designed to increase transparency and reduce the possibility that a misunderstood cyber incident could create instability or a crisis in our bilateral relationship. Taken together, they represent important progress by our two nations to build confidence and strengthen our relations in cyberspace; expand our shared understanding of threats appearing to emanate from each other's territory; and prevent unnecessary escalation of ICT security incidents.

Links between Computer Emergency Response Teams

To facilitate the regular exchange of practical technical information on cybersecurity risks to critical systems, we are arranging for the sharing of threat indicators between the U.S. Computer Emergency Readiness Team (US-CERT), located in the Department of Homeland Security, and its counterpart in Russia. On a continuing basis, these two authorities will

exchange technical information about malware or other malicious indicators, appearing to originate from each other's territory, to aid in proactive mitigation of threats. This kind of exchange helps expand the volume of technical cybersecurity information available to our countries, improving our ability to protect our critical networks.

Exchange of Notifications through the Nuclear Risk Reduction Centers

To prevent crises, the United States and Russia also recognize the need for secure and reliable lines of communication to make formal inquiries about cybersecurity incidents of national concern. In this spirit, we have decided to use the longstanding Nuclear Risk Reduction Center (NRRC) links established in 1987 between the United States and the former Soviet Union to build confidence between our two nations through information exchange, employing their around-the-clock staffing at the Department of State in Washington, D.C., and the Ministry of Defense in Moscow. As part of the expanded NRRC role in bilateral and multilateral security and confidence building arrangements, this new use of the system allows us to quickly and reliably make inquiries of one another's competent authorities to reduce the possibility of misperception and escalation from ICT security incidents.

White House-Kremlin Direct Communications Line

Finally, the White House and the Kremlin have authorized a direct secure voice communications line between the U.S. Cybersecurity Coordinator and the Russian Deputy Secretary of the Security Council, should there be a need to directly manage a crisis situation arising from an ICT security incident. This direct line will be seamlessly integrated into the existing Direct Secure Communication System ("hotline") that both governments already maintain, ensuring that our leaders are prepared to manage the full range of national security crises we face internationally.

These confidence-building measures supplement an earlier exchange of White Papers between our two countries. Both our militaries are actively examining the implications of ICTs for their planning and operations. As we work to create predictability and understanding in the political-military environment, both the U.S. and Russian militaries have shared unclassified ICT strategies and other relevant studies with one another. These kinds of exchanges are important to ensuring that as we develop defense policy in this dynamic domain, we do so with a full understanding of one another's perspectives.

* * * *

c. Private military and security companies

On September 19, 2013, U.S. Ambassador to the UN in Geneva Betty King delivered remarks at the launch of the International Code of Conduct for Private Security Service Providers ("ICoC") Association. For background on the new association, including the Articles of Association, see *www.icoc-psp.org*. For additional background on the ICoC process, see *Digest 2010* at 740-42. Ambassador King's remarks are excerpted below and available at *http://geneva.usmission.gov/2013/09/19/icoc/*.

---

* * * *

Let me start by thanking our hosts and acknowledging the critical role that the Swiss Government has played in this initiative since its inception. As most of you know, together with the ICRC, the Swiss co-facilitated the process that led to the development of the Montreux Document on private military and security companies in 2008. And when private security companies expressed an interest in developing sector-specific guidance based on the Montreux Document, the Swiss agreed to sponsor the process that eventually resulted in 2010 in the ICoC. Since then, the Swiss have facilitated the work of the multi-stakeholder Temporary Steering Committee (TSC), including through the support of the Geneva Center for the Democratic Control of Armed Forces (DCAF). Most recently, the Swiss government generously committed to providing over one million dollars of in-kind assistance to the Association over the next two years. Without their consistent and far-sighted support, this initiative would not be where it is today.

* * * *

In addition to the countless hours that our team of experts from the Departments of State and Defense has already dedicated to this initiative, today I am pleased to announce that the United States looks forward to providing, subject to the availability of funds, a package of in-kind and financial support for the initiative along the lines of that provided by other governments. Beginning next year, the U.S. government intends to provide staff support for the certification function of the Association. In addition, we intend to provide grant funds for the Association to use in carrying out its monitoring function. This is in addition to the time, energy, and funding that our colleagues in the Defense Department have invested over the last few years in fostering the development, under the auspices of the American National Standards Institute, of the PSC 1 and 2 management and conformity assessment standards, which are based on the Code. Finally, aware of the influence we have and the role we play as a client and regulator in this sector, we have committed to using our contracting processes to support this process. For instance, the Defense Department currently requires conformance with the PSC 1 standard for its private security contracts and the Department of State has committed to requiring conformance with the same, as well as membership in the ICoC Association, as a condition for bidding on its next Worldwide Protective Services contract.

We support this initiative because we recognize the important role that private security providers play in complex environments. While it is undeniably the role of governments to provide security within their jurisdictions, private security providers support those efforts in contexts where state capacity is limited. It is precisely in these complex environments—areas of weak or non-existent state capacity—that private security providers can facilitate vital efforts that are central to our foreign policy and security objectives. Although private security companies help safeguard U.S. government facilities and personnel, the bulk of their work is devoted to the critical tasks of protecting humanitarian organizations delivering essential food, water, and medicine; development organizations providing support for strategic sectors; and critical private sector investments. However, it is in these same complex environments that private security company activity, if not properly managed, can most easily contribute to further destabilization and adverse human rights impacts.

We have supported this initiative and will continue to do so because we believe it can play an important role in improving the standards for, and conduct of, private security companies operating in complex environments. This is imperative because, while we do our best to ensure responsible conduct by those PSCs which we contract and supervise, misconduct by other PSCs can sour public perceptions and undermine the positive impact of all PSCs. The United States believes that the principle method for regulating this sector must be through responsible, domestic legislation and regulation. That said, we also believe that multistakeholder initiatives like the ICoC, can and do play an important role in raising industry standards and encouraging the development of effective regulations by facilitating shared learning, monitoring performance, identifying best practices, and facilitating the resolution of complaints.

This association, together with the ongoing development of international standards, will breathe life into the Code by creating an effective and independent governance mechanism that will promote respect for and adherence to the human rights principles and the law of armed conflict set forth in the Code. We see this as an important sector-specific development in-line and consistent with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Through the adoption and implementation of standards based on the Code, companies are required to develop systems and policies to ensure proper due diligence, impact assessment, and grievance mechanisms. That is the starting point. Beyond that, the companies that become members of this Association are also committing to on-going reporting to, and monitoring by, the Association, as well as its facilitation of the resolution of complaints. These are meaningful commitments that can produce real results, and the companies that join this Association—especially those that have been involved in its development and committed to joining it from the start—should be commended for their leadership. The civil society organizations that have become founding members also deserve recognition for their willingness to participate in and lend their expertise to a process designed to build trust and constructive engagement among stakeholders that don't always see eye-to-eye.

In closing, the United States is honored to be a founding member of this initiative. There is much that remains to be done, and the soon-to-be introduced individuals who will make up the first Board of Directors all deserve our support… and probably our prayers! Though the challenges may be daunting, we should be proud of and motivated by the fantastic work that has been done to date. The United States will continue to work constructively to build on that success and ensure that this initiative demonstrates the potential of dedicated, well-intentioned companies, states, and non-governmental organizations to work together to effect meaningful change on the ground.

* * * *

In December, the United States participated in the Montreux+5 conference, commemorating the five-year anniversary of the adoption of the Montreux Document, which addresses international legal issues related to operations of private military and security companies ("PMSCs") during armed conflict. See *Digest 2010* at 740-42 regarding U.S. endorsement of principles articulated in the Montreux Document. Prior to the conference, the United States submitted a response to a questionnaire regarding its compliance with the international legal obligations and best practices contained in

the Montreux Document. Excerpts from the U.S. submission follow. The submission in its entirety is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

1. Provide examples, if any, of how you have determined which services may or may not be contracted out to PMSCs. If you have done so, please specify what and how services are limited, and how you take into account factors such as whether those services could cause PMSC personnel to become involved in direct participation in hostilities. Please indicate by what means you do this (*e.g.*, national legislation, regulation, policy, etc.). [GP 1, 24, 53]

As a matter of U.S. law and policy, an "inherently governmental function" (IG function) cannot be contracted out. The Federal Activities Inventory Reform (FAIR) Act of 1998 defines an IG function as "a function so intimately related to the public interest as to require performance by Federal Government employees." A number of U.S. statutory, regulatory, and agency provisions provide additional guidance regarding what constitutes an IG function and designate specific functions as IG or commercial.

Under policy guidance applicable to all executive branch departments and agencies, … IG functions that may not be contracted out include the command of military forces, combat, security operations performed in direct support of combat as part of a larger integrated armed force, security that entails augmenting or reinforcing others that have become engaged in combat, and security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.

Department of Defense Instruction 1100.22, *Policies and Procedures for Workforce Mix,* April 12, 2010, defines combat operations and provides further guidance on when the provision of security services would be IG. The instruction defines combat operations as the deliberate destructive and/or disruptive action against the armed forces or other military objectives of another sovereign government or against other armed actors on behalf of the United States. This entails the authority to plan, prepare, and execute operations to actively seek out, close with, and destroy a hostile force or other military objective by means of, among other things, the employment of firepower and other destructive and disruptive capabilities. These functions may not be performed by contractor personnel.

Security provided for the protection of resources (people, information, equipment, supplies, facilities, etc.) and operations in uncontrolled, unpredictable, unstable, high risk, or hostile environments inside or outside the United States entail a wide range of capabilities, some of which are IG and others of which are commercial. Security is IG if it is performed in environments where there is such a high likelihood of hostile fire, bombings, or biological or chemical attacks by groups using sophisticated weapons and devices that, in the judgment of the military commander, the situation could evolve into combat. Security performed in such high-risk environments is designated for military performance, and private security contracts are not a force structure substitute for these requirements.

Security is also IG if, in the commander's judgment, decisions on the appropriate course of action would require substantial discretion, the outcome of which could significantly affect U.S. objectives with regard to the life, liberty, or property of private persons, a military mission, or international relations. Such actions typically require high-risk, on-the-spot judgments regarding the appropriate level of force, the acceptable level of collateral damage, and whether the target is friend or foe in situations pivotal to U.S. interests. This type of security requires command decisions, military training, and operational control, and it is reserved for military personnel. Combatant Commander Orders implement these instructions and forbid private security contractors (PSCs) from taking a direct part in combat operations, combat-like operations, offensive operations, quick reaction force missions, cordon and search operations, or other uniquely military functions.

PSCs under the Department of State's Worldwide Protective Services (WPS) contract do not perform IG functions, as the security services they provide are solely protective and defensive in nature. The WPS contract provides the State Department with movement security, specialized emergency services, and guard services for U.S. diplomatic missions overseas. Although not all WPS task orders are carried out in areas of armed conflict, the provisions and practices under the WPS contract are cited herein to demonstrate how the legal obligations and good practices set forth in the Montreux Document are being implemented where WPS contractors are providing services in areas of armed conflict.

2. Indicate if you require PMSCs to obtain an authorization to provide any one or more private military and security services. This may include whether PMSCs and/or individuals are required to obtain licenses. [GP 25, 26, 54]

Pursuant to the Arms Export Control Act (AECA), as implemented through the International Trade in Arms Regulations (ITAR) (available at: *<http://pmddtc.state.gov/regulations_laws/itar_official.html>*), the United States controls the export and import of defense articles, including technology, and defense services. Any person wishing to export these items must register with the Department of State prior to exporting any item. A license or other authorization is required for the export of "defense articles," which includes weapons, other military material, and items or technology with specific military applications. Further, a license or other authorization is required for the export of "defense services," which is defined as the furnishing of assistance, including training to foreign persons whether in the United States or abroad in the development, design, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of a defense article. Accordingly, the export of the training in the maintenance and operation of weapons systems and advice to, or training of, local forces and security personnel, as described in the definition of PMSCs in paragraph nine of the Preface of the Montreux Document, constitute a "defense service" under ITAR. Specific weapons, material, technology, and defense services covered by ITAR are found on the United States Munitions List (USML) and set forth in Part 121 of the ITAR.

* * * *

4. Provide details of procedures for the authorization and/or selection and contracting of PMSCs and their personnel [GP 2, 28, 57]. Please include details of how you ensure adequate resources are applied to this function [GP 3, 27, 58] and examples of how such procedures are transparent and supervised. [GP 4, 29, 59]

The U.S. Government has extensive experience in selecting and contracting for private security services. The Federal acquisition process is governed by the Federal Acquisition Regulations (FAR) found at Title 48 of the Code of Federal Regulations (CFR). The FAR provides standardized contract clauses, and Requests for Proposals (RFPs) indicate the elements upon which contract award decisions will be based.

The Defense Federal Acquisition Regulation Supplement (DFARS) and the Department of State Acquisition Regulation (DOSAR) provide acquisition procedures specific to the Departments of Defense and State, respectively. In addition, procedures for soliciting and awarding contracts in armed conflict and comparable situations can be found in the Defense Contingency Contracting (DCC) Handbook, available at: *<http://www.acq.osd.mil/dpap/ccap/cc/jcchb/index.html>*. Solicitations for contracts are publicly available and can be accessed through a number of sources, including: <https://www.fbo.gov/index?cck=1&au=&ck=> and *http://www.defense.gov/landing/contract_resources.aspx*. Contract awards are published on a publicly available website at: *<http://www.defense.gov/Contracts/default.aspx>*.

DFARS Part 225.74 addresses the requirements for contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States. The supporting Procedures, Guidance, and Information (PGI) 225-7401(a) requires potential DoD contractors to be informed that they must be in compliance with ANSI/ASIS PSC.1-2012, American National Standard, *Management System for Quality of Private Security Operations—Requirements with Guidance* (hereafter "the PSC Standard"). Successful offerors will include evidence that the company is in compliance with that standard.

The Department of State anticipates that conformance with the PSC Standard will be a requirement in the bidding process for the successor WPS contract, which provides the Department with movement security, specialized emergency services, and guard services for U.S. diplomatic missions overseas. The Department also plans to make membership in the International Code of Conduct Association (ICoCA) a requirement in the bidding process for the successor WPS contract, so long as the process moves forward as expected and the association attracts significant industry participation.

The Department of Defense has more than 20,000 warranted Contracting Officers (COs) and more than twice as many trained and certified Contracting Officer's Representatives (CORs) to assist in the selection and contracting of DoD contracted support, including services provided by PSCs and other services as described in paragraph 9(a) of the Preface to the Montreux Document. Duties and performance expectations of CORs can be found in the Defense Contingency Contracting Officer Representative (COR) Handbook, available at: *<http://www.acq.osd.mil/dpap/ccap/cc/corhb/index.html>*.

5. To what degree have you sought to harmonize any authorization system with those of other States. [GP 56]

The United States has worked closely with other Contracting States and Home States to secure wide acceptance of the PSC Standard. The United Kingdom has adopted the PSC

Standard for use in its overseas contracts for private security services, and the International Organization for Standardization has accepted the PSC Standard for development as an international standard. The Department of Defense also provides staff and faculty assistance for international education and outreach on PMSC-related issues.

The United States has actively participated in other international harmonization efforts, such as the ICoC and the establishment of the ICoCA. The United States is also a founding member of the Advisory Forum of Montreux Document Participants. The forum will provide an informal venue for Montreux Document participating states to share information to promote the implementation of the legal obligations and good practices set forth in the Montreux Document.

6. Provide details on criteria that have been adopted that include quality indicators to ensure respect of relevant national law, international humanitarian law and human rights law. Indicate how you have ensured that such criteria are then fulfilled by the PMSC. [GP 5, 30] If relevant, please indicate if lowest price is not the only criterion for the selection of PMSCs. [GP 5]

Through contracting requirements and rigorous oversight, the Departments of Defense and State have implemented measures to help ensure the high quality performance of government-contracted PSCs in conformance with applicable national and international laws. COs within the Departments of Defense and State provide contract management and oversight of government contracts, including those for PSC services, to ensure compliance with applicable contract requirements and standards. The CO possesses the sole authority to enter into or modify a contract on behalf of the U.S. Government. The CO may delegate authority to a COR and other government contract administration personnel to assist in the administration of the contract or task order.

The Security Branch, within the Department of State's Office of Acquisitions Management, administers and oversees all PSC contracts utilizing consistent best practices in accordance with the FAR. The specific duties and authorities of Department of State contract administration personnel are detailed in the delegation letter issued by the CO. Contract administration personnel must be familiar with the base contract and any task orders for which they are responsible and must maintain official written records to document contractor performance. These records are used to substantiate contractor performance assessments documented in periodic reports by the COR to the CO.

Lowest price is not the only criterion for the selection of PMSCs. In both Departments, contracts and task orders under existing contracts are negotiated and awarded on a "best value" basis when the expected outcome of the acquisition in the Government's estimation provides the greatest overall benefit in response to the requirement. 48 CFR 15.302, *Contracting by Negotiation*, provides that "[t]he objective of source selection is to select the proposal that represents the best value." By contrast, lowest price technically acceptable (LPTA) source selection is appropriate when the expectation is that best value will result from selection of the technically acceptable proposal with the lowest evaluated price.

One means of determining minimal technically acceptable performance is through the use of performance standards. Using this process, the emphasis that cost is given in an evaluation of proposals will not carry significant weight if the offeror cannot demonstrate the ability to meet applicable performance standards. As noted above, PGI 225.7401(a) requires DoD acquisitions involving the performance of security services, as defined in 48 CFR 252.225-7039, in areas of

combat operations, contingency operations, or other military operations or exercises, to incorporate, and require compliance with, the PSC Standard. The Department of State anticipates requiring Contractors to demonstrate conformance with the PSC Standard in order to bid on the successor WPS contract. The PSC Standard provides quality indicators for the performance of PSC-related services, and is supported by ANSI/ASIS PSC.2-2012, *Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations*, and ANSI/ASIS PSC.3-2013, *Maturity Model for the Phased Implementation of a Quality Assurance Management System for Private Security Service Providers*, which provides requirements and guidance for assessing a contractor's conformity with the PSC Standard.

The Defense Contract Auditing Agency (DCAA) audits contractor performance on all Department of Defense contracts, as well as the Department of State's WPS task orders, and the Defense Contract Management Agency and the State Department's Office of Acquisitions Management assess contractor performance on DoD contracts and the WPS contract, respectively. Contractor performance is also subject to audit by Special Inspector Generals and the Offices of Inspector General (OIG) at the Departments of Defense and State.

7. Describe how the following elements, if any, are considered in authorization or selection procedures and criteria. Please also indicate to what degree they are included in terms of contract with, or terms of authorization of, PMSCs or their personnel [GP 14, 39, 40, 67]:

Section 862 of the National Defense Authorization Act of 2008 (Public Law 110-181), as amended ["Section 862"], mandated that the Secretary of Defense, in coordination with the Secretary of State, prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions in designated areas of combat operations, including certain contingency operations and other significant military operations as appropriately designated (hereinafter "designated areas"). The final rule, entitled *Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations* (32 CFR 159), implements this statutory requirement. Section 862 also required revision of the FAR to require contractors to comply with the policies established in 32 CFR 159. The FAR was revised accordingly by adding sections 25.302 through 25.302-6 to subpart 25.3. 48 CFR 25.302-6 requires all covered contracts to include the clause contained at 52.225-26, *Contractors Performing Private Security Functions Outside the United States*, which, in turn, requires PSCs under covered contracts to ensure that their personnel comply with the policies set forth in 32 CFR 159. In addition, the WPS contract incorporates the requirements of 48 CFR 52.225-19, *Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States.*

During the acquisition process, PSCs are evaluated on their ability to comply with these regulations and the solicitation requirements, which address elements (a)-(h), below. Offerors whose proposals do not meet these requirements are deemed technically unacceptable or nonresponsible and are ineligible for contract award.

a. past conduct [GP 6, 32, 60].

48 CFR 25.302-6 requires contracts for private security functions in designated areas to specify that "the Contractor's failure to comply with the requirements of this clause [the clause at 48 CFR 52.225-26] will be included in appropriate databases of past performance and considered in any responsibility determination or evaluation of past performance." The database used to

track this information is the Contractor Performance Assessment Reporting System (CPARS). Reports in CPARS assess contractor performance and provide a record, both positive and negative, of the contractor during a specified period of time. Each assessment is based upon objective facts and supported by program and contract management data, such as cost performance reports, customer comments, quality reviews, technical interchange meetings, financial solvency assessments, construction/production management reviews, contractor operations reviews, functional performance evaluations, and earned contract incentives. Past performance documented in CPARS is used to evaluate contractor proposals for future contracts in support of contingency operations with the U.S. Government, anywhere in the world.

The Department of State requires prospective contractors to submit for review prior to award three past performance references from prior clients. In addition, in both Departments, the CO uses the periodic reports, as well as the recommendations in the annual performance review, to support the decision to exercise another option year or terminate the contract. The Department retains all incident reports, terminations, and dismissals of PSC personnel and tracks eligibility for employment under the contract.

b. financial and economic capacity [GP 7, 33, 61].

48 CFR 9.104-1 requires a prospective contractor to demonstrate adequate financial resources (or the ability to obtain the resources) needed to perform the contract work. The CO is required to review evidence of economic capacity when considering contract award.

The Department of State reviews prospective contractors' Dun and Bradstreet reports prior to award to validate financial and economic capacity. In addition, the Department requires prospective contractors to submit three years of audited financial performance data, including income statements, balance sheets, and cash-flow statements for consideration and evaluation prior to award.

Defense Base Act (DBA) insurance is required under all DoD contracts for services to be performed outside the United States, as well as under the Department of State's WPS contract. In addition, 48 CFR 52.228-5 and 428.310 require Federal contractors, at their own expense, to provide and maintain during the entire performance of the contract, at least the kinds and minimum amounts of insurance required in the schedule or elsewhere in the contract.

c. possession of required registration, licenses or authorizations (if relevant) [GP 8].

32 CFR 159.6 requires PSCs to develop procedures to ensure that their personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of their contract and host country law. 48 CFR 52.225-26 implements 32 CFR 159 by requiring PSCs under covered contracts to ensure that their personnel performing private security functions under the contract comply with any instructions for authorizing and accounting for weapons to be used by those personnel and for registering and identifying armored vehicles, helicopters, and other military vehicles operated by those personnel.

The WPS contract provides that armed contractor personnel are subject to host country laws regarding the licensure, carrying, and proper use of firearms. The contractor is responsible for ensuring that all armed contractor personnel are properly licensed in accordance with local law for the duration of time such personnel are in-country and must maintain all permits, licenses, and appointments required for work under the contract.

d. personnel and property records [GP 9, 34, 62].

Section 862 and 48 CFR 52.225-26 require PSCs under covered contracts to ensure that their personnel performing private security functions under the contract comply with any instructions for: registering, processing, accounting for, and keeping appropriate records of personnel performing private security functions; authorizing and accounting for weapons to be used by personnel performing private security functions; and registering and identifying armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions. The Departments of Defense and State use the Synchronized Pre-deployment Operations Tracking (SPOT) system to enter this information and maintain situational awareness.

e. training [GP 10, 35, 63].

Section 862 and 32 CFR 159 require the development of procedures to implement pre-deployment training requirements for personnel performing private security functions in designated areas, including, but not limited to, the identification of resources and assistance available to PSC personnel, country information and cultural training, guidance on working with host country nationals and military personnel, rules on the use of force and graduated force procedures, and requirements and procedures for direction, control and the maintenance of communications with regard to the movement and coordination of PSCs and PSC personnel, including specifying interoperability requirements. 48 CFR 52.225-26 implements 32 CFR 159 by requiring PSCs under covered contracts to ensure that their personnel performing private security functions under the contract understand their obligation to comply with qualification and training requirements, as well as any instructions related to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals, and rules on the use of force.

Department of Defense contracts include 48 CFR 252.225-7040, which additionally requires all contractors accompanying the U.S. Armed Forces to receive pre-deployment training on applicable provisions of the laws of war and any other applicable treaties and international agreements. Section 9.3 of the PSC Standard includes requirements for training PSC personnel in measures against bribery, corruption, and in handling complaints by the local population. As cited elsewhere in this response, conformance with the PSC Standard is mandatory in all DoD contracts for security functions performed overseas.

Under the WPS contract, PSCs must successfully complete all required pre-deployment training before beginning work on any WPS contract or task order. Proof of successful training completion must be kept on file by the contractor and provided to the Department at any time upon request. WPS pre-deployment training includes familiarization with the Department of State, operating in a contingency environment, and cultural familiarization with the area of deployment, as well as labor category-specific firearms and operational training. The State Department's Bureau of Diplomatic Security (DS) performs periodic program management reviews (PMRs) of contractor training and training facilities (domestic and overseas) to ensure compliance with program, contract, and task order requirements.

f. lawful acquisition and use of equipment, in particular weapons [GP 11, 36, 64].

… Section 862 requires contractors and all employees of the contractor or of any subcontractor, who are responsible for performing private security functions under such contract, to comply with applicable laws and regulations of the United States and the host country, and applicable treaties and international agreements. 48 CFR 52.225-26 provides the specific

contract clauses requiring PSCs under covered contracts to ensure that their personnel performing private security functions under the contract are briefed on, and understand their obligation to comply with, applicable laws and regulations of the United States and the host country, applicable treaties and international agreements, and any instructions issued by the applicable commander or relevant Chief of Mission (COM) related to weapons and equipment. Similarly, 48 CFR 252.225-7040(d) requires DoD-contracted PSCs to comply with, and to ensure that their personnel authorized to accompany U.S. Armed Forces deployed outside the United States are familiar with and comply with, all applicable U.S., host country, and third country laws; provisions of the law of war, and any other applicable treaties and international agreements; U.S. regulations, directives, instructions, policies, and procedures; and orders, directives, and instructions issued by the Combatant Commander. These encompass laws, regulations, and directives applicable to the acquisition and use of weapons and other equipment.

Combatant Commander Orders specify weapons authorization policies, including types of weapons, ammunition, and procurement. These orders typically provide restrictions regarding weapons and ammunition types that exceed those permitted by the law of the host nation. For example, Combatant Commander Orders typically prohibit the use of anything other than full-jacketed ball ammunition, even where other types of ammunition would be allowable for civilian personal defense under host nation law. Lawful acquisition of weapons is also required by Section 9.2.5 of the PSC Standard.

All WPS Contractors utilize government furnished vehicles and weapons when deployed, and all equipment utilized by WPS PSCs must be approved in advance by DS.

g. internal organization and regulation and accountability [GP 12, 37, 65].

Title 48 CFR 9-103(a) requires that purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only. To be determined responsible, 48 CFR 9.104-1 provides that a contractor must "have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors)."

- With regard to GP 12 a), 32 CFR 159.6 requires that all requests for permission to arm PSC personnel include documentation of individual training, covering weapons familiarization and qualification, rules for the use of force (RUFs), limits on the use of force, including whether defense of others is consistent with host nation Status of Forces Agreements (SOFAs) or local law, the distinction between the rules of engagement applicable to military forces and the prescribed RUFs that control the use of weapons by civilians, and the Law of Armed Conflict. These requirements also exist in the PSC Standard. Specifically, requirements for company policies promoting compliance with international humanitarian law, human rights law, and RUFs are set forth in sections 9.5.1 and 9.5.2. Implementing guidance for these sections is provided in sections A.2, on Human Rights and International Law; A.9.5.1, on Respect for Human Rights; and A.9.5.3, on RUFs and Use of Force Training.

- With regard to GP 12 b), 48 CFR 52.225-26 requires PSCs under covered contracts to ensure that their personnel performing private security functions under the contract comply with directives in the contract for specified incident reporting and cooperate with any government-authorized investigations of incidents reported. The WPS contract requires that contractors

notify the government of all serious incidents and incidents involving misconduct. For DoD contracts, complaints and grievance mechanisms are set forth in Section 9.4.3 of the PSC Standard, with implementing guidance provided in A.9.5.10. Whistleblower protections are covered in Section 9.4.4, with additional guidance in A.9.4.3. Incident monitoring, reporting, and internal investigations are covered in Section 9.5.6, with implementing guidance in A.9.5.10.

h. welfare of personnel [GP 13, 38, 66].

In 2003, the Trafficking Victims Protection Act (TVPA) was amended (Pub. L. 108-193) to require that Federal government contracts with private entities include a provision authorizing the government to terminate the contract, or take other remedial action, without penalty, if the contractor or subcontractor engages in severe forms of trafficking in persons, procuring commercial sex acts, and using forced labor during the performance of the contract. This requirement has been implemented in all Federal government contracts through 48 CFR 22.1700, which provides that all Federal government contracts shall prohibit contractors, subcontractors, and their employees from engaging in such activities. The scope of these prohibited activities was expanded by Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts (Sept. 25, 2012) and by 2013 amendments to the TVPA contained in Title XVII of the National Defense Authorization Act, Pub. L. 112-239, the End Trafficking in Government Contracting Act (ETGCA) to also address the unscrupulous recruitment practices widely known to facilitate human trafficking. Although their provisions are not identical, the Executive Order and ETGCA authorize termination and other remedial action for activities that directly support or promote trafficking in persons, such as using fraud to recruit employees, confiscating employee identity or immigration documents, and charging employees recruitment fees that can lead to debt bondage. Among other things, they both also require contractors to apply new, tailored compliance measures for larger contracts performed overseas to prevent such activities from occurring, to ensure their subcontractors do the same, and also to certify that such plans and procedures are in place prior to being awarded the contract. The process of incorporating these more extensive and precise restrictions into the FAR is underway; proposed amendments have been published for public comment in the Federal Register (78 F.R. 59317 (Sept. 26, 2013)) but are not yet in effect.

Consistent with GPs 13 and 66, 48 CFR 252.222-7002 requires DoD contractors working overseas to comply with all local laws, regulations, and labor union agreements governing work hours. These requirements are implemented through specific contract language, including Joint Theater Support Contracting Command (JTSCC) Special Clause 952.222-0001, *Prohibition Against Human Trafficking, Inhumane Living Conditions, and Withholding of Employee Passports*, which is included in PSC contracts in Iraq and Afghanistan. This clause requires contractors to provide all employees with a signed copy of their employment contract, in English as well as the employee's native language, defining the terms of employment or compensation.

- Pay. The proposed amendments to the FAR include a provision for all Federal government contracts allowing the government to terminate the contract, without penalty, if the contractor or subcontractor charges recruited employees recruitment fees.
- Section 9.2.1 of the PSC Standard also addresses adequate compensation, providing that "[p]ersonnel shall be provided with adequate pay and remuneration arrangements,

including insurance, commensurate to their responsibilities." Additional guidance implementing this requirement is found in A.9.2.1.

- Safety. Under the TVPA and implementing regulation 48 CFR 22.1700, all Federal government contracts include a provision allowing the government to terminate the contract, without penalty, if the contractor or subcontractor engages in trafficking in persons, the procurement of a commercial sex act, or the use of forced labor in the performance of the contract. Under the proposed amendments to the FAR, arranging or providing housing that fails to meet host country housing and safety standards would be an act allowing for such termination. In addition, JTSCC Special Clause 952.222-0001 requires DoD contractors to provide adequate living conditions (sanitation, health, safety, living space) for their employees and specifies what those conditions are. The clause further requires contracting officers and their representatives to conduct random checks to ensure that contractors and subcontractors at all tiers are adhering to the TVPA. Under the WPS contract, CORs and Government Technical Monitors (GTMs) conduct regular Trafficking in Persons (TIP) inspections, as well as inspections of meal services and health and welfare inspections of PSC personnel living quarters and common areas.
- Travel docs. 18 U.S.C. §§ 1592 prohibits knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person. This prohibition is included in Federal government contracts pursuant to 48 CFR 52.222-50, *Combating Trafficking in Persons*. Under the proposed amendments to the FAR, all Federal government contracts will include a provision allowing the government to terminate the contract, without penalty, if the contractor or subcontractor destroys, conceals, removes, confiscates, or otherwise denies an employee access to his/her identity or immigration documents. In addition, JTSCC Special Clause 952.222-0001 provides specific contract language requiring contractors to hold employee passports and other identification documents discussed above for the shortest period of time reasonable for administrative processing purposes.
- Unlawful discrimination. Unless otherwise exempted, 48 CFR 22.810(e) specifies that Federal contracts must include a clause stating that the contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Also, the contractor shall take affirmative steps to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. The contractor shall also take positive action to ensure that employees are aware of these non-discrimination requirements and the means to process complaints.

GP 13 and all subordinate elements are also required under the PSC Standard, sections 9.2.1 and A.9.2.1.

8. To what extent is the conduct of any subcontracted PMSC required to be in conformity with relevant law? Please include requirements relating to liability and any notification required. [GP 15, 31]

The requirement under 32 CFR 159 and 48 CFR 52.225-26 to conform to relevant law … applies to subcontractors providing private security services. Specifically, section 52.225-26 requires PSCs to include the requirements of that clause in all subcontracts to be performed in

the designated areas. Section 52.225-26 further provides that the duty of the PSC to comply with the requirements of the clause shall not be reduced or diminished by the failure of a higher- or lower-tier contractor or subcontractor to comply with the clause requirements or by a failure of the contracting activity to provide required oversight. As noted above, 48 CFR 252.225-7040(d) and clauses of PSC contracts specify that the contractor shall comply with, and shall ensure that its personnel authorized to accompany U.S. Armed Forces deployed outside the United States are familiar with and comply with all applicable U.S., host country, and third country national laws; provisions of the law of war, as well as any other applicable treaties and international agreements; U.S. regulations, directives, instructions, policies, and procedures; and orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.

9. Do you use financial or pricing mechanisms as a way to promote compliance? These may include requiring a PMSC to post a financial bond against non-compliance. [GP 17, 41]

Section 862 requires that the failure of a contractor under a covered contract to comply with the requirements of the regulations governing private security contractors as implemented in contract clauses in an award fee contract shall be considered in any evaluation of contract performance by the contractor for the relevant award fee period. Such failure may be a basis for reducing or denying award fees for such period, or for recovering all or part of award fees previously paid for such period. In the case of a failure to comply that is severe, prolonged, or repeated, such failure will be referred to the suspension or debarment official for the appropriate agency and may be a basis for suspension or debarment of the contractor. In addition, standard contract clauses in the FAR provide for possible remediation measures, including, but not limited to, the withholding of payment, reduction of award fees, and reimbursement of U.S. Government expenses. The WPS contract does not require contractors to post bonds but contains financial incentives for compliance.

* * * *

11. Please describe any rules/limitations on the use of force and firearms. For example, these may include use of force "only when necessary and proportionate in self-defence or defence of third persons", and "immediately reporting to competent authorities" after force is used. [GP18, 43]

Department of Defense Directive 5210.56, *Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities*, April 1, 2011, provides specific guidance for the use of force and firearms by DoD military and DoD civilians and DoD contractor personnel. This Directive is supplemented and implemented by combatant commander orders (or fragmentary orders (FRAGOs)), violations of which may subject a person to punitive or administrative action. These orders apply the requirements found in DoDD 5210.56, tailoring them for the specific terms of the contract and the political, legal, and operational context of the area in which the contract is being performed. These FRAGO's include, but are not limited to, specific procedures for requesting arming authorization, the types of weapons authorized, training requirements, registration requirements for personnel and weapons, procedures for incident reporting, as well as specific RUFs. These FRAGOs direct the

use of weapons consistent with the civilian status of PSC personnel and exclude PSC personnel from participating in combat operations. 48 CFR 252.225-7039, *Contractors Performing Private Security Functions*, requires DoD contractor personnel performing private security functions to follow the RUFs issued by the applicable Combatant Commander.

Additionally, 48 CFR 252.225-7040, *Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States*, is included in DoD contracts for PSC services and states that the contractor shall ensure that the contractor and all contractor personnel performing security functions under the contract comply with any orders, directives, and instructions to contractors performing private security functions that are identified in the contract. Contractor personnel are only authorized to use deadly force in self-defense and when such force reasonably appears necessary to execute their security mission to protect assets/persons consistent with the regulations and orders cited above. The clause also provides that, unless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces can subject such personnel to U.S. or host nation prosecution and civil liability.

Title 48 CFR 252.225-7039 also implements requirements in Section 862 by requiring DoD contractors to report incidents in which: a weapon is discharged by PSC personnel; personnel performing private security functions are attacked, killed, or injured; persons are killed or injured or property is destroyed as a result of conduct by contractor personnel; a weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or specific active, non-lethal countermeasures are employed by PSC personnel in response to a perceived, immediate threat.

WPS contractors and their personnel are required to abide by the applicable mission firearms policy, the prescribed RUFs and the Deadly Force Policy in the WPS base contract, and Department policy guidance. In the event of a conflict, the mission firearms policy takes precedence. The WPS contract incorporates 48 CFR 52.225-19, which states that contractor personnel are authorized to use deadly force only in self-defense or when the use of such force reasonably appears necessary to execute their security mission to protect assets/persons, consistent with the terms and conditions contained in the contract or with their job description and terms of employment.

12. Please provide information on any rules in place regulating the possession of weapons by PMSCs and their personnel. [GP 44, 55]

GP 44 does not apply to the United States, as the United States is not a Territorial State as defined in the Montreux Document.

GP 55, the requirement to have appropriate rules on the accountability, export, and return of weapons and ammunition by PMSCs, is controlled pursuant to the Arms Export Control Act (AECA), as implemented by the International Trade in Arms Regulation (ITAR). The specific requirements for the export or import of weapons and ammunition are described in the answer to question 2, above. Accountability of such weapons and ammunition is maintained through end-use monitoring pursuant to section 40A of the AECA and non-transfer and use assurances required under section 123.9 of the ITAR. For certain defense articles, a separate non-transfer and end-use certificate must be signed by the license applicant, foreign consignee, and foreign

end-user that stipulates the defense article will not be re-exported, resold, or otherwise disposed of without the prior written approval of the Department of State.

In addition, 32 CFR 159 provides that PSC personnel under covered contracts may be armed only upon obtaining the appropriate authorization. Requests for such authorization must include, among other things, documentation of individual training covering weapons familiarization and qualification, RUFs, limits on the use of force, the distinction between the rules of engagement and the prescribed RUFs, and the Law of Armed Conflict, as well as written verification that PSC personnel are not prohibited under U.S. law from possessing firearms. Such requests must also include written acknowledgment by the PSC and its personnel that: (i) potential civil and criminal liability exists under U.S. and local law or host nation SOFAs for the use of weapons; (ii) proof of authorization to be armed must be carried by each PSC personnel; (iii) PSC personnel may possess only U.S. Government-issued and/or -approved weapons and ammunition for which they have been qualified according to specified standards; (iv) PSC personnel were briefed and understand limitations on the use of force; (v) authorization to possess weapons and ammunition may be revoked for non-compliance with established RUFs; and (vi) PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

13. To what degree are personnel of a PMSC, including all means of their transport, required to be personally identifiable whenever they are carrying-out activities under a contract? [GP 16, 45]

The WPS contract incorporates 48 CFR 52.225-19, *Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States*, which prohibits covered PSC personnel from wearing military clothing unless specifically authorized by the Combatant Commander. If authorized to wear military clothing, PSC personnel must wear distinctive patches, armbands, nametags, or headgear, in order to be distinguishable from military personnel, consistent with force protection measures. WPS contractors in uniform (i.e., static guards) wear distinctive patches identifying their company, while plain clothes contractors wear such patches if directed by the RSO. All WPS contractor personnel are required to carry personal identification cards, providing the individual's name, the labor categories they are authorized to fill, and the retest dates of any firearms qualifications and physical fitness testing.

Similarly, 48 CFR 252.225-7039 requires DoD PSC personnel to have issued to them and carry with them Personal Identity Verification credentials described in 48 CFR 52.204-19, *Personnel Identity Verification of Contractor Personnel*. FRAGOs routinely specify uniforms and markings for PSC personnel and vehicles, tailored for the specific requirements of the area in which the PSCs are operating. In Afghanistan, these orders require all armed contractors to use uniforms and markings, which clearly distinguish PSC personnel from military or police forces, consistent with the regulations issued by the Afghan Government and approved by the appropriate DoD CO. The PSC Standard, Section 9.2.1.1, also provides that PSCs shall use uniforms and markings to identify their personnel and means of transportation.

14. Please indicate to what degree contracts with PMSCs provide for the following:

a. the ability to terminate the contract for failure to comply with contractual provisions.

All Federal government contracts may be terminated in whole or in part for default if a contractor fails to perform any provision of a contract. 48 CFR 49.4. In contracts for private security functions outside the United States, 48 CFR 25.302-5 and 252.225-7039(c)(4) further specify that if the performance failures are significant, severe, prolonged, or repeated, the CO shall refer the matter to the appropriate suspension and debarment official.

b. specifying the weapons required.

48 CFR 252.225-7040(j) specifies that any requests from the contractor that its personnel in the designated operational area be authorized to carry weapons shall be made through the contracting officer's Combatant Commander, who will determine whether to authorize in-theater contractor personnel to carry weapons and what weapons and ammunition, in accordance with DoDI 3020-41. These determinations are detailed in FRAGOs addressing the arming of DoD civilians and contractor personnel and are specified in contract clauses where contractor personnel are authorized to carry weapons. JTSCC clause 5152.225-5900 is current for such contracts in Afghanistan.

Under the WPS contract, PSC personnel may use only Department of State issued or approved handguns, holsters, support weapons, magazines, optics, other vision enhancement devices, or ammunition, with specific weapon training and qualification requirements established based on the role of the individual and specific carry authority granted by the RSO and any applicable host country authority. Specific weapons requirements are listed in task orders only when they deviate from the weapons requirements in the base contract.

c. that PMSCs obtain appropriate authorizations from the Territorial State.

32 CFR 159 provides for the development of procedures for PSC verification that their personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of the contract and host country law. 48 CFR 52.225-26 and 252.225-7039(b)(2) implement 32 CFR 159 by requiring covered PSCs to ensure that they and all of their personnel responsible for performing private security functions under the contract are briefed on, and understand their obligation to comply with, applicable laws and regulations of the host country.

The PSC Standard, section A.10.2, provides that contractors should be able to demonstrate compliance with legal requirements, including applicable permits or licenses. Specific requirements to obtain and maintain current business licenses and licenses to operate as a PSC are contained in standard clauses in DoD contracts for these services. Similarly, the WPS contract requires each contractor to have a valid operating license and to operate in accordance with all host country laws.

d. that appropriate reparation be provided for those harmed by misconduct. [GP 14]

32 CFR 159 provides that all requests to arm PSC personnel shall include a written acknowledgment by the PSC and its personnel that potential civil and criminal liability exists under U.S. and local law or host nation SOFAs for the use of weapons. That section also notes that the written acknowledgment does not limit civil and criminal liability to conduct arising from the use of weapons. …

15. Provide details of how you provide for criminal jurisdiction in your national legislation over crimes under national and international law committed by PMSCs and their personnel. This may include details on if you have considered establishing corporate criminal responsibility and/or jurisdiction over serious crimes committed abroad. [GP 19, 49, 71]

In recent years, the United States has amended both its Federal criminal code and its Uniform Code of Military Justice (UCMJ) to provide greater accountability for civilian employees, contractors, and other civilians supporting and accompanying our armed forces outside the United States who have engaged in criminal misconduct. Under U.S. law, criminal jurisdiction is limited to the territory of the United States absent a provision in a statute that explicitly or implicitly makes it extraterritorial in scope.

The Special Maritime and Territorial Jurisdiction Act (SMTJ) provides jurisdiction for U.S. courts wherever "American citizens and property need protection, yet no other government effectively safeguards those interests." In 2001, the SMTJ was expanded to provide jurisdiction over certain listed offenses committed by or against a U.S. national on certain physical spaces in a foreign State.

The Military Extraterritorial Jurisdiction Act (MEJA) provides criminal jurisdiction over PSCs to the extent their employment relates to supporting the mission of the Department of Defense overseas. MEJA provides jurisdiction over these individuals if they commit an offense outside the United States that would be punishable if committed within the SMTJ of the United States, as defined in 18 U.S.C. § 7. A number of sections in the U.S. criminal code declare certain conduct, such as murder and other felonies, to be a crime if committed within the SMTJ of the United States.

The War Crimes Act (18 U.S.C. § 2441) provides criminal jurisdiction over conduct overseas that is determined to constitute a war crime when committed by or against a U.S. national or U.S. military member. The Federal Torture Statute (18 U.S.C. § 2340-2340B) provides criminal jurisdiction over U.S. nationals who commit torture anywhere in the world.

Finally, PSC personnel may be subject to the jurisdiction of the UCMJ (10 U.S.C. §§ 801-946). Under the UCMJ, a person serving with or accompanying the U.S. Armed Forces in the field during a declared war or contingency operation may be disciplined for a criminal offense, including by referral of charges to a General Court-Martial. PSC personnel may be ordered into confinement or placed under conditions that restrict movement in the area of operations or administratively attached to a military command pending resolution of a criminal investigation.

The Executive Branch has also supported legislation, introduced during the 112th Congress, which would clarify and expand extraterritorial jurisdiction over Federal contractor personnel operating overseas by providing analogue jurisdiction to MEJA for serious overseas crimes committed by personnel who are not currently covered by MEJA. The Executive Branch continues to support such legislation, and efforts are ongoing to secure its reintroduction in Congress and eventual enactment into law.

16. Provide details of how you provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel. This may include contractual sanctions, referral to competent investigative authorities, providing for civil liability and otherwise requiring PMSCs, or their clients to provide reparation to those harmed by PMSCs. [GP 20, 50, 72]

The U.S. Government is fully committed to ensuring that PSCs respect applicable national and international laws and are held accountable when they engage in misconduct. Contractual sanctions and civil liability, in U.S. courts and abroad, exist to ensure that PSCs are held accountable for such misconduct. 48 CFR 52.225-26 and 252.225-7039(c) provide that, in addition to other remedies available to the Government, the CO may direct the contractor, at its own expense, to remove and replace any contractor personnel who fail to comply with or violate applicable requirements of the contract. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of the contract, including termination for default.

Furthermore, PSCs are typically subject to civil litigation in the courts of the territorial State in which they operate. It is not the practice of the United States to accredit as members of the diplomatic mission PSC personnel or to grant such requests submitted by other countries for such personnel working in the United States. Most U.S. Government security contractors operating around the world are not immune from the laws of the host government and may be subject to host government civil jurisdiction.

Finally, those harmed by PSCs may have a number of avenues available for pursuing remedies under U.S. law. For example, the common law of the individual States of the United States may provide for tort liability in certain circumstances. Other cases have been brought under various Federal statutes. In some cases, a cause of action may be available under the Alien Tort Statute (ATS), pursuant to which U.S. Federal courts may hear civil actions by an alien for tort only, committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350; *see also Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (2013). PSCs that engage in fraud on a U.S. Government contract can also be held accountable by whistleblowers through qui tam actions under the False Claims Act.

17. In addition to the criminal and non-criminal mechanisms referred to above, do you have other administrative and other monitoring mechanisms to ensure proper execution of the contract and/or accountability of the PMSC and their personnel for improper conduct? [GP 21]

As introduced in the response to question 4, above, contracts for private military companies and private security companies are subject to oversight and monitoring through several different means and levels of accountability. Each contract is managed by a warranted CO, who is assisted by CORs responsible for the day-to-day monitoring of the contract and contractor performance. Private security contracts are required to have a COR and a Deputy COR to provide periodic and specified reports to the CO.

The *DoD Standard for Certification of Contracting Officer's Representatives (CORs) for Service Acquisitions* defines minimum COR competencies, experience, and training based on the nature and complexity of the requirement and contract performance risk. COR reports feed the CPARS system, as required by law (described above). The WPS contract has an overall COR for

the base contract, a dedicated CONUS and OCONUS COR for each task order, and GTMs for most task orders, as well as GTMs for specific operational areas of concern, such as logistics.

Serious incident reports are required by 32 CFR 159 and 48 CFR 52.225-26 and 252.225-7039. A serious incident involving a DoD contractor is reviewed by responsible officers and, as appropriate, may be the cause for initiation of a Commander's Inquiry under the Rules for Court Martial, Article 303. Similarly, DS may initiate an investigation in the case of an incident involving firearms or violations of U.S. or international law by a WPS contractor. Allegations of misconduct are subject to investigation by military law enforcement agencies, in the case of DoD contractors, and by DS in the case of WPS contractors. Under the WPS contract, PSC personnel may be removed from the task order for incidents of misconduct or other breaches of the standards of conduct contained in the WPS contract and may be deemed ineligible to work on other WPS task orders.

* * * *

21. Provide details of how you support other States in their efforts to establish effective monitoring of PMSCs. [GP 70]

Where the U.S. Government has used private military companies and private security companies in areas of armed conflict, it has worked with other concerned governments to enable a common perspective on the use of PMSCs to enhance the stability of conflict and post-conflict regions. Most notable is the U.S. Government's early and consistent support of the Montreux Document initiative, the ICoC, and the ICoCA. A partial list of other examples includes:

- Establishment of the Private Security Company Association of Iraq (PSCAI), which enabled Iraq's Ministry of Interior to access a single point of contact for exchange of information and interaction with PSCs operating in its territory. The PSCAI was disestablished on December 31, 2011.
- Establishment of the Contractor Operations Center in Iraq, which maintained situational awareness of PSCs operating in Iraq and a central repository for incident reports and complaints. Information was shared with the Government of Iraq and included the presence of Liaison officers from Iraq in the operations center. This center was closed in January 2012 with the end of military operations, with residual functions transitioned to the Office of Security Cooperation – Iraq.
- Establishment of Task Force Spotlight in Afghanistan to address issues relating to the compliance of PSCs with U.S. and Afghan regulatory requirements. Work was quickly expanded to assist in implementation of Presidential Decree (PD) 62, which initiated the transition of all PSCs to the Afghan Public Protection Force (APPF). (The APPF is a state-owned enterprise that provides security services to domestic and international customers on a pay-for-service basis.) PD62 provides that diplomatic entities may continue to utilize private security. This work included biometric registration of all PSC personnel in Afghanistan and assistance in screening/vetting of PSC and APPF personnel.
- Continued assistance to the Afghan Government in its efforts to meet its Territorial and Home State responsibilities for oversight and regulation of PSCs. In addition to the biometric enrollment mentioned above, this includes:

- Developing and executing an eight-step vetting process, which meets all requirements of GPs 32 and 60. Noteworthy is the inclusion of references from Tribal Elders attesting to, and guaranteeing, the good conduct and background of PSC and APPF personnel.
- Assisting the Afghan Government with the introduction of transparent licensing regimes to ensure better supervision and accountability so that only PSCs and other contractors likely to respect international humanitarian law and human rights law, through appropriate training, internal procedures, and supervision, can provide services in areas of armed conflict. (GP 25, 26, 30, 63)
- Increasing accountability of superiors of PSC personnel, including government officials and PSC managers consistent with Legal Obligation 27.
- Establishing standardized criteria for PSC personnel training in relevant Afghan law, including law of armed conflict and applicable human rights law consistent with GP 35 and 63.

22. In negotiating with other States agreements which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel (*e.g.* Status of Forces agreements). Please provide details on how you take into consideration the impact of the agreement on the compliance with national laws and regulations, and how you address the issue of jurisdiction and immunities. [GP 22, 51]

…The U.S. Government is fully committed to ensuring that U.S. contractors who are accused of committing crimes abroad are investigated and, when warranted, fully prosecuted. It is not the common practice of the United States to seek immunity from host government criminal jurisdiction for PSCs contracting with the U.S. Government. Most PSCs operating around the world under contract with the U.S. Government are subject to the criminal jurisdiction of the host government.

In any event, PSCs and other contractors operating under contract with the U.S. Government are instructed to follow the laws of the host government. There are also means to prosecute contractor personnel in U.S. courts when they are not held accountable under the host government's legal system for criminal activity, including the Military Extraterritorial Jurisdiction Act (MEJA), which provides for U.S. jurisdiction over contractors if they are working abroad on a Department of Defense contract or a contract of any other Federal agency to the extent that their employment relates to supporting the mission of the Department of Defense.

23. Please provide details of your cooperation with the investigating or regulatory authorities of other States in matters of common concern regarding PMSCs. [GP 23, 52, 73]

Currently, our work with the Government of Afghanistan provides the best example of such activities. The authorities currently being worked in Afghanistan involve the establishment and the assessment aspects of the APPF and the transition away from the use of PSCs. In August 2010, President Karzai issued PD62, directing dissolution of PSCs and expansion of the APPF. Shortly after PD62 was released, the Government of Afghanistan requested NATO assistance with the stand-up of the APPF. The International Security Assistance Force (ISAF), Ministry of Interior (MoI), and U.S. Embassy Kabul conducted a six-month assessment completed in September 2011 that baselined the status of the APPF's capability to conduct two core functions: execute business functions and generate/employ a force. Based on this assessment, ISAF formed a Joint Planning Team (JPT) to create a deliberate plan to build the APPF's capacity to manage the transition from the use of PSCs. The result of this plan was the September 2011 creation of

the APPF Advisory Group (AAG) assigned to NATO Training Mission – Afghanistan (NTM-A/CSTC). From the time the AAG was created, the AAG has conducted assessments every 3-6 months. The focus of these efforts is to complete the establishment of the APPF and to provide another security pillar in Afghanistan. The AAG is currently overseeing the transition of security for ISAF bases and convoys to the APPF.

24. Please list any other measures you have in place for overseeing and/or contracting with PMSCs, and briefly describe how they are implemented or enforced.

The U.S. Government has several oversight, policy, and contracting offices and bureaus that are, or have been, dedicated to evaluating the U.S. Government's use of PSCs and our broader national interests in this area. These include:

- The Government Accountability Office: Independent, nonpartisan U.S. agency within the legislative branch that investigates how the Federal government spends money and provides advice on ways to make government more efficient and effective. The GAO has published reports on the U.S. Government's use of PSCs.
- Commission on Wartime Contracting: Independent, bipartisan commission established by Congress to study wartime contracting in Iraq and Afghanistan. The Commission issued a publically available final report to Congress in August 2011, which included recommendations to Congress on the use of PSCs.
- Department of State Bureau of Diplomatic Security: The Department bureau that manages the oversight of, and provides operational guidance to, PSCs providing security at U.S. diplomatic and consular facilities abroad.
- Contractor Operations Center: This center operated in Iraq from 2004 through 2012 to maintain situational awareness of PSCs operating in Iraq, including their licensing, movements, incident responses, and incident reporting.
- Armed Contractor Oversight Directorates: Directors in Iraq and Afghanistan responsible for monitoring PSCs under DoD contracts and for processing arming authorization requests, maintaining PSC personnel census data, verifying the accuracy of PSC information in the SPOT database, and conducting or coordinating biometric enrollment of PSC personnel.
- Contingency Contractor Standards and Compliance: Department of Defense office responsible for maintaining, developing, and promoting policy and operational guidance for all armed contractors operating in support of U.S. operations in armed conflict and similar environments. Works closely with the Director, Defense Procurement and Acquisition Policy, the Office of the Assistant Secretary of the Army for Procurement, and the Defense Acquisition Regulations Council to provide current and effective contracting procedures, policies, and regulations that implement U.S. national policy regarding PSCs and PMCs.

* * * *

Joshua Dorosin, Assistant Legal Adviser at the Department of State, delivered remarks for the United States on December 11, 2013 at the opening of the Montreux+5 Conference. Mr. Dorosin's remarks follow.

---

* * * *

Thank you Mr. Chairman. I would like to begin by thanking the Government of Switzerland and the International Committee of the Red Cross for providing this forum for States and International Organizations to share their experiences utilizing, and regulating, private military and security companies. As we all know, it was the Swiss Government and the ICRC that co-facilitated the process culminating in the successful completion of the Montreux Document five years ago. Thanks to their continued leadership, we now have this opportunity to learn from our collective experience, and to identify ways to further promote respect for international humanitarian law, and human rights law, in the provision of private military and security services in areas of armed conflict. And thanks also to Geneva Center for Democratic Forces for preparing its thought-provoking study, which helpfully frames this week's discussions.

The United States is pleased to have been one of the 17 initial participating States of the Montreux Document—and is proud of our record of promoting respect for the legal principles reflected in the Montreux Document and the implementation of the good practices identified therein. I will summarize a few of the recent developments in the United States, but I would note that we have submitted a response to the Swiss/ICRC questionnaire, which is posted on the U.S. Mission website at *http://geneva.usmission.gov/*.

Private military and security contractors have continued to play a critical role in supporting U.S. military and diplomatic operations around the world, and also play a critical role in supporting the operations of many of the governments and international organizations represented here today. At the same time, the United States recognizes that their role must be limited and carried out in accordance with the principles reflected in the Montreux Document, and that their activities must be subject to standards of professionalism and accountability.

To that end, under U.S. law, contractors are prohibited from engaging in combat operations or in situations where it is determined that there is significant potential for their security operations to evolve into combat. As importantly, the United States has been a strong supporter of the development of the PSC.1 Standard adopted by the American National Standards Institute. Currently, all Department of Defense contractors accompanying U.S. Armed Forces deployed outside the United States must demonstrate that they are in compliance with PSC.1 and an equally strong supporter of the ICoC process and establishment of the new ICoC Association. All bidders for the successor to the Department of State's Worldwide Protective Services contract will likewise have to demonstrate that they are in conformance with that standard.

To briefly summarize what we have done to-date, we have ensured that:

- **Contract Requirements and Oversight:** Private military and security companies that contract with the U.S. Government are subject to rigorous contract requirements and oversight measures.
- **Selection of PMSCs:** During the selection process, these contractors are evaluated on their ability to comply with applicable federal regulations and solicitation requirements, meant to promote the responsible provision of security services in areas of armed conflict. This evaluation includes an assessment of the contractor's past performance, its financial resources available to perform the contract, and its ability to meet requirements pertaining to weapons authorizations, accounting for equipment and personnel, and pre-deployment training.

- **Training of PMSCs:** We require contractors to ensure that their personnel receive pre-deployment training covering cultural familiarization with the area of deployment and guidance on working with host country nationals and military personnel. And they are required to ensure that their personnel are briefed on, and understand their obligation to comply with, applicable national and international law. In addition, contract personnel may be authorized to carry weapons only upon a showing of individual training and qualification, including training on weapons familiarization, the prescribed Rules on the Use of Force, and the Law of Armed Conflict.
- **Oversight of PMSCs:** Once deployed, contractors providing security services in areas of armed conflict are subject to multiple means of oversight and monitoring. These means include the placement of a U.S. Government employee in embassy convoys, the increased use of technology, such as video and audio recording and biometric tracking of contract personnel, and enhanced reporting of serious incidents, including use-of-force incidents. In addition, the United States has been dedicated to the establishment of an oversight mechanism under the International Code of Conduct for Private Security Service Providers and believes that the recently-established ICoCA can play an important role in improving the standards for, and the conduct of, private security companies.
- **Accountability for PMSCs:** These enhanced contracting practices and oversight mechanisms are all meant to promote responsible conduct by the companies we contract and supervise. When they engage in misconduct, however, the United States remains committed to ensuring that these companies and their personnel are held accountable. This can happen both at home and in the state where misconduct occurred. It is not the common practice of the United States to seek immunity from host government criminal jurisdiction for PSCs contracting with the U.S. Government and, in any event, PSCs and other contractors operating under contract with the U.S. Government are instructed to follow the laws of the host government.
- In addition, in recent years, the United States has amended both its federal criminal code and its Uniform Code of Military Justice to provide greater accountability for contractors supporting and accompanying our armed forces outside the United States. The Department of Justice continues to pursue accountability for those responsible for the 2008 shooting in Nisour Square in Iraq, and in October of this year filed a new indictment against four former Blackwater guards involved in the shooting under the Military Extraterritorial Jurisdiction Act, or MEJA. The Executive Branch continues to support the passage of new legislation in the form of the Civilian Extraterritorial Jurisdiction Act, or CEJA, to clarify and expand extraterritorial jurisdiction over contractor personnel overseas.
- Finally, 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. For example, the U.S. Government amicus brief in *Al Shimari and Al-Quraishi* argued against preemption of state tort law claims in those cases to the extent that they involve conduct by civilian contractors that, in the circumstances associated with the instances of abuse at Abu Ghraib in 2004, constitutes torture as defined in federal criminal law.

Closing/Looking Forward: To build on these successes to-date, the United States looks forward to engaging in a constructive dialogue with all participants this week. We are pleased to welcome the Government of the Czech Republic, the Organization for Security and Cooperation in Europe, and NATO as the newest Montreux Document participants. We hope that engagement among Montreux Document participants is something that can continue in the years to come as we all strive to do better to bring the principles of the Document home, and to that end we hope to use our time this week to explore ways to establish a more regular dialogue among Montreux Document participants and to encourage Montreux participants to become more actively engaged in the ICoC process. Through our shared learning, we are confident that we can continue to improve our practices and our ability effectively to promote respect for the international legal principles and best practices reflected in the Montreux Document in all aspects of PMSC operations.

* * * *

B. CONVENTIONAL WEAPONS

1. General

See Chapter 19.J. for discussion of the conclusion of the Arms Trade Treaty in 2013. On October 29, 2013, Christopher Buck, Alternate Representative for the U.S. delegation to the UN General Assembly's First Committee, addressed the First Committee's thematic discussion on conventional weapons. Mr. Buck's statement follows and is available at *http://usun.state.gov/briefing/statements/216006.htm*.

---

* * * *

Thank you, Mr. Chairman. In the interest of time, I will address several separate issues in this statement relating to the Arms Trade Treaty, the UN Register of Conventional Arms, conventional weapons destruction, small arms and light weapons, man-portable air defense systems, and the Convention on Certain Conventional Weapons.

Let me start with the Arms Trade Treaty. The United States is proud to have signed the ATT on September 25 because we know from decades of effort that any time that we work cooperatively to address the illicit international trade in conventional weapons, we make the world a safer place. This Treaty is a significant step in that effort.

The ATT helps lift countries up to the highest standards of export and import control for conventional weapons. It requires countries that join it to create and enforce the kind of strict national export controls that the United States already has in place. This Treaty strengthens countries' national security, builds global security, and advances important humanitarian goals

without undermining the legitimate international trade in conventional arms which allows each country to provide for its own defense.

The United States looks forward to the early entry into force of the Treaty, and we call on those countries that have not signed it to consider doing so as soon as possible. We also need signatory States to be ready to implement the Treaty's obligations once they ratify it. The United States looks forward to working with other countries on implementing this Treaty to ensure that it lives up to all of our expectations.

Mr. Chairman, my country was pleased to have participated in the 2013 UN Group of Governmental Experts that reviewed the continuing operation of the UN Register. Unfortunately, the GGE was unable to bring an end to its now 13-year discussion of small arms and light weapons by agreeing to expand the Register to including SA/LW. This means that the 2013 GGE repeated the failure of the 2009 GGE to address the security concerns of the states that traditionally do not report to the Register by expanding it to include the weapons that are of most concern to them. We hope that the next GGE will correct this shortcoming and reinforce the Register's role as a global transparency and confidence-building measure.

Now let me turn to conventional weapons destruction. The United States continues its strong support for eliminating aging, surplus, loosely-secured, or otherwise at-risk conventional weapons and munitions, as well as explosive remnants of war. Since 1993, we have provided more than $2.1 billion in aid to over 90 countries for conventional weapons destruction programs, including clearance of landmines and unexploded munitions and destruction of excess small arms and light weapons and munitions. We have assisted 15 affected states to become mine-impact free. Since 2001, we have helped to destroy more than 1.6 million excess or poorly secured weapons and over 90,000 tons of munitions around the world.

Mr. Chairman, the United States welcomes the adoption by the UN Security Council of its first standalone resolution on the illicit trade in small arms and light weapons, and thanks Australia for its leadership on the matter. The illicit transfer, destabilizing accumulation, and misuse of small arms and light weapons in many regions of the world pose a threat to international security, and the resolution laid out a variety of measures that should be taken by all Member States to reduce the risk that deadly weapons may fall into the wrong hands. The United States also continues to urge fellow Member States to fully implement the 2001 UN Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects and the 2005 International Tracing Instrument. Much more needs to be done by the international community to ensure full implementation of existing commitments in these instruments, and we look forward to discussing these issues at the Biennial Meeting of States in June 2014.

In addition to supporting the above mentioned programs to destroy excess small arms and light weapons, the United States provides a wide variety of assistance to combat the illicit trafficking of conventional weapons, helping states improve their export control practices and providing technical assistance for physical security and stockpile management of at-risk conventional arms and munitions.

Mr. Chairman, in the hands of terrorists, insurgents, or criminals, Man-Portable Air Defense Systems—also known as shoulder-fired anti-aircraft missiles—pose a serious threat to global passenger air travel, the commercial aviation industry, and military aircraft around the world. In recognition of the risk of diversion and potential use by terrorists, insurgents, and

criminals, the United States has established strict export controls over the transfer of all MANPADS. The U.S. Government transfers only on a government-to-government basis through the Foreign Military Sales system. Since 2003, the United States has cooperated with countries around the globe to destroy over 33,000 excess, loosely-secured, illicitly held, or otherwise at-risk MANPADS missiles, and thousands more launchers, in 38 countries.

Mr. Chairman, the United States is a High Contracting Party to the Convention on Certain Conventional Weapons 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.

We look forward to the annual meetings of High Contracting Parties in November and to establishing a program of work for 2014 that will allow CCW States to continue supporting the universalization of the CCW and the implementation of all its Protocols. During this past year, questions have arisen regarding the development and use of lethal fully autonomous weapons in forums such as the Human Rights Council. As the United States delegation to the Human Rights Council stated, we welcome discussion among states of the legal, policy, and technological implications associated with lethal fully autonomous weapons in an appropriate forum that has a primary focus on international humanitarian law issues, if the mandate is right. The United States believes the CCW is that forum. CCW High Contracting Parties include a broad range of States, including those that have incorporated or are considering incorporating automated and autonomous capabilities in weapon systems. The CCW can bring together those with technical, military, and international humanitarian law expertise, ensuring that all aspects of the issue can be considered. Accordingly, we support an informal, exploratory discussion of lethal fully autonomous weapons and are engaged with our fellow CCW High Contracting Parties in formulating an appropriate mandate that will facilitate these discussions.

* * * *

2. Lethal Autonomous Weapons Systems

During the 23rd session of the UN Human Rights Council, the U.S. delegation expressed its view that "lethal autonomous weapons may present important legal, policy, and ethical issues" but that these issues "go beyond the Human Rights Council's core expertise." The U.S. delegation therefore urged that discussion of lethal autonomous weapons systems "take place in an appropriate forum that has a primary focus on international humanitarian law issues, with the participation of States that have incorporated or are considering incorporating automated and autonomous capabilities in weapon systems."

At the meeting of High Contracting Parties to the Convention on Certain Conventional Weapons, the U.S. delegation stated that it supported discussion of lethal autonomous weapons systems in that forum. The U.S. delegation's opening statement at the Meeting of the High Contracting Parties, delivered on November 14, 2013 by Michael W. Meier, is available at

https://geneva.usmission.gov/2013/11/15/u-s-opening-statement-at-the-meeting-of-parties-to-the-ccw/.

Ultimately, the High Contracting Parties decided to convene in 2014 "a four-day informal Meeting of Experts . . . to discuss the questions related to emerging technologies in the area of lethal autonomous weapons systems."

C. DETAINEES

1. General

a. Presidential Statements on 2013 and 2014 National Defense Authorization Acts

On January 2, 2013, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2013. Pub. Law No. 112–239. The President issued a signing statement expressing concerns about several provisions in the legislation, which he signed because of its overall benefits to the U.S. military. Daily Comp. Pres. Docs. 2013 DCPD No. 00004, pp. 1-3. In particular, the legislation contains several provisions relating to detainees. Excerpts from the President's signing statement relating to detainees appear below.

---

* * * *

Several provisions in the bill also raise constitutional concerns. Section 1025 places limits on the military's authority to transfer third country nationals currently held at the detention facility in Parwan, Afghanistan. That facility is located within the territory of a foreign sovereign in the midst of an armed conflict. Decisions regarding the disposition of detainees captured on foreign battlefields have traditionally been based upon the judgment of experienced military commanders and national security professionals without unwarranted interference by Members of Congress. Section 1025 threatens to upend that tradition, and could interfere with my ability as Commander in Chief to make time-sensitive determinations about the appropriate disposition of detainees in an active area of hostilities. Under certain circumstances, the section could violate constitutional separation of powers principles. If section 1025 operates in a manner that violates constitutional separation of powers principles, my Administration will implement it to avoid the constitutional conflict.

Sections 1022, 1027 and 1028 continue unwise funding restrictions that curtail options available to the executive branch. Section 1027 renews the bar against using appropriated funds for fiscal year 2012 to transfer Guantanamo detainees into the United States for any purpose. I continue to oppose this provision, which substitutes the Congress's blanket political determination for careful and fact-based determinations, made by counterterrorism and law enforcement professionals, of when and where to prosecute Guantanamo detainees. For decades, Republican and Democratic administrations have successfully prosecuted hundreds of terrorists in Federal court. Those prosecutions are a legitimate, effective, and powerful tool in our efforts

to protect the Nation, and in certain cases may be the only legally available process for trying detainees. Removing that tool from the executive branch undermines our national security. Moreover, this provision would, under certain circumstances, violate constitutional separation of powers principles.

Section 1028 fundamentally maintains the unwarranted restrictions on the executive branch's authority to transfer detainees to a foreign country. This provision hinders the Executive's ability to carry out its military, national security, and foreign relations activities and would, under certain circumstances, violate constitutional separation of powers principles. The executive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. The Congress designed these sections, and has here renewed them once more, in order to foreclose my ability to shut down the Guantanamo Bay detention facility. I continue to believe that operating the facility weakens our national security by wasting resources, damaging our relationships with key allies, and strengthening our enemies. My Administration will interpret these provisions as consistent with existing and future determinations by the agencies of the Executive responsible for detainee transfers. And, in the event that these statutory restrictions operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.

* * * *

On December 26, 2013, the President signed into law the National Defense Authorization Act for Fiscal Year 2014. Pub. Law. No. 113-66. President Obama's signing statement again expressed concerns about provisions in the law relating to detainees. Daily Comp. Pres. Docs. 2013 DCPD No. 00876, pp. 1-2 (Dec. 26, 2013). Excerpts follow from the President's signing statement.

---

* * * *

For the past several years, the Congress has enacted unwarranted and burdensome restrictions that have impeded my ability to transfer detainees from Guantanamo. Earlier this year I again called upon the Congress to lift these restrictions and, in this bill, the Congress has taken a positive step in that direction. Section 1035 of this Act gives the Administration additional flexibility to transfer detainees abroad by easing rigid restrictions that have hindered negotiations with foreign countries and interfered with executive branch determinations about how and where to transfer detainees. Section 1035 does not, however, eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. Of course, even in the absence of any statutory restrictions, my Administration would transfer a detainee only if the threat the detainee may pose can be sufficiently mitigated and only when consistent with our humane treatment policy. Section 1035

nevertheless represents an improvement over current law and is a welcome step toward closing the facility.

In contrast, sections 1033 and 1034 continue unwise funding restrictions that curtail options available to the executive branch. Section 1033 renews the bar against using appropriated funds to construct or modify any facility in the United States, its territories, or possessions to house any Guantanamo detainee in the custody or under the control of the Department of Defense unless authorized by the Congress. Section 1034 renews the bar against using appropriated funds to transfer Guantanamo detainees into the United States for any purpose. I oppose these provisions, as I have in years past, and will continue to work with the Congress to remove these restrictions. The executive branch must have the authority to determine when and where to prosecute Guantanamo detainees, based on the facts and circumstances of each case and our national security interests. For decades, Republican and Democratic administrations have successfully prosecuted hundreds of terrorists in Federal court. Those prosecutions are a legitimate, effective, and powerful tool in our efforts to protect the Nation. Removing that tool from the executive branch does not serve our national security interests. Moreover, section 1034 would, under certain circumstances, violate constitutional separation of powers principles.

The detention facility at Guantanamo continues to impose significant costs on the American people. I am encouraged that this Act provides the Executive greater flexibility to transfer Guantanamo detainees abroad, and look forward to working with the Congress to take the additional steps needed to close the facility. In the event that the restrictions on the transfer of Guantanamo detainees in sections 1034 and1035 operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.

* * * *

b. CAT Report

As discussed in Chapter 6, the United States submitted its third, fourth, and fifth periodic reports to the United Nations Committee Against Torture on August 12, 2013. Several of the questions addressed in the report relate to detainees. Relevant portions are excerpted below. The full text of the report is available at *www.state.gov/j/drl/rls/213055.htm*.

---

* * * *

4. In light of the Committee's previous concluding observations (para. 16) and the replies provided in the State party's comments under the follow-up procedure (CAT/C/USA/CO/2/Add.1, para. 3), please provide:

(a) Information on steps taken by the State party to ensure that it registers all persons it detains in any territory under its jurisdiction, including in all areas under its de facto effective control. …

Response to issues raised in Question 4(a).

15. Noting paragraph 6 of this Report, although there is no unified national policy governing the registry of all persons detained by the United States, relevant individual federal, state, and local authorities, including military authorities,maintain appropriate records on persons detained by them. Although the United States notes that the Convention has no provision requiring the registration of detainees, such records would generally include the information mentioned in the Committee's recommendation.

16. DoD keeps detailed information regarding every individual it detains, to serve as both an aid in ensuring appropriate care and custody and as an appropriate oversight mechanism of the conditions of detention. It also assigns internment serial numbers to all detainees interned by the United States in connection with armed conflict as soon as practicable and in all cases within 14 days of capture, and grants the International Committee of the Red Cross (ICRC) access to such detainees, consistent with DoD regulations and policies. Pursuant to DoD Directive 2310.01E (The DoD Detainee Program), the ICRC is made aware of and has access to all U.S. law of war detention facilities and all persons detained by the United States in situations of armed conflict. This is consistent with President Obama's Executive Order (E.O.) 13491 on Ensuring Lawful Interrogations, issued on January 22, 2009, requiring that all agencies of the U.S. government provide the ICRC with such notification of and access to any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. government, consistent with DoD regulations and policies.

17. Within the United States, the U.S. and state constitutions and other laws provide comprehensive safeguards to ensure that persons under detention are protected and provided due process. Under such laws, all persons detained are booked when they are taken into custody. Generally, booking information includes the name, physical description, charges, bond information, and emergency contact information for the detainee. Such bookings are public information and are often published in local newspapers. Pre-trial detention is governed by constitutional and statutory standards, and approved and supervised by independent judicial officers who are available to address allegations of mistreatment.

* * * *

5. Please provide information on:

(a) Whether the State party has adopted a policy that ensures that no one is detained in any secret detention facility …

(b) The legal safeguards provided to the detainees and the manner in which they are treated.

(c) Steps taken to address the reports of detainees held incommunicado and without the protection of domestic or international law …

Response to issues raised in Question 5(a).

23. In September 2006 former President Bush acknowledged that in addition to individuals then held at the U.S. Naval Station Guantanamo Bay (Guantanamo), "a small number of suspected terrorist leaders and operatives captured during the war [were] held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency." He then announced that 14 individuals were being transferred from Central Intelligence Agency (CIA) custody to DoD custody at Guantanamo. The CIA's overseas detention and interrogation program was described in detail in a 2004 CIA Inspector General Special Review, which has been publicly released in redacted form, and was further discussed in DOJ Office of Legal Counsel memoranda from 2002 and 2005 that were publicly released in 2009.

24. On his second full day in office, January 22, 2009, President Obama issued three executive orders concerning lawful interrogations, the military detention facility at Guantanamo, and detention policy options. E.O. 13491, Ensuring Lawful Interrogations, instructed the CIA to close as expeditiously as possible any detention facilities it operated. As noted in the answer to Question 4, it requires that all agencies of the U.S. government provide the ICRC with timely access to any individual detained by the United States in any armed conflict, consistent with DoD regulations and policies.

25. Consistent with E.O. 13491, the CIA does not operate any detention facilities. The United States does not have and has never had a detention facility on Diego Garcia.

26. The United States does not operate any secret detention facilities. In some contexts, the United States operates battlefield transit and screening facilities, the locations of which are often classified for reasons of military necessity. All such facilities are operated consistent with applicable U.S. law and policy and international law, including Common Article 3 of the Geneva Conventions, the Detainee Treatment Act of 2005, and DoD Directive 2310.01E. The ICRC and relevant host governments are informed about these facilities, and the ICRC has access to all individuals interned by the United States in the context of armed conflict, consistent with DoD policy.

Response to issues raised in Question 5(b).

27. Pursuant to E.O. 13491, all U.S. detention facilities in the context of armed conflict are operated consistent with obligations under U.S. domestic and international law and policy. E.O. 13491 directs that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations and U.S. policy, and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States; and that such

individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual on Human Intelligence Collector Operations, FM 2-22.3 (Army Field Manual), without prejudice to authorized non-coercive techniques of federal law enforcement agencies.

28. In March 2011 the United States confirmed its support for Additional Protocol II and for Article 75 of Additional Protocol I to the 1949 Geneva Conventions. A March 7, 2011White House press release explained the significance of this announcement:

• Because of the vital importance of the rule of law to the effectiveness and legitimacy of our national security policy, the Administration is announcing our support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions. Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are party. An extensive interagency review concluded that U.S. military practice is already consistent with the Protocol's provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

• Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported.

• Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

29. The full text of the White House fact sheet is available at ***www.whitehouse.gov/sites/default/files/Fact_Sheet_--_Guantanamo_and_Detainee_Policy.pdf***.

30. Additionally, in E.O. 13567, issued March 7, 2011, President Obama established a new periodic status review process for detainees at Guantanamo, as discussed in response to Question 8(c). …

Response to issues raised in Question 5(c).

31. As stated above, E.O. 13491 requires that all agencies of the U.S. government provide the ICRC with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. government, consistent with DoD regulations and policies. Partnering with the ICRC, DoD has greatly expanded the contact detainees have with their families while in detention. Detainees are given the opportunity to send and receive letters, facilitated by the

ICRC, and many of them are able to talk to their families via phone or video teleconference. DoD provides the ICRC ongoing access to individuals detained in armed conflict throughout the duration of their detention.

32. All detainees held by DoD are treated in a manner consistent with U.S. obligations under international and domestic law. Upon arrival in any DoD detention facility, all detainees receive medical screening and any necessary medical treatment. The medical care detainees receive throughout their time in U.S. custody is generally comparable to that which is available to U.S. personnel serving in the same location.

33. The extensive U.S. procedural protections, including rigorous review procedures afforded to law of war detainees in its custody in Afghanistan, as well as litigation establishing that U.S. constitutional habeas corpus jurisdiction does not extend to aliens held in law of war detention in the Bagram detention facility in Afghanistan, are discussed in the 2011 ICCPR Report ¶¶ 520 and 216, incorporated herein by reference. Further, control of the detention facility was transferred to Afghanistan on March 25, 2013, at which time the United States also transferred custody of all Afghan detainees in the facility to Afghan authorities. The facility was renamed the Afghan National Detention Facility-Parwan (ANDF-P).

34. As discussed further in response to Question 8(c), U.S. constitutional habeas corpus jurisdiction has been held to extend to those detained outside the United States in some situations.

* * * *

8. Please provide updated information on practical steps taken to close down Guantánamo Bay. …

40. The President has repeatedly reaffirmed his commitment to close the Guantanamo detention facility. In his May 23, 2013 speech at the National Defense University, he outlined a series of steps that have been or will be taken to reach this goal, including calling on Congress to lift the restrictions on detainee transfers from Guantanamo; asking DoD to designate a site in the United States where military commissions can be held; appointing new senior envoys at DOS and DoD who will be responsible for negotiating the transfer of detainees; and lifting the moratorium on detainee transfers to Yemen. A fact sheet summarizing the President's speech is available at ***www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism***.

41. The United States derives its domestic authority to detain the individuals at Guantanamo from the 2001 Authorization for Use of Military Force (AUMF), as informed by the laws of war, and as such may detain, inter alia, "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 coalition partners." Such detention is permitted by the law of war until the cessation of hostilities covered by the AUMF.

42. On January 22, 2009, President Obama issued E.O. 13492, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," calling for the closure of the Guantanamo facility. As the President explained, he knew when he

ordered Guantanamo closed that the process would be "difficult and complex." This remains true today. But, consistent with its policies and its values, the United States continues to work through these challenging issues in order to close the facility.

43. Pursuant to E.O. 13492, the United States established a Guantanamo Review Task Force (Task Force) to carry out the review of the status of all detainees then held at Guantanamo. The Task Force, comprised of representatives of DOJ, DoD, DOS and DHS, and of the Office of the Director of National Intelligence and the Joint Chiefs of Staff, painstakingly considered all relevant information in the possession of the U.S. government about each Guantanamo detainee to assess whether it was possible to transfer each individual detained at Guantanamo to his home country or to a third country; or whether he should be referred for prosecution or continue to be held pursuant to the AUMF, as informed by the laws of war. E.O. 13492 and subsequent developments are discussed below.

* * * *

Article 3

In light of the Committee's previous concluding observations (para. 20), please provide updated information on:

(a) …the non-refoulement guarantee …. Please provide information on steps taken to establish adequate judicial mechanisms to challenge all refoulement decisions.

(b) Whether the State party has ceased the "rendition" of suspects….

(c) Steps taken to ensure that the State party conducts investigations into all allegations of violation of article 3 of the Convention. …

Response to issues raised in Question 10(a).

66. …United States policy is not to transfer any person to a country where it is more likely than not that the person will be tortured or, in appropriate cases, where the person has a well-founded fear of persecution based on a protected ground and would not be disqualified from persecution protection on criminal or security-related grounds. Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277 (FARRA) provides that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." In application, the "substantial grounds" standard equates to the "more likely than not" standard. The clear statement in the FARRA informs U.S. treatment of detainees in its custody, and others subject to transfer by the United States.

67. In E.O. 13491, President Obama ordered the establishment of the Special Task Force in part "to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control." The Special Task Force considered seven types of transfers conducted by the U.S. government: extradition, removals pursuant to immigration proceedings, transfers pursuant to the Geneva Conventions, transfers from Guantanamo, military transfers within or

from Afghanistan, military transfers within or from Iraq, and transfers pursuant to intelligence authorities. The work of the Special Task Force was informed, inter alia, by the record in past cases. Recommendations made by the Special Task Force in August 2009, were accepted by the President. The Special Task Force was terminated upon the completion of its duties.

68. The United States maintains extensive mechanisms to ensure that all transfers are conducted in a manner consistent with its non-refoulement commitment, as discussed in response to Questions 8(a) and 11. In its Initial Report ¶¶ 156-177, 2005 CAT Report ¶¶ 32-43, and 2006 Response to List of Issues pp. 27-32, 39-43 and 46, the United States provided detailed information on the implementation of Article 3 in the immigration removal and extradition contexts. *See, e.g.*, DHS regulations for the implementation of Article 3 in the immigration removal context, 8 C.F.R. 208.16-208.18, and DOS regulations implementing Article 3 in the extradition context, 22 C.F.R. 95.1-95.4. U.S. implementation of Article 3 of the Convention in the immigration and extradition context is discussed further in the 2011 ICCPR Report ¶¶ 282-287 and ¶¶ 558-559, incorporated herein by reference.

69. As addressed elsewhere in this submission, the United States conducts a thorough, case-by-case analysis of each potential transfer to a foreign government of third country nationals detained in situations of armed conflict and may secure diplomatic assurances from the country of proposed transfer, as well as post-transfer monitoring of the detainee. This thorough and rigorous process ensures that any transfers are consistent with the U.S. non-refoulement commitment.

70. The United States also takes measures to ensure that law of war detainees who are transferred to a host government are treated humanely. …

Response to issues raised in Question 10(b).

71. The United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured. The Special Task Force established in E.O. 13491 issued a set of recommendations to ensure that U.S. transfer practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture, and the President accepted those recommendations. The U.S. government is in the process of implementing those recommendations.

Response to issues raised in Question 10(c).

72. The United States is firm in its commitment not to transfer any person to a country where it is more likely than not that the person will be tortured, as discussed further in response to Questions 8 and 11. Assignment of responsibility within the U.S. government for investigating alleged violations of this law and policy necessarily depends on the specific facts and circumstances of the allegations. If criminal violations of federal law are suspected, DOJ may investigate. In other cases, the Inspector General's office or another component of the agency involved may investigate.

* * * *

75. The United States is not aware of any cases in which humane treatment assurances have not been honored in the case of an individual transferred from the United States or Guantanamo since the Special Task Force report was issued in August 2009.

11. Please provide detailed information on:

(a) The procedures in place for obtaining "diplomatic assurances"…

(b) Steps taken to establish a judicial mechanism for reviewing, in last instance, the sufficiency and appropriateness of diplomatic assurances in any applicable case. …

(c) Steps taken to guarantee effective post-return monitoring arrangements.

(d) All cases since 11 September 2001 where diplomatic assurances have been provided. …

Response to issues raised in Question 11(a).

76. For the United States, the critical determination in the context of any transfer of an individual to a foreign country is whether it is more likely than not that the person would be tortured. U.S. consideration and use of assurances from foreign governments regarding the treatment of people who may be transferred to foreign countries, where such assurances are relevant, factor into this determination.

77. As noted, in August 2009 the Special Task Force made recommendations to the President with respect to all scenarios in which the United States transfers or facilitates the transfer of a person from one country to another or from U.S. custody to the custody of another country. The Special Task Force recommendations were accepted by the President. Several recommendations were aimed at clarifying and strengthening U.S. procedures for obtaining and evaluating diplomatic assurances from receiving countries for those transfers in which such assurances are obtained. These included a recommendation that the Secretary of State be involved in evaluating all diplomatic assurances, and a recommendation that the Inspectors General of the Departments of State, Defense, and Homeland Security prepare annually a coordinated report on all transfers involving diplomatic assurances conducted by each of their agencies. … The United States has been implementing the Special Task Force recommendations across the range of government transfers.

* * * *

Response to issues raised in Question 11(b).

79. A judicial mechanism is generally not available to review diplomatic assurances regarding humane treatment. That said, the United States maintains robust procedures to review the sufficiency and appropriateness of humane treatment assurances, which are different in nature from formal judicial review but effective in ensuring compliance with applicable law and policy. The Executive Branch, and in particular DOS, has the tools to obtain and evaluate assurances of humane treatment, to make recommendations about whether transfers can be made consistent with U.S. government policy on humane treatment, and where appropriate to follow up with receiving governments on compliance with those assurances. DOS has used these tools in the past to facilitate transfers in a responsible manner that comports with the obligations and policies described herein.

* * * *

Response to issues raised in Question 11(c).

82. Consistent with the recommendations of the Special Task Force established under E.O. 13491, in general, the U.S. government will seek the foreign government's agreement to

allow consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government, by non-governmental entities, or in some circumstances U.S. government officials, in the country concerned to monitor the condition of an individual returned to that country. In the past several years, the United States has established monitoring regimes in particular cases. In appropriate situations, the United States has raised concerns regarding both treatment and the process under which prosecutions have been pursued post-transfer when concerns have been brought to its attention, whether from U.S. government information, monitoring by non-governmental organizations, or other sources. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.

Response to issues raised in Question 11(d).

83. As discussed above, diplomatic assurances have been sought and obtained from foreign governments in an extremely small number of immigration and extradition cases, sometimes as a prudential matter. In an effort to maintain the ability to manage the delicate negotiations needed to obtain assurances, the United States does not as a general matter publicly release the names of countries from which it has secured assurances.

84. In the law of war detention context, the U.S. government has in many cases obtained humane treatment assurances along with security-related assurances. As explained in the response to Question 11(b), the United States is not in a position to provide further detail on such cases, but U.S. practices in this area are fully consistent with U.S. humane treatment commitments. …

85. In instances in which the United States transfers an individual subject to diplomatic assurances, it would pursue any credible report of conduct contrary to those assurances and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored. The United States takes seriously past practice by foreign governments. In an instance in which specific concerns about the treatment an individual may receive in a particular country cannot be resolved satisfactorily, the United States would seek alternative arrangements. The United States has declined to transfer based on prior failure to comply with humane treatment commitments.

12. Please provide updated information on the security agreement reached between the State Party and Iraq on the transfer of detainees …

86. Consistent with its terms, the Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of their Activities During Their Temporary Presence in Iraq (Security Agreement) expired on December 31, 2011. All detainees in U.S. physical custody were released or transferred to the Ministry of Justice of the Government of Iraq prior to the expiration of the agreement. The U.S. government sought and received assurances from the Government of Iraq that Iraq was committed to treating detainees in accordance with its Constitution and its international human rights obligations, including the CAT.

87. During the period in which the United States was involved in holding detainees in Iraq on behalf of the Iraqi government, the U.S. Supreme Court held that habeas corpus jurisdiction could not be exercised to enjoin the United States from transferring a U.S. citizen to the custody of Iraq, a foreign sovereign, for criminal trial where the individuals were detained within its territory on behalf of that sovereign pending their criminal prosecution, and where the

U.S. government had a firm policy not to transfer individuals if they were more likely than not to face torture. Munaf v. Geren, 553 U.S. 674 (2008). Nevertheless, the United States took appropriate action, before and after the Security Agreement went into effect, to mitigate the risk that any transferred detainees would be subject to torture.

88. As part of this effort, DOS has implemented extensive training and assistance programs for Iraqi prisons. Since 2003, more than 15,000 Iraqi correctional officers have received training through DOS programs. The United States has also helped the Iraqis establish their own training and auditing programs to promote and protect human rights, and has provided improved facilities and ongoing partnering. Although all U.S. forces have now withdrawn from Iraq, the United States continues its partnership with Iraq through DOS programs such as these, as well as through regular bilateral dialogue regarding detention and treatment issues.

* * * *

14. Please indicate what are the purposes of the agreements the State party is signing with countries not to transfer its citizens to the International Criminal Court ….

90. The United States has signed agreements with over 100 States of the type described above that apply to United States persons. In general, States concluding the agreements agree to surrender or transfer such persons to the International Criminal Court only with the consent of the State concerned. To date there have not been any requests for such consent under these agreements. For its part, the United States is fully committed to investigating and prosecuting, where appropriate, acts that amount to war crimes, crimes against humanity, and genocide alleged to have been committed by its officials, employees, military personnel or other nationals. Indeed, the agreements contain language specifically underscoring this intention, and reaffirming the importance of bringing to justice those who commit war crimes, crimes against humanity, and genocide, and this would include any such crimes that are covered by the CAT.

* * * *

Article 10

16. Please include information on steps taken to:

(a) Ensure that education and training of all law enforcement or military personnel is conducted on a regular basis…

(b) Ensure specific training for all medical personnel dealing with detainees ….

(c) Develop and implement a methodology to evaluate the implementation of its training/educational programmes ….

Response to issues raised in Question 16(a).

94. DoD intelligence interrogations are conducted only by properly trained and certified personnel. Training includes instruction on applicable law and policy; lawful interrogation methods and techniques; the humane treatment of detainees and how to identify signs of torture and/or cruel, inhuman or degrading treatment; and the procedures for the reporting of alleged violations. Routine refresher training is provided on a recurring basis. Refresher training is also provided by Combatant Commanders to all interrogators when they are assigned to conduct operations in a specific theater.

* * * *

96. The Federal Bureau of Investigation (FBI) uses a non-coercive rapport-based approach to interrogation, and FBI policy specifically prohibits the use of force, threats, or promises in the course of an interrogation. Although the FBI instructs its agents on the elements of effective interrogation, it does not define a particular set of techniques for its agents to use. All FBI Special Agents receive extensive training on interview and interrogation during their new agents training classes in Quantico, Virginia. Training is conducted in the classroom and through practical exercises. FBI personnel may attend additional interrogation training after basic training.

* * * *

Response to issues raised in Question 16(b).

101. The United States recognizes the important role the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) can play in international efforts to promote the effective investigation and documentation of torture and other ill-treatment. U.S. agencies involved with detainees are aware of the need to recognize and document such evidence as part of the effort to bring to justice those who violate the law. Medical personnel associated with such agencies who treat detainees are trained to detect signs of abuse or neglect and are required to report any such signs to appropriate supervising authorities if misconduct is suspected.

Response to issues raised in Question 16(c).

102. In an on-going effort to lessen the likelihood of abusive treatment, the Army Inspector General conducts an in-depth biennial inspection of all aspects of detention operations. The inspection team includes intelligence professionals who look specifically at interrogation operations. In addition, all combatant commanders who have detention responsibilities conduct semi-annual detention operations assessments, which are also supported by intelligence professionals who carefully examine interrogation operations. Both the biennial and semi-annual assessments provide DoD with the ability to ascertain the effectiveness of its training protocols. Any lessons learned, noted shortfalls, or recommendations are provided to training institutions to ensure they receive appropriate feedback on the results of their training curriculum.

17. Please indicate steps taken to ensure that acts of health personnel are in full conformity with principle No. 2 of the Principles of Medical Ethics relevant to the Role of Health Personnel ….

* * * *

105. U.S. practice is consistent with principle No. 2 of the non-binding Principles of Medical Ethics relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition on torture under U.S. law is absolute and, as provided in the Detainee Treatment Act of 2005, no individual in the custody or under the physical control of the U.S. government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading

treatment or punishment. Provisions applicable to BOP medical staff are delineated in Program Statement 6010.02 Health Services Administration. The policy reaffirms the agency's position that all inmates have value as human beings, deserve medically necessary health care, and should be treated with a focus on compassionate care. Medical staff who deviate from the standards of care are addressed through administrative discipline, professional license referrals, and personal liability in the federal courts. All staff members are provided training concerning the use of force against inmates upon employment with the agency, and in refresher classes provided annually. Medical staff are part of this training, and also receive training on several areas concerning standards of care on a frequent basis. Medical staff are subject to the same provisions concerning this matter as other BOP staff. Program Statement 3420.09, Standards of Employee Conduct, states, "An employee may not use brutality, physical violence, or intimidation towards inmates, or use of any force beyond that which is reasonably necessary to subdue an inmate." Program Statement 5566.06, Use of Force, authorizes staff to use force only as a last resort, and limits the amount of force used to only that which is necessary to gain control of an inmate, protect human safety, prevent serious property damage, and to ensure security and good order. The Bureau's policies concerning interrogation are available at ***www.bop.gov***.

106. DoD Instruction 2310.08E (Medical Program Support for Detainee Operations) Section 1.3, issued on June 6, 2006, "[r]eaffirms the responsibility of health care personnel to protect and treat, in the context of a professional treatment relationship and established principles of medical practice, all detainees in the control of the Armed Forces during military operations. This includes enemy prisoners of war, retained personnel, civilian internees, and other detainees." Section 4.1 of the instruction goes on to establish basic principles for healthcare personnel, among which are included the duty to uphold humane treatment and ensure that no individual in U.S. custody is subject to cruel, inhuman, or degrading treatment or punishment (in accordance with U.S. law); and the "duty to protect detainees' physical and mental health and provide treatment for disease . . . guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces." Paragraph 4.1.3 states "Health care personnel shall not be involved in any professional provider-patient treatment relationship with detainees the purpose of which is not solely to evaluate, protect, or improve their physical and mental health." Paragraph 4.1.5 states "Health care personnel shall not certify, or participate in the certification of, the fitness of detainees for any form of treatment or punishment that is not in accordance with applicable law, or participate in any way in the administration of any such treatment or punishment." Paragraph 4.5 establishes reportable incident requirements related to observed or suspected violation of applicable standards for treatment of detainees. In addition, section 4.6 establishes a requirement that "health care personnel involved in the treatment of detainees or other detainee matters receive appropriate training on applicable policies and procedures regarding the care and treatment of detainees." With regard to the role of health personnel in interrogations, behavioral science consultants (BSCs) are the only medical personnel who may provide advice concerning interrogations of detainees and they may do so only when the interrogations are fully in accordance with applicable law and properly issued interrogation instructions. BSCs are not involved in the medical treatment of detainees and do not access medical records.

Article 11

18. … please describe steps taken to ensure that interrogation rules, instructions or methods do not derogate from the principle of absolute prohibition of torture. Furthermore, please:

(a) Provide updated information on the content of the Army Field Manual on Interrogation and its conformity with the Convention;

(b) Clarify if the standard for interrogation set in the manual is binding on all components of the State party, including intelligence agencies and private contractors who act on their behalf;

…

107. As discussed in response to Questions 5 and 6, in E.O. 13491, Ensuring Lawful Interrogations, President Obama directed that individuals detained in any armed conflict shall in all circumstances be treated humanely, and shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual, without prejudice to the use by federal law enforcement agencies of authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises. The manual explicitly prohibits threats, coercion, physical abuse, and "waterboarding." The executive order also revoked previous executive directives, orders, and regulations to the extent inconsistent with that order.

108. Actions prohibited by the Army Field Manual with respect to intelligence interrogations include, but are not limited to: forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee or using duct tape over the eyes; applying beatings, electronic shock, burns, or other forms of physical pain; "waterboarding"; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; and depriving the detainee of necessary food, water, or medical care. The Army Field Manual also provides guidance to be used while formulating interrogation plans for approval. It states: "In attempting to determine if a contemplated approach or technique should be considered prohibited . . . consider these two tests before submitting the plan for approval:

• If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?

• Could your conduct in carrying out the proposed technique violate a law or regulation? Keep in mind that even if you personally would not consider your actions to constitute abuse, the law may be more restrictive.

If you answer yes to either of these tests, the contemplated action should not be conducted."

Response to issues raised in Question 18(a).

109. The Army Field Manual was promulgated on September 6, 2006 and supersedes all previous versions of the manual. It lists the 18 Congressionally-approved interrogation approaches and the one Congressionally-approved interrogation technique (separation) that may be used with detainees, including the restrictions and limitations on their use discussed above.

110. Interrogations undertaken in compliance with the Army Field Manual are consistent with U.S. domestic and international law obligations. For example, the Army Field Manual states that "[a]ll captured or detained personnel, regardless of status, shall be treated humanely, and in

accordance with the Detainee Treatment Act of 2005 and DoD Directive 2310.1E . . . and no person in the custody or under the control of DoD, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with and as defined in U.S. law." The Army Field Manual is available at ***www.fas.org/irp/doddir/army/fm2-22-3.pdf***.

Response to issues raised in Question 18(b).

111. The United States confirms that the interrogation approaches and techniques in the Army Field Manual are binding on the U.S. military, as well as all federal government agencies, including the intelligence agencies, with respect to individuals in U.S. custody or under U.S. effective control in any armed conflict, without prejudice to authorized non-coercive techniques of federal law enforcement agencies. This requirement was established in E.O. 13491, and the Special Task Force created by that E.O. specifically affirmed that the Army Field Manual provides appropriate guidance on interrogation for military interrogators and determined that no additional or different guidance was necessary for other agencies. The Special Task Force explained that its conclusions rested on its unanimous assessment, including that of the Intelligence Community, that the practices and techniques identified by the Army Field Manual or currently used by law enforcement provide adequate and effective means of conducting interrogations.

112. With respect to private contractors, § 1038 of the 2010 National Defense Authorization Act (Public Law 111-84) banned contractor personnel from interrogating any individual "under the effective control of DoD or otherwise under detention in a DoD facility in connection with hostilities" unless the Secretary of Defense determines that a waiver to this prohibition is vital to the national security interests of the United States and waives the prohibition for a period of up to 60 days or renews the waiver for one additional 30-day period. The Department does not currently employ contract interrogators. This does not prohibit contractors from performing tasks ancillary to interrogations. DoD policy (DoD Directive 3115.09) applies the humane treatment standard to contractors performing these ancillary tasks and specifies that their contracts must "comply with the same rules, procedures, policies, and laws pertaining to detainee operations and interrogations as apply to Government personnel in such positions."

* * * *

20. Please indicate if the International Committee of the Red Cross is granted access to all places of detention ….

119. The United States notes paragraph 6 of this report. Executive Order 13491 requires that "[a]ll departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. Government, consistent with Department of Defense regulations and policies." (Section 4(b)). Additional information on detainee registration and ICRC access is provided in response to Question 4(a).

* * * *

21. Please provide updated information on the establishment, composition and functioning of the "High-Value Interrogation Group"…

122. The High-Value Detainee Interrogation Group (HIG) was established as recommended by the Special Task Force, which concluded that the HIG could improve the U.S. ability to interrogate the most dangerous terrorists by bringing together the most effective and experienced interrogators and support personnel from the FBI, the CIA, and DoD to conduct interrogations in a manner that will continue to strengthen national security consistent with the rule of law. The Special Task Force recommended that this specialized interrogation group develop a set of best practices and disseminate them for training purposes to agencies that conduct interrogations. In addition, the Special Task Force recommended that a scientific research program for interrogation be established to study the comparative effectiveness of interrogation approaches and techniques, with the goal of identifying the existing techniques that are most effective and developing new lawful techniques to improve intelligence interrogations.

123. The HIG is an interagency body that is administratively housed within the FBI. The HIG has a Director, who is an FBI employee, and two Deputy Directors, who are drawn from the CIA and DoD. The HIG's Mobile Interrogation Teams bring together experienced interrogators, analysts, subject matter experts, behavioral science experts, linguists, and others drawn from across the intelligence community, military and law enforcement to conduct and/or provide support to interrogation of high-value detainees.

124. Interrogations conducted or supported by the HIG are consistent with the provisions of E.O. 13491 and with U.S. domestic and international law, including the CAT.

125. Under its charter of operations, the HIG complies with the humane treatment requirements set forth in E.O. 13491, as well as all other U.S. law, policies and guidance regarding the treatment and interrogation of detainees. HIG personnel also have a duty to comply with their home agencies' operations, and report legal issues regarding compliance with the law to the proper authority. DOJ in its role as HIG legal counsel, in coordination with attorneys at participating agencies and the National Security Council and the White House, is responsible for evaluating legal issues concerning HIG compliance with US domestic and international legal obligations regarding the treatment and interrogation of detainees and other appropriate matters.

* * * *

24. Please describe steps taken to ensure prompt and effective investigation into any allegations of torture or ill-treatment by private military and security companies …

136. DoD Directive 3115.09 (DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning) ¶ 4.c. states that "[o]nly DoD interrogators who are trained and certified in accordance with the standards . . . may conduct DoD intelligence interrogations. DoD intelligence interrogations shall be conducted only by personnel properly trained and certified to DoD standards" Congress has now effectively 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. …

137. Several cases have been brought against contractors under the Military Extraterritorial Jurisdiction Act and the Special Maritime and Territorial Jurisdiction (SMTJ). Convictions of David Passaro and Don Ayala under these authorities are discussed in 2011

ICCPR ¶¶ 533 and 534, incorporated herein by reference. The availability of criminal and civil remedies for all forms of torture and ill-treatment is discussed in response to Questions 23(a) and 27(a).

138. In addition, domestic legislative efforts continue to pass a Civilian Extraterritorial Jurisdiction Act (CEJA) that provides clear and unambiguous jurisdiction to prosecute non-DoD personnel for overseas misconduct. CEJA's enactment has been supported by the Executive Branch. It was not passed by the 112th Congress, however, and has not been reintroduced in the current Congress to date.

139. At the international level, the U.S. government actively engaged in the development of 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 (Code). The latter initiative has the potential to improve private security contractor (PSC) compliance with applicable laws and respect for human rights, and to provide additional tools for identifying, avoiding, and remediating impacts that PSCs may have on communities and other stakeholders. DOS, along with other federal agencies including DoD, is actively engaged in ongoing efforts to establish a credible governance and oversight mechanism for the Code.

* * * *

26. Please provide detailed information on the procedures in place to review the circumstances of detention, as well as on steps taken to ensure that the status of detainees is available to all detainees. In this respect, please elaborate on the status and content of the Military Commission Act, as well as its conformity with the Convention.

143. The United States notes that in ¶ 27 of its 2006 Concluding Observations, the Committee indicated that its concern with review of circumstances of detention and ensuring that status of detainees is available to all detainees arises in particular in the context of military detention at Guantanamo and in Iraq and Afghanistan.

144. As noted in response to Question 8(c), the U.S. Supreme Court has determined that habeas corpus jurisdiction extends to noncitizens detained by DoD at Guantanamo (Rasul v. Bush, 542 U.S. 466 (2004), and Boumediene v. Bush, 553 U.S. 723 (2008)) and to U.S. citizens detained in effective U.S. custody in Iraq (Munaf v. Geren, 553 U.S. 674 (2008)).

145. As also discussed in response to Question 8(c), President Obama issued E.O. 13567 on March 7, 2011, establishing a new robust periodic review process for Guantanamo detainees that includes the ability to present information, call certain witnesses, and receive the assistance of counsel. In 2009 review procedures were also improved for detainees held at the theater internment facility at Bagram airfield in Afghanistan. Safeguards to ensure humane treatment of detainees who were previously held by the United States in Iraq and have been transferred to Iraqi custody are discussed in response to Question 12. As noted there, the last detainee held in U.S. physical custody in Iraq was transferred to Iraqi custody prior to the expiration of the U.S.-Iraq security agreement on December 31, 2011.

146. The United States believes that the Military Commissions Act of 2009 is fully consistent with the Convention. The terms of the Act are described in response to Question 8(b).

* * * *

38. Please provide information on steps taken to address the reports of inhumane conditions at Guantánamo Bay….

216. The conditions of detention at Guantanamo meet or exceed all U.S. obligations under international law. No individuals currently detained at Guantanamo are juveniles. Omar Khadr, who was 16 years old when he was transferred to Guantanamo, pleaded guilty before a military commission as discussed in ¶ 55 and was sentenced pursuant to a pre-trial agreement to eight years imprisonment. On September 29, 2012, he was transferred to Canada to serve the remainder of his sentence.

* * * *

2. Transfers

Eleven individuals were transferred from the detention facility at Guantanamo Bay in 2013 as part of ongoing U.S. efforts to close the facility. On August 29, 2013, the Department of Defense announced the transfer of Algerians Nabil Said Hadjarab and Mutia Sadiq Ahmad Sayyab to the Government of Algeria. In a news release available at *www.defense.gov/releases/release.aspx?releaseid=16235*, the Department of Defense explained that these men were approved for transfer by consensus of the six departments and agencies comprising the interagency Guantanamo Review Task Force after a comprehensive review that considered security issues, among other factors. The Department of Defense announced the transfer of two more Algerian citizens to Algeria on December 5: Djamel Saiid Ali Ameziane and Bensayah Belkecem. The December 5, 2013 news release is available at *www.defense.gov/releases/release.aspx?releaseid=16404*.

On December 16, in a news release available at *www.defense.gov/releases/release.aspx?releaseid=16427*, the Department of Defense announced the transfer of Saad Muhammad Husayn Qahtani and Hamood Abdulla Hamood to the Government of the Kingdom of Saudi Arabia. On December 18, 2013, the Department of Defense announced the transfer of Noor Uthman Muhammed and Ibrahim Othman Ibrahim Idris to the Government of Sudan. As explained in the December 18 news release available at *www.defense.gov/releases/release.aspx?releaseid=16436*, the Convening Authority for Military Commissions agreed to suspend Muhammed's confinement after 34 months in exchange for his guilty plea and cooperation in military commission proceedings. Idris was released in accordance with a court order and after review by the Guantanamo Review Task Force.

In a December 31, 2013 news release, available at *www.defense.gov/releases/release.aspx?releaseid=16457*, the Department of Defense announced the transfer of the last three ethnic Uighurs remaining at Guantanamo: Yusef Abbas, Saidullah Khalik, and Hajiakbar Abdul Ghuper. The three were transferred

to Slovakia for voluntary resettlement there after the interagency Guantanamo Review Task Force conducted a comprehensive review of their cases.

3. U.S. court decisions and proceedings

a. Detainees at Guantanamo: Habeas Litigation

(1) Al Warafi v. Obama

On May 24, 2013, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's denial of a petition for habeas brought by Yemeni citizen Mukhtar Al Warafi. 716 F.3d 627 (D.C. Cir. 2013). The D.C. Circuit had previously remanded the case after the district court's first denial of the petition, directing the lower court to consider Al Warafi's claim that he should have been afforded protection as "medical personnel" pursuant to the First Geneva Convention. On remand, the district court determined that Al Warafi had not proven his status as medical personnel under Article 24 of the First Geneva Convention. The appeals court affirmed in an opinion excerpted below (with footnotes omitted).

---

* * * *

The commentary to the First Geneva Convention declares that Article 24 personnel "are to be furnished with the means of proving their identity." GC Commentary 218. Article 40 of the First Geneva Convention mandates that "[t]he personnel designated in Article 24 ... shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority." In addition to mandating the wearing of the armlet, Article 40 further declares that "[s]uch personnel ... shall also carry a special identity card bearing the distinctive emblem." That card "shall be water-resistant and of such size that it can be carried in the pocket." It further "*shall* be worded in the national language," and include the full name, date of birth, rank and service number of the bearer, and "*shall* state in what capacity he is entitled to the protection of the present Convention." The Article further requires that "[t]he card *shall* bear the photograph of the owner and also either his signature or his finger-prints or both." Just as the armlet must bear the stamp of the military authority issuing it, the card "*shall* be embossed with the stamp of the military authority." (Emphases added.)

It is undisputed that Al Warafi wore no such armlet and carried no such card. For that reason, in our remand order, we stated that "it appears that Al Warafi bears the burden of proving his status as permanent medical personnel." *Al Warafi v. Obama*, 409 Fed.Appx. 360.

On remand, the district court reviewed the evidence. The court opined that the Convention created "a straightforward regime in which proper identification is *necessary* to prove one's protected status as permanent medical personnel." 821 F.Supp.2d at 54 (emphasis in original). In the end, the court concluded that Al Warafi's petition "will be denied."

On appeal, Al Warafi argues, *inter alia*, that "the district court's holding that Article 24

status is conditioned upon detainee having 'official identification' is inconsistent with this Court's remand order...." The argument proceeds that because this court, in our earlier remand decision, stated that we knew that Al Warafi had no identification card or armlet at the time of capture, but nonetheless remanded for further consideration on the question of whether Mukhtar "was permanently and exclusively engaged as a medic," we were, in effect, establishing the law of the case that the lack of such identification did not deprive petitioner of the ability to establish his status by other evidence. We do not accept Al Warafi's argument.

The law of the case doctrine will not bear the weight Al Warafi places upon it. "The law-of-the-case doctrine bars us from considering *only* questions *decided* by this Court in this case." *Coalition for Common Sense in Government Procurement v. United States,* 707 F.3d 311 (D.C.Cir.2013) (emphases added) (other emphasis omitted). *See also LaShawn A. v. Barry,* 87 F.3d 1389, 1393 (D.C.Cir.1996) (en banc) ("The same issue presented a second time in the same case in the same court should lead to the same result." (emphases omitted)). While this is the same question in the same court, we did not decide the question in the unreported order upon which Al Warafi relies. Concededly, the unpublished order is consistent with his interpretation, but it is also consistent with a court which remained agnostic as to the question at issue. Again, we did not decide the question. We left the question open and remanded the case to the district court for further development. On remand, the district court reinstated its prior decision with further discussion of the determinative question, and an apparent firm conviction that other evidence could not substitute for the indicia of medical personnel status recited in the Convention and in the Army Regulation. Upon review, we agree with the district court.

As we noted above, the Convention speaks in mandatory terms. As relevant to this case, and as noted by the district court, the First Geneva Convention protects personnel who are "[m]edical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, [and] staff *exclusively engaged* in the administration of medical units and establishments." The commentary to the Convention expressly provides for the identification elements we set forth above. It does so in mandatory terms. *See* First Geneva Convention Commentary 219. Neither the Convention nor the commentary provide for any other means of establishing that status.

The Geneva Conventions and their commentary provide a roadmap for the establishment of protected status. As the district court found, Al Warafi was serving as part of the Taliban. The Taliban has not followed the roadmap set forth in the Conventions, and it has not carried Al Warafi to the destination. We hold that without the mandatory indicia of status, Al Warafi has not carried his burden of proving that he qualified "as permanent medical personnel."

While not necessary to its decision, the district court, in addition to its legal conclusion that the identification requirements of Article 24 constitute a *sine qua non* for protected status under Article 24, found as fact that petitioner had been stationed in a combat role before serving in a clinic. The court further found that "[p]etitioner was captured with a weapon." 821 F.Supp.2d at 49. It reiterated its earlier finding that it was more likely than not that Al Warafi was part of the Taliban. The court further reiterated the well-established law that in habeas proceedings such as this, the government bears the burden "to prove that petitioner's detention is lawful." That is, the government must prove " 'that petitioner more likely than not was part of the Taliban' at the time of his capture." 821 F.Supp.2d at 53 (citing *Al–Bihani v. Obama,* 590 F.3d 866, 872 (D.C.Cir.2010)). The court renewed its conclusion that the government had met

that burden.

The court recalled that: " '[O]nce the government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.' " 821 F.Supp.2d at 53–54 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 534, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion)).

In the end, the question of whether Al Warafi has met his burden of establishing his status as permanent medical personnel entitled to protection under the First Geneva Convention is one of fact, or at least a mixed question of fact and law. Although the district court believed, and we agree, that military personnel without appropriate display of distinctive emblems can never so establish, it also found facts—*e.g.*, the prior combat deployment—inconsistent with that role. These are findings of fact reviewed by us for clear error. *See, e.g., American Soc. for Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 659 F.3d 13, 19 (D.C.Cir.2011). The evidence in the record gives credence to the view that Al Warafi is unable to provide the proof required under the Convention because he was not a medic.

* * * *

(2) Enteral feeding cases

On September 4, 2013, the United States filed its brief on appeal in the consolidating claims brought by several detainees challenging the practice of enteral feeding used with detainees on hunger strikes. The district court denied the detainees' motions to enjoin the practice. The U.S. brief on appeal, excerpted below (with footnotes omitted), argues that the courts lack jurisdiction over claims such as petitioners,' which challenge conditions of confinement, and that the standard for granting an injunction cannot be satisfied. The brief is available in full at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Here, through Section 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e), Congress has exercised its constitutional prerogative to withdraw from the federal courts jurisdiction to adjudicate conditions of confinement and treatment claims by detainees at Guantanamo Bay:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, *treatment*, trial, or *conditions of confinement* of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant.

28 U.S.C. § 2241(e)(2) (emphasis added).

By withdrawing jurisdiction over claims relating to detainees' conditions of confinement or treatment, members of Congress specifically intended to prevent detainees from raising claims related to the provision of medical care. …

This Court has held that § 2241(e)(2) is a valid exercise of congressional power. *See Al-Zahrani*, 669 F.3d at 318-19 (upholding the continuing applicability of § 2241(e)(2) bar to "our jurisdiction over 'treatment' cases"). And § 2241(e)(2) has been repeatedly applied by district courts in this Circuit to bar a variety of challenges to detainees' conditions of confinement and treatment, including claims related to the provision of medical care. The district court thus correctly concluded that it lacked jurisdiction over the claims raised in petitioners' preliminary injunction motion.

* * * *

3. Petitioners further assert that the court has jurisdiction over their injunction motion because they "assert habeas jurisdiction to review a quantum change in the level of custody in which they are being held." Pet. Br. at 24 (emphasis omitted). According to petitioners, because hunger striking detainees are transferred from communal living quarters to single cells, petitioners' "force-feeding is reviewable via habeas corpus." Pet. Br. at 25.

Petitioners' argument attempts to recast the nature of the claims they presented to the district court, which did not challenge the "level of custody" in which petitioners are being held. Although petitioners allege that JTF-GTMO has made the discretionary decision to house hunger striking detainees separately from other detainees, petitioners are not challenging that particular decision—*i.e.*, they are not asking to be moved to a communal environment. Rather, in the motion at issue, petitioners requested "a preliminary injunction prohibiting respondents from subjecting petitioners to force-feeding of any kind, including forcible nasogastric tube feeding, and from administering medications related to force-feeding without the petitioners' consent." App. 1. And petitioners' motion for an emergency injunction requested an injunction "prohibiting respondents from depriving petitioners of their right to preform nightly communal Ramadan prayers unless they stop hungerstriking." App. 168. Neither of these requests implicates—nor would granting them require—a "quantum change in the level of custody" in which petitioners are being held.

As the Seventh Circuit explained in *Graham v. Broglin*, the case relied upon by petitioners, "[i]f a prisoner seeks by his suit to shorten the term of his imprisonment, he is challenging the state's custody over him and must therefore proceed under the habeas corpus statute . . . while if he is challenging merely the conditions of his confinement his proper remedy is under civil rights law[.]" 922 F.2d 379, 380-81 (7th Cir. 1991)). …

Petitioners here are not seeking a quantum change in the level of their custody; they are seeking an order requiring the government to cease feeding them involuntarily and allowing them to pray communally, wherever they are located. This is akin to "a different program or location or environment," even if the enteral feeding program petitioners are challenging "is more restrictive than the alternative that [they] seek[ ]." *See Khadr v. Bush*, 587 F. Supp. 2d 225, 237 (D.D.C. 2008) (holding that Guantanamo detainee's request for a transfer from adult

detention into a rehabilitation and reintegration program for juveniles "is programmatic" and thus not a cognizable habeas action). As Justice Scalia has noted, "[i]t is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a'quantum change in the level of custody,' *Graham v. Broglin*, . . . , such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody." *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring). But that is precisely what petitioners seek: an order "prohibiting respondents from subjecting petitioners to force-feeding of any kind, including forcible nasogastric tube feeding," App. 1, which would neither terminate petitioners' custody, accelerate the date of their release from custody, nor reduce the level of their custody. Respondents' alleged decision to house hunger striking detainees in single cell living does not somehow transform the enteral feeding program from a condition of petitioners' confinement into a quantum change in their level of custody.

* * * *

4. Petitioners' third attempt to establish the courts' jurisdiction over their habeas challenge to their treatment and conditions of confinement relies on an assertion that involuntary feeding "constitutes a severe restraint on individual liberty" that "is within the scope of the Great Writ." Pet. Br. at 26 (emphasis omitted). As an initial matter, it is not clear that petitioners in fact have a "constitutionally-protected [sic] liberty interest in avoiding unwanted medical treatment." Pet. Br. at 26. *Sell v. United States*, the case cited by petitioners for the proposition that they have such a constitutionally protected interest, reiterated that individuals have "a constitutionally protected liberty 'interest in avoiding involuntary administration of antipsychotic drugs[.]'" 539 U.S. 166, 178 (2003) (quoting *Riggins v. Nevada*, 504 U.S. 127, 134 (1992)). But the right asserted by petitioners to commit suicide by starvation while in respondents' custody is not a fundamental liberty interest. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."); *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 625 (N.Y. App. Div. 1982) ("[I]t is self-evident that the right to privacy does not include the right to commit suicide.").

* * * *

As previously discussed, the courts lack jurisdiction over petitioners' challenge because § 2241(e)(2) removes the courts' jurisdiction over all claims that are not "proper claim[s] for habeas relief." *Kiyemba*, 561 F.3d at 513. Petitioners' challenges to their treatment and conditions of confinement are not properly brought via habeas petition, and thus the courts lack jurisdiction over those claims by operation of § 2241(e)(2). Because this conclusion in no way turns on whether petitioners are "in custody" for the purposes of the federal habeas statute, *Hensley* is irrelevant to this case.

* * * *

c. Even if the Courts Had Jurisdiction Over Petitioners' Preliminary Injunction Motion, Petitioners Have Not Established a Likelihood of Success on the Merits of Their Underlying Claims

* * * *

Courts have repeatedly recognized the government's legitimate interest in providing life-saving nutritional and medical care in order to preserve the life and prevent suicidal acts of individuals in its care and custody. *See generally In re Soliman*, 134 F. Supp. 2d 1238, 1255-56 (N.D. Ala. 2001) (noting that that "Federal Courts generally have approved of force-feeding hunger striking inmates . . . State courts also have upheld the right to force-feed hunger-striking prisoners"), *vacated as moot*, 296 F.3d 1237 (11th Cir. 2002); Op. at 13, App. 154 (citing cases).

* * * *

2.a. Petitioners attempt to distinguish their case as one involving "indefinite detention," … But respondents' legitimate interests in preserving life, preventing suicide, and enforcing prison security and discipline are in no way dependent on the length or status of petitioners' detention—indeed, if accepted, petitioners' argument would bar prison administrators from preventing the suicide of any person with a life sentence. Moreover, multiple courts have rejected challenges to involuntary feeding brought by prisoners who claimed they were subject to indefinite detention. *See In re Grand Jury Subpoena*, 150 F.3d at 171; *In re Soliman*, 134 F. Supp. 2d at 1245, 1258. In each case, the court concluded that the government had legitimate interests in preserving life and maintaining order and safety regardless of the status of the prisoner's detention. *See generally In re Soliman*, 134 F. Supp. 2d at 1255 ("Federal Courts generally have approved of force-feeding hunger striking inmates, regardless of whether the person was a convicted prisoner, a pre-trial detainee, or a person held pursuant to a civil contempt order."). The fact that petitioners are presently detained pursuant to the Authorization for the Use of Military Force, as informed by the laws of war, as opposed to a criminal conviction or authority, is irrelevant to the question whether respondents have a legitimate interest in administering life-saving nutrition and medical care to preserve petitioners' health and life.

b. Petitioners separately claim that enteral feeding "is inhumane, degrading and a violation of medical ethics," Pet. Br. at 33-34, and that it "can be extremely painful," *id.* at 37. Those assertions are not only incorrect, but they do not undercut respondents' legitimate interests in preserving petitioners' lives, safeguarding the health of all detainees, and maintaining order and safety at Guantanamo Bay. Nor do petitioners' assertions establish that feeding petitioners enterally is not reasonably related to those legitimate interests. *See generally Safley*, 482 U.S. at 89 ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests").

While petitioners claim that they "do not wish to die," Pet. Br. at 38, petitioners do not dispute that respondents are feeding petitioners enterally in order to keep them alive, and that such feeding is necessary to do so. *See, e.g.*, Statement of Petitioner Hadjarab, App. 39-40 ("I do not want to die, but I am prepared to. . . [M]y situation is so serious now I am willing to sacrifice my body and my health. . . . I am *prepared* to die"); Statement of Petitioner Belbacha, App. 35

("I am participating in this hunger strike of my own free choice and am fully aware of the negative consequences which a long-term strike could have on my health."). Rather than claiming that enteral feeding is unnecessary to preserve petitioners' lives, petitioners assert that "there are *ready alternatives* to such force-feeding: *promptly bring the detainees to trial or military commission proceedings*, the absence of which is the reason why they are hunger striking. Those alternatives make their force-feeding unreasonable." Pet. Br. at 40. This is an argument challenging petitioners' detention; it does not address the merits of respondents' decision to feed petitioners enterally. As the district court recognized, in making this argument, petitioners are "using their motion for preliminary injunction as a vehicle for challenging their detention. . . . Petitioners, in fact, are seeking trial or release; that relief is properly the basis of their habeas petitions." Op. at 9-10, App. 150-51.

In any event, the district court did not abuse its discretion in concluding that "there is nothing so shocking or inhumane in the treatment of Petitioners—which they can avoid at will—to raise a constitutional concern that might otherwise necessitate review." *Id.* at 7, App. 148. JTF-GTMO's hunger strike protocol follows the Federal Bureau of Prisons' model and guidelines for managing hunger strikers. SMO Decl. ¶ 9, App. 93. A hunger striking detainee is only fed enterally once the detainee's refusal to consume food or nutrients voluntarily reaches the point where JTF-GTMO medical staff determines that the detainee's life or health could be threatened. *Id.* ¶ 11, App. 94. Even then, prior to every feeding, the detainee is offered the opportunity to eat a meal or consume a liquid nutritional supplement orally, instead of being enterally fed. *Id.* If enteral feeding is necessary, it is administered in a humane manner through a nasogastric tube, and only when medically necessary to preserve the detainee's health or life. *Id.* ¶ 12, App. 94. The process is never undertaken in a fashion intentionally designed to inflict pain or harm on the detainee. *Id.* ¶ 15, App. 95. To the contrary, the detainee's comfort and safety is a priority for the medical staff. *Id.*

Nothing about the process described above constitutes "torture" or "cruel, inhuman, and degrading treatment or punishment." Pet. Br. at 34. None of the many courts that have rejected challenges to the involuntary feeding of prisoners have suggested that the involuntary feeding process constitutes torture or punishment. Indeed, the Eighth Circuit has concluded that "[t]he mere allegation of forced-feeding does not describe a constitutional violation." *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992). Nor is there any suggestion that respondents have acted with deliberate indifference to petitioners' medical needs. *See generally Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (applying deliberate indifference standard to Eighth Amendment claims involving prisoners' medical care and conditions of confinement); *O.K. v. Bush*, 344 F. Supp. 2d 44, 60-63 & n.23 (D.D.C. 2004) ("Without concluding that the 'deliberate indifference' doctrine" applies to challenges to Guantanamo detainee medical care, "the Court will draw on this well-developed body of law to guide its analysis"). Quite the opposite: respondents are acting appropriately and humanely in response to petitioners' attempt to starve themselves to death. *See, e.g.*, *Freeman v. Berge*, 441 F.3d 543, 547 (7th Cir. 2006) ("[A]t some point in Freeman's meal-skipping the prison doctors would have had a duty and certainly a right to step in and force him to take nourishment.").

Nor are petitioners correct in their suggestion that enteral feeding is "out of step with international norms." Pet. Br. at 39 (quotation marks omitted). The International Criminal

Tribunal for the Former Yugoslavia (ICTY), for example, has ordered a hunger striking detainee to be involuntarily fed "with the aim of protecting the health and welfare of the Accused and avoiding loss of life[.]" *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused, at 6 (Dec. 6, 2006) (Urgent Order). The ICTY explained that "according to jurisprudence of the European Court of Human Rights, 'force-feeding' does not constitute torture, inhuman or degrading treatment if there is a medical necessity to do so, if procedural guarantees for the decision to force-feed are complied with and if the manner in which the detainee is force-fed is not inhumane or degrading." *Id.* at 5 (citing *Nevmerzhitsky v. Ukraine*, ECHR Judgment, Application No. 54825/00 (Oct. 12, 2005). The ICTY also noted that detainees may be fed involuntarily in countries such as Germany, Austria, and Australia. *See* Urgent Order at 5 n.13. More recently, it has been recognized in the Copenhagen Process on the Handling of Detainees in International Military Operations that "[m]edical assistance should, wherever possible, be undertaken with the consent of the wounded or sick detainee" but that "medical actions to preserve the health of the detainee may be justified even where the detainee refuses to provide consent." 9 Chairman's Commentary to the Copenhagen Process: Principles and Guidelines *available at* *http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf*.

* * * *

(3) Abdullah v. Obama

On October 31, 2013, the United States filed its brief in support of affirming a district court denial of a motion brought by a detainee at Guantanamo seeking a preliminary injunction against his ongoing detention while his habeas petition was still pending. The U.S. brief is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Petitioner asserts that his detention is inconsistent with Article III of the Yemen agreement because it violates the Third Geneva Convention. This contention is without merit. As is explained more fully below, assuming arguendo that petitioner has rights under the Yemen agreement that are enforceable in federal court, detention under the AUMF is consistent with the "requirements and practices of generally recognized international law." *See infra* 16-19; Add. 5. Additionally, we note that on its face, Article III applies only to citizens of Yemen "in the United States of America." Add. 5. Guantanamo Bay, however, has been deemed not to be part of the United States of America. *See Boumediene v. Bush*, 553 U.S. 723, 753 (2008) (noting Cuban sovereignty over Guantanamo Bay); *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-

148, Tit. X, § 1005(g), 119 Stat. 2739, 2743 (2005); 8 U.S.C. § 1101(a)(38) (Guantanamo Bay is not a territory of the United States for purposes of federal immigration statutes).[2]

Moreover, to the extent that petitioner relies directly on the Third Geneva Convention, his claim is also barred by the Military Commissions Act of 2006 ("MCA"). In that Act, Congress "provided explicitly that the Convention's provisions are not privately enforceable in habeas proceedings." *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010); *see* Pub. L. No. 109-366, 120 Stat. 2600, 2631 ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus . . . proceeding" against the federal government "as a source of rights in any court of the United States or its States or territories."). The MCA confirms that, as with the prior 1929 version of the Third Geneva Convention, the protections afforded under the current version of the Third Geneva Convention are not judicially enforceable by individuals in a habeas proceeding. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950); *see also Holmes v. Laird*, 459 F.2d 1211, 1221-22 (D.C. Cir. 1972).

Petitioner's contention that the Geneva Conventions can be relied upon as a source of rights because the Geneva Conventions have been incorporated into the Yemen agreement rests on a misunderstanding of *Al Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013). At best, *Al Warafi* is relevant to the merits of the habeas petition, not the question of preliminary injunctive relief. In any event, *Al Warafi* held that where domestic U.S. law codified in army regulations "expressly incorporates relevant aspects of the Geneva Conventions" and "explicitly establishes a detainee's entitlement to release from custody," the court may analyze "aspects of the Geneva Conventions that have been expressly incorporated" into the army regulations. *Al Warafi*, 716 F.3d at 629. In this case, by contrast, petitioner relies not on the army regulations but on the executive agreement with Yemen. Unlike the army regulations at issue in *Al Warafi*, the Yemen Agreement, even if it applied and could be invoked as a source of individual rights in this proceeding, does not reference the Geneva Conventions by name or explicitly import their provisions and apply them to wartime detainees. Rather, it makes general mention of the "requirements and practices of generally recognized international law." Add. 5. It therefore does not "expressly incorporate relevant aspects of the Geneva Convention" that "explicitly establish a detainee's entitlement to release from custody" in the manner proposed by the *Al Warafi* court. *Al Warafi*, 716 F.3d at 629.

Petitioner also contends that any rights he asserts under the Yemen Agreement cannot be abrogated by Congress, because that would constitute an impermissible interference with the President's recognition power. Petitioner relies on *Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013), *see* Pet. Br. 13-14, but that case holds that the President "exclusively holds the power to determine whether to recognize a foreign sovereign." *Id*. at 214. *Zivotofsky* did not address Congress' authority to define the jurisdiction of the federal courts.

---

[2] Because Petitioner's claims fail for several distinct reasons, this Court need not decide, and the government does not take a position on, whether the Yemen Agreement is judicially enforceable against the signatory nations at the behest of an individual. We note, however, that this Court has held that "'[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."'" *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 489 (D.C. Cir. 2008) (quoting *Medellin v. Texas*, 552 U.S. 491, 506 n.3(2008)).

2. In any event, Petitioner's continued detention under the AUMF is consistent with the "requirements and practices of generally recognized international law." The United States bases its authority to detain Petitioner (and others in military custody at Guantanamo Bay) on the AUMF, as informed by the laws of war. The AUMF authorizes use of military force against those "nations, organizations, or persons [the President] 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." AUMF, § 2(a). In *Hamdi*, a plurality of the Supreme Court concluded that what is "necessary and appropriate" under the AUMF is properly understood in light of "[l]ongstanding law-of-war principles." Those principles recognize that the capture and detention of enemy forces, "by 'universal agreement and practice,'" are "'important incident[s] of war,'" and supported the conclusion that the detention of enemy forces could continue "for the duration of the relevant conflict." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521 (2004) (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)). Significantly, the writings on the law of war cited in *Hamdi* included authorities discussing both the Geneva Conventions and principles of international law predating those conventions. Thus, lawful detention under the AUMF, including detention for the "duration of the relevant conflict," is consistent with applicable international law—specifically, principles of the laws of war. It therefore complies with the Yemen Agreement provision referencing the "requirements and practices of generally recognized international law." *See* Add.5.

Petitioner further errs in arguing that his continued detention violates Article 87 of the Third Geneva Convention (and by extension, the Yemen Agreement) which provides that "[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." *See* Pet. Br. 9.

Article 87's limitation on when a prisoner of war can be "sentenced" to "penalties" does not apply to preventive wartime detention, the purpose of which "is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518. Wartime detention is "neither revenge, nor punishment" and is "devoid of all penal character." *See ibid*. (internal quotation marks omitted).

Petitioner also argues that Article 87 bars indefinite detention without trial, but petitioner is not being indefinitely detained. Petitioner is being held for the duration of hostilities as authorized by the AUMF, as informed by the laws of war.

Wartime detention is "merely a temporary detention." *Hamdi*, 542 U.S. at 518. If petitioner is lawfully detained under the AUMF, as informed by the laws of war—a question that the district court will decide in reviewing petitioner's habeas petition—his detention is consistent with generally recognized principles of international law.

Petitioner's reliance on the ICCPR is likewise unavailing. The ICCPR was signed by the President, and ratified by the President with the advice and consent of the Senate, "on the express understanding that [the ICCPR] was not self-executing and so did not itself create obligations enforceable in the federal courts." *Sosa*, 542 U.S. at 735; *see also* S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992). It would be flatly inconsistent with the decisions of the political branches for a court to permit an individual to enforce the terms of the ICCPR in a U.S. court.

Petitioner also asserts that the district court erred by not enjoining "[o]ther [v]iolations of [i]nternational [l]aw." Pet. Br. 16. But petitioner has not set out, either in district court or in this Court, any argument regarding how the government has violated any other specific provisions of international law in its dealings with him. *See* Pet. Br. 16 (asserting without explanation that "[r]espondents are now, and have been for a decade, violating [Third Geneva Convention] sections 3, 25, 70-72, and 78-79, among others"); Mot. for Prelim. Inj., Dkt. No. 295, at 34 (listing other Geneva Convention provisions that petitioner considers to be self-executing, but not making an argument regarding how those provisions have been violated as to petitioner and asserting that "Abdullah's claim here is based" on Article 87). Petitioner has not carried his burden of demonstrating a probability of success on the merits.

Ultimately, petitioner's main complaint appears to be that he has not been able to challenge the factual basis for his detention. *See e.g.*, Pet. Br. 10 (discussing indefinite detention without trial). Under *Boumediene*, that question is to be addressed through the adjudication of his habeas petition. Petitioner cannot short circuit the habeas process by bringing a motion for a preliminary injunction.

* * * *

(4) Hatim v. Obama

On June 3, 2013, the United States filed a brief in opposition to motions regarding access to counsel filed by detainees at Guantanamo in U.S. District Court for the District of Columbia. *Hatim v. Obama*, Civil No. 1 :05-cv-1429. Petitioners allege that Joint Task Force-Guantanamo ("JTF-GTMO") changed certain security procedures at the detention facility to interfere with their access to their attorneys. The new security protocol includes frisking the area between the waist and thigh as well as hand-wanding the entire body with a metal detector whenever a detainee leaves or returns to camp. Excerpts below from the U.S. brief explain why the challenged procedures are valid. The U.S. brief is available in full at *www.state.gov/s/l/c8183.htm*. On July 11, 2013, the district court entered an order granting the detainees' motions and enjoining implementation of the security procedures. The United States appealed on July 17, 2013 and the Court of Appeals for the District of Columbia stayed the district court's order pending appeal. The United States filed its opening brief on appeal on September 20, 2013 and its reply brief on October 25, 2013. The U.S. briefs on appeal are available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Even if Petitioners had made a credible showing that the new frisk-search and meeting location policies have some impact on detainees' ability to meet and speak with their counsel, which they have not, they still would not be entitled to extraordinary relief dictating to military prison

officials the terms and conditions under which detainees will be permitted to meet and speak with persons from outside the facility.

In the domestic prison context, the Supreme Court has long held that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. This deference recognizes that prison administrators, not the courts, are the subject-matter experts when it comes to operating and safeguarding prisons. See *Turner*, 482 U.S. at 85 (recognizing that prison administration is an "inordinately difficult undertaking" requiring expertise, planning, and resources that are "peculiarly within the province of the legislative and executive branches"); *Procunier v. Martinez*, 416 U.S 396, 404-405 (1974) (prison administrators must deal with complex, intractable problems that "are not readily susceptible of resolution by decree"). Accordingly, courts cannot "freely substitute their judgment for that of officials who have made a considered choice." *Whitley v. Albers*, 475 U.S. 312, 322 (1986). Detention officials "are to remain the primary arbiters of the problems that arise in the facility." *Shaw v. Murphy*, 532 U.S. 223, 230 (2001). Consequently, even where prison regulations are said to infringe on constitutionally evidence of any prejudice to an inmate in bringing or prosecuting a lawsuit" as protected interests of prison inmates, they will be upheld so long as they are reasonably related to legitimate interests of prison security and operations. *Turner*, 482 U.S. at 89.[11]

Here, the objective—security—is legitimate. It is well-settled that the "internal security of a detention facility is a legitimate government interest," *Block v. Rutherford*, 468 U.S.576, 586 (1984), perhaps the most legitimate concern, *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003). See also *Bell*, 441 U.S. at 546 ("Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees."); *Pell*, 417 US at 873 ("Central to all other corrections goals is the institutional consideration of internal security with the corrections facilities themselves.").

And the required connection between this legitimate objective and the two challenged procedures is readily demonstrated.[12] As for the challenged search procedure, precedent readily establishes the requisite logical connection. In *Bell v. Wolfish*, the Supreme Court upheld visual-body-cavity searches of pretrial detainees, 441 U.S. at 558-560, searches that were conducted after every contact visit with someone from outside the facility, including visits with defense attorneys, *id*. at 576-577 (Marshall, J., dissenting). The Court rested its holding on the obvious connection between the serious security dangers inherent in a detention facility and the ability of detainees to smuggle money, drugs, weapons, and other contraband as a result of a contact visit. *Id*. at 559. And it did so despite the factual finding that only one case of smuggling had ever been

[11] As reflected in the commentary to Chapter VI of the Third Geneva Convention of 1949, the law of war similarly recognizes that a "Detaining Power can carry out its duty to treat prisoners of war in accordance with the Convention only if it ensures that discipline is maintained in prisoner-of-war camps. And in fact disciplinary measures do assist the application of standards designed to improve the situation of the prisoners in the camp. A considerable part of the Convention is therefore composed of Articles providing for the establishment or strengthening of discipline in prisoner-of-war camps .... " See Jean S. Pictet, ed., Geneva Convention Relative to the Treatment of Prisoners of War: Commentary at 238 (Geneva: International Committee of the Red Cross, 1960).

[12] The logical connection between objective and procedure is not high; the connection need only be not so "remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90.

detected during these searches, relying on a further logical connection between the searches and their deterrent effect on smuggling. *Id*.; see also *id*. at 551 n.32 (noting that detention facility administrators should be permitted to prevent a problem before it arises); see *Goff*, 803 F.2d at 367-369 (upholding visual-body-cavity searches after contact visits by inmates not only with attorneys, but even with the prison chaplain, because even conceding that the chaplain was unlikely to smuggle contraband, prisoners might still obtain contraband from other sources during these visits).

The rational connection between adequate searches and the need for institutional security found in Bell and *Goff* is equally present here. As explained by Col. Bogdan, the prior policy, because of its inconsistency with standard procedures in which U.S. Army personnel are trained, created a risk that detainee searches would not be effective in uncovering weapons or contraband, such as the smuggled medications that Adnan Latif used to end his life. Thus, the decision by JTF-GTMO to alter their search procedures to enhance the safety of guards and detainees easily passes muster, even in the face of Petitioners' claims of interference with access to their counsel.

* * * *

The transportation of detainees to Camp Echo for counsel visits (and to Camp Delta for telephone calls) is also a perfectly valid procedure that is rationally related to legitimate prison security and operational interests. As an initial matter, it is difficult to understand what Petitioners hope to gain by suddenly insisting, ten months after the new visit location policy was put in place, that counsel visits take place in Camp 6. Even if that request were granted, they would still have to endure the body searches they claim to find objectionable, as those searches must be conducted before and after all meetings with non-JTF GTMO personnel, regardless of where they take place. Col. Bogdan Decl. ¶ 19. And the claimed physical discomfort of the van rides will soon be remedied by the installation of lower benches that will allow detainees to sit upright during transport to Camp Echo or Camp Delta. *Id*. ¶ 22. …

* * * *

In summary, this is at bottom a challenge to routine conditions of confinement that Petitioners may find disagreeable, but which is jurisdictionally barred by § 2241 (e)(2). Their claims that the frisk-search and meeting-location policies were adopted with the purpose and effect of interfering with their access to counsel are unsubstantiated and affirmatively refuted by the competent evidence of record. Hence they cannot succeed in removing this matter from the ambit of§ 2241 (e)(2)'s prohibition. Even if the change in search procedures, and the restriction of counsel visits to Camp Echo, involve Petitioners' access to counsel, those policies remain constitutionally valid. Both are rationally connected to the legitimate government concern of detention facility security, and orderly prison operations. Thus, even if Petitioners' own choice to refuse visits by their counsel to avoid succumbing to these policies could rightly be characterized as an infringement on their access to counsel, that choice does not render the challenged policies invalid.

* * * *

(5) Ali v. Obama

On December 3, 2013, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013). Mr. Ali, an Algerian national, was taken into custody in Pakistan where he had been staying in an al-Qaeda guesthouse with al-Qaeda terrorist leader Abu Zubaydah and al-Qaeda trainers and explosive experts. The court of appeals affirmed the district court's denial of habeas relief, holding that the evidence established that it was more likely than not that Ali was a member of a force associated with al-Qaeda and that any error in the district court was harmless. Judge Edwards filed a separate concurrence in which he expressed concern that the court's interpretation of the AUMF could lead to the result that someone who had stayed in an al-Qaeda guesthouse for 18 days could be detained, possibly for life, when he had no part in the terrorist attacks of September 11, 2001 or any other attacks against the United States. Judge Edwards wrote in his concurrence:

> The troubling question in these detainee cases is whether the law of the circuit has stretched the meaning of the AUMF and the NDAA so far beyond the terms of these statutory authorizations that habeas corpus proceedings like the one afforded Ali are functionally useless.[**]

[**] Editor's note: In *Hussain v. Obama*, decided June 18, 2013, Judge Edwards also concurred, similarly questioning the Court's precedent regarding the application of the appropriate evidentiary standard for the burden of proof in Guantanamo habeas cases. He wrote:

> To hold a detainee at Guantanamo, we have required that the Government show, by a *preponderance of the evidence*, that the detainee was a "part of" al Qaeda, the Taliban, or associated forces at the time of his capture. *See Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010) ("Although we doubt . . . that the [Constitution] requires the use of the preponderance standard, we will not decide the question in this case. As we [have done previously], we will assume *arguendo* that the government must show by a preponderance of the evidence that [the detainee] was part of al-Qaida."). Under the preponderance of the evidence standard, "the factfinder must evaluate the raw evidence, [and] find[] it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993). The evidence in this case may satisfy the lesser substantial evidence standard, *see Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (the substantial evidence standard requires a reviewing court "to ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion"), but it does not meet the preponderance of the evidence test."

Hussain v. Obama, 718 F.3d 964, 971 (D.C. Cir. 2013).

b. Former Detainees

(1) Al Janko v. Gates

On March 1, 2013, the United States filed its brief in the U.S. Court of Appeals for the D.C. Circuit in a case brought by former detainee Abdul Rahim Abdul Razak Al Janko, a Syrian national. *Al Janko v. Gates*, No. 12-5017 (D.C. Cir.). After plaintiff's petition for habeas corpus was granted by a federal district court in the District of Columbia in 2009, he brought damages claims against government officials in their individual capacities, asserting violations of, inter alia, international law and the Fourth and Fifth Amendments to the U.S. Constitution. He also sought damages under the Federal Tort Claims Act ("FTCA") from the United States for alleged violations of District of Columbia law. The district court dismissed plaintiff's claims and plaintiff appealed. The U.S. brief is available at *www.state.gov/s/l/c8183.htm*. Excerpts below summarize the U.S. arguments for affirming the district court's dismissal of all claims. The U.S. brief relies, first, on the jurisdiction stripping provision of the Military Commissions Act ("MCA"), codified at 28 U.S.C. § 2241(e)(2), which says:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

The U.S. brief also relies on past precedents including *Rasul*, discussed in *Digest 2009* at 751-52, and *Ali*, discussed in *Digest 2011* at 582.

---

* * * *

Plaintiff filed a damages action against the United States and twenty current and former senior government officials, in their individual capacities, for harm allegedly stemming from his military detention. The district court's dismissal of plaintiff' action should be affirmed on one or more independent grounds.

I. The district court correctly held that it lacked subject-matter jurisdiction over all of plaintiff's claims under 28 U.S.C. § 2241(e)(2). Plaintiff here was "determined by the United States to have been properly detained as an enemy combatant" as required by § 2241(e)(2) because two [Combatant Status Review Tribunals or] CSRTs concluded that he was an "enemy combatant."

The subsequent grant by a district court of plaintiff's habeas petition does not alter this conclusion because a habeas ruling is not a "determin[ation] by the United States" within the

meaning of § 2241(e)(2) and, in any event, § 2241(e)(2) is triggered by any prior determination that an individual was properly detained as an enemy combatant.

Plaintiff argues that § 2241(e)(2) is unconstitutional because it deprives him of a damages remedy, but this Court rejected that argument in *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319-20 (D.C. Cir. 2012). Although plaintiff argues that § 2241(e)(2) violates due process because his CSRT determinations were assertedly erroneous and violative of due process, plaintiff's arguments invoking due process are inconsistent with this Court's precedent that aliens at Guantanamo have no due process rights. In any case, it was not irrational for Congress to conclude that CSRT determinations should trigger application of the statute.

II. The district court's dismissal of plaintiff's constitutional claims asserted against the individual defendants may be affirmed on two independent grounds.

A. First, the district court properly held that the individual defendants are entitled to qualified immunity because it was not clearly established during plaintiff's detention (which ended in 2009) that aliens at Guantanamo possessed any Fourth and Fifth Amendment rights. *Boumediene v. Bush*, 553 U.S. 723 (2008), is not to the contrary because it was expressly limited to the constitutional privilege of habeas corpus. In any event, the contours of any applicable Fourth and Fifth Amendment rights were not clearly established during plaintiff's detention. In addition, although this Court should not reach the question, the defendants are entitled to qualified immunity on the independent ground that controlling precedent holds that aliens detained at Guantanamo do not possess Fourth and Fifth Amendment rights.

B. Although the district court did not reach the issue, its dismissal of the constitutional claims should also be affirmed on the alternative ground that special factors bar the recognition of a damages action in the military-detention context, as this Court has held in *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) ("*Rasul II*"), *Ali v. Rumsfeld*, 649 F.3d 762, 773-74 (D.C. Cir. 2011), and *Doe v. Rumsfeld*, 683 F.3d 390, 394-97 (D.C. Cir. 2012). Plaintiff argues that his case does not implicate sensitive national security decisions because a district court has already determined on habeas review that he was not lawfully detained, but special factors bar the recognition of a Bivens action for the category of military-detention cases regardless of the specifics of a given plaintiff's case. In any event, plaintiff's action seeking to hold senior government officials liable for their roles in making decisions about plaintiff's detention, treatment, CSRTs, and transfer plainly implicates sensitive national security and military matters not addressed in the district court habeas decision. In addition, as in Doe, a judicially created damages remedy would be inappropriate here because Congress has devoted significant attention to military detainee matters but has declined to create a damages remedy.

III. The district court correctly held that the United States properly substituted itself under the Westfall Act for the individual defendants on plaintiff's international law claims asserted under the ATS because the named defendants were acting within the "scope of their employment" at the time of the incidents alleged in the complaint. That holding is controlled by *Ali* and *Rasul v. Myers*, 512 F.3d 644, 654-63 (D.C. Cir. 2008) ("*Rasul I*"), *vacated*, 555 U.S. 1083, *reinstated in relevant part*, *Rasul II*, 563 F.3d at 528-29. Plaintiff's attempts to circumvent these rulings fail because the underlying conduct here—the management by senior Department of Defense officials of the detention and interrogation of an individual found by two CSRTs to have been an "enemy combatant"—is precisely the type of conduct that *Rasul I* and *Ali* held the defendants were employed to perform. In addition, plaintiff's argument that the defendants'

purpose in engaging in the alleged conduct was not to serve their "master" is contradicted by his complaint, which levels no such allegations against any of the named defendants.

IV. The district court properly held that all of plaintiff's FTCA claims, including plaintiff's ATS claims that were converted into FTCA claims upon substitution by the United States, are barred because they "aris[e] in a foreign country," 28 U.S.C. § 2680(k). Plaintiff argues that Guantanamo Bay, Cuba, is not a "foreign country" under § 2680(k), but the Supreme Court and other courts have held that "de jure sovereignty" is the relevant touchstone, and Cuba retains de jure sovereignty over Guantanamo. Although the district court did not reach the issue, plaintiff's international-law claims asserted under the ATS are also properly dismissed for the independent reason that plaintiff failed to exhaust his administrative remedies regarding those claims. In addition, the district court correctly held that plaintiff's international-law claims asserted under the ATS and FTCA were properly dismissed on the independent ground that they do not assert violations of the "law of the place," 28 U.S.C. § 1346(b), *i.e.*, state tort law. Although plaintiff argues that customary international law has been incorporated into D.C. law, any customary international law recognized by U.S. courts today as domestic law is federal law, which is not the "law of the place."

* * * *

(2) Hamad v. Gates

On October 7, 2013, the U.S. Court of Appeals for the Ninth Circuit held that 28 U.S.C. § 2241(e)(2) deprived the district court of subject-matter jurisdiction over claims brought by a former detainee, Adel Hassan Hamad, who sought damages for his detention and treatment from former Secretary of Defense Robert Gates and numerous other military and civilian officials. *Hamad v. Gates*, 732 F.3d. 990 (9th Cir. 2013). The court considered whether the Supreme Court's decision in *Boumediene v. Bush*, discussed in *Digest 2008* at 891-902, invalidated the entirety of § 2241(e) or just section 2241(e)(1), relating to habeas actions. The Ninth Circuit panel held that *Boumediene* did not invalidate § 2241(e)(2); that the latter subsection was severable from § 2241(e)(1); and that, as applied to Hamad, the provision was not unconstitutional. The appeals court vacated the district court's decision, which reasoned that *Boumediene* invalidated § 2241(e) in its entirety.

The Ninth Circuit's decision in *Al Nashiri v. MacDonald*, 741 F.3d 1002 (9th Cir. 2013) applied the ruling in *Hamad v. Gates* to dismiss a suit which was a collateral attack on the military commission prosecution of Nashiri, seeking a declaratory judgment that the military commission lacks jurisdiction to hear the charges against him because his alleged crimes took place outside the context of, and not associated with, hostilities. The Ninth Circuit affirmed the dismissal of the suit for lack of jurisdiction.

(3) Allaithi v. Rumsfeld

On November 13, 2013, the United States filed its brief on appeal in another case in the D.C. Circuit, consolidating claims brought by several former detainees who were transferred from detention, some after a CSRT determination that they were no longer "enemy combatants," and others prior to the establishment of CSRTs. *Allaithi v. Rumsfeld*, Nos. 13-5096, 13-5097 (D.C. Cir. 2013). Plaintiffs sought declaratory relief and money damages for alleged violations of: (1) the First and Fifth Amendments to the U.S. Constitution; (2) international law, including Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; (3) 42 U.S.C. § 1985(3); and (4) the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. The district court had dismissed all claims. The U.S. brief makes similar arguments to those made in the brief in *Al-Janko*, discussed above. The brief is available at *www.state.gov/s/l/c8183.htm*. The section of the brief summarizing the U.S. argument appears below.

---

* * * *

Plaintiffs seek damages against a number of current and former senior government officials, in their individual capacities, for harm allegedly stemming from plaintiffs' prior military detention. Plaintiffs acknowledge (Br. 4 n.4) that the claims asserted by the three plaintiffs transferred prior to the establishment of Combatant Status Review Tribunals (Celikgogus, Sen, and Mert) are materially identical to those rejected by this Court in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*"), and *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) ("*Rasul I*"). They argue, however, that the claims of the remaining three plaintiffs (Allaithi, Hasam, and Muhammad) survive *Rasul II*, *Rasul I*, and related cases. That argument is without merit.

I. The district court's dismissal of plaintiffs' constitutional claims may be affirmed on two independent grounds, the first of which also provides a basis for affirming the dismissal of plaintiffs' § 1985 claims.

A. First, the district court properly held that the individual defendants are entitled to qualified immunity with respect to the constitutional and § 1985 claims. As the district court concluded, it was not clearly established during plaintiffs' detention (which ended on dates ranging from November 2003 to November 2006) that aliens in Afghanistan and at Guantanamo possessed any First and Fifth Amendment rights. Plaintiffs do not challenge the district court's conclusion with respect to their Afghanistan-related claims. Moreover, recognizing that *Rasul II* held that it was not clearly established as of early 2004 that aliens at Guantanamo have Fifth and Eighth Amendment rights, plaintiffs make no attempt to argue that *Rasul II* is not dispositive of their Guantanamo-related claims up to early 2004. Instead, the three plaintiffs transferred in 2005 and 2006 contend that the Supreme Court's June 2004 decision in *Rasul v. Bush*, 542 U.S. 466

(2004), clearly established that they have constitutional rights. But *Rasul v. Bush* was a statutory decision and thus did not address, much less clearly establish, plaintiffs' constitutional rights.

In any event, the contours of any applicable First and Fifth Amendment rights were not clearly established during plaintiffs' detention. In addition, although this Court should not reach the question, the defendants are entitled to qualified immunity on the Fifth Amendment claims on the independent ground that this Court's binding precedent holds that aliens detained at Guantanamo do not possess Fifth Amendment rights.

B. Although the district court did not reach the issue, its dismissal of the constitutional claims can also be affirmed on the alternative ground that special factors bar the recognition of a damages action in the military-detention context, as this Court has held in *Rasul II*, *Ali v. Rumsfeld*, 649 F.3d 762, 773-74 (D.C. Cir. 2011), and *Doe v. Rumsfeld*, 683 F.3d 390, 394-97 (D.C. Cir. 2012). The three plaintiffs who were determined by CSRTs to no longer be "enemy combatants" contend that their cases would not implicate sensitive national security decisions, but special factors bar the recognition of a *Bivens* action for the *category* of military-detention cases regardless of the specifics of a given plaintiff's case. Plaintiffs' actions seeking to hold senior government officials liable for their roles in making decisions about plaintiffs' detention, treatment, and transfer plainly implicate sensitive national security and military matters regardless of the outcome of any CSRT proceeding. In addition, as in *Doe*, a judicially created damages remedy would be inappropriate here because Congress has devoted significant attention to military detainee matters but has declined to create a damages remedy.

II. The district court correctly held that the United States properly substituted itself under the Westfall Act for the individual named defendants on plaintiffs' international-law claims because the named defendants were acting within the "scope of their employment" at the time of the incidents alleged in the complaints. That holding is controlled by *Ali* and *Rasul I*, which held that many of the same defendants (and others in the same or similar positions) were acting within the scope of their employment with respect to materially identical conduct underlying virtually identical claims alleging unlawful detention and mistreatment.

Plaintiffs attempt to distinguish these rulings by arguing that once the CSRTs determined that three of the plaintiffs were no longer "enemy combatants," the government lacked the authority to detain those individuals, and thus the defendants' actions were outside the scope of their employment. But the question whether the government had the authority to continue to detain plaintiffs while seeking their transfer to a suitable country is not the proper focus of the Westfall Act analysis. The relevant inquiry centers on the nature of the underlying conduct. Here, as in *Rasul I*, the underlying conduct is the management of detention and interrogation in a military detention facility, and that conduct falls well within the scope of the named defendants' employment.

Plaintiffs' argument that their Vienna Convention claim should be treated differently is without merit because the conduct underlying that claim is the defendants' alleged failure to issue timely notifications to consular officers and detainees, and that conduct is clearly incidental to the defendants' employment duties managing the military detention facility. In addition, plaintiffs' argument that the named defendants' purpose in engaging in the alleged conduct was not, even in part, to serve their "master" is contradicted by plaintiffs' complaints, which do not plausibly level any such allegations against any of the named defendants.

III. The district court also correctly concluded that plaintiffs' Religious Freedom Restoration Act claims must be dismissed under this Court's binding decision in *Rasul II*. That decision held that aliens at Guantanamo are not "persons" protected by the statute, 42 U.S.C. § 2000bb-1(a), and, in the alternative, that the defendants were entitled to qualified immunity because it was not clearly established as of early 2004 that aliens at Guantanamo were "persons" within the meaning of the statute. Plaintiffs make no attempt to distinguish their case from *Rasul II*, and thus the district court's dismissal of the Religious Freedom Restoration Act claims must be affirmed.

* * * *

(4) Former detainees challenging convictions after accepting plea agreements

On November 8, 2013 counsel for Omar Khadr filed an appeal with the U.S. Court of Military Commission Review of his military commission convictions for murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material for terrorism, and spying in violation of the law of war. See *Digest 2012* at 608 regarding Khadr's transfer to Canada and *Digest 2007* at 976-82 regarding Khadr's case. Khadr argues that his convictions must be vacated pursuant to the rule of *Hamdan II*, because the offenses of which he was convicted are not violations of the international law of war and the military commission therefore lacked jurisdiction over the charged conduct. Khadr also maintains he did not submit a valid waiver of appellate review and in any case the commission's lack of jurisdiction cannot be waived, and that his convictions should also be dismissed for outrageous government conduct as a result of the severe mistreatment he suffered at Bagram and GTMO.

On November 5, 2013, counsel for David Hicks filed an appeal with the U.S. Court of Military Commission Review of his conviction for providing material support for terrorism. Like Khadr, Hicks argues that his conviction must be vacated because, pursuant to the D.C. Circuit's decision in *Hamdan II*, the military commission lacked jurisdiction to try, convict, or sentence Hicks for his alleged conduct. On December 19, 2013, the U.S. government filed briefs in both cases arguing that the U.S. Court of Military Commission Review should dismiss the appeals for lack of jurisdiction, because Hicks and Khadr both validly waived appeal as a condition of their plea deals. The U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

c. Scope of Military Detention Authority: Hedges v. Obama

On July 17, 2013, the U.S. Court of Appeals for the Second Circuit issued its decision in *Hedges et al. v. Obama et al.*, 724 F.3d 170 (2d Cir. 2013). The case was brought by activists and journalists who allegedly feared they could be detained under the authority affirmed by the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"). The

lower court granted both preliminary and permanent injunctions against enforcement of Section 1021(b) of the NDAA. The Court of Appeals for the Second Circuit vacated the injunction and remanded the case. The opinion of the appeals court reviews the history of the military detention authority, beginning with the Authorization for the Use of Military Force ("AUMF") following the September 11, 2001 attacks. The opinion reviews litigation regarding the scope of the executive's detention authority, including the *Hamdi*, *Padilla*, and *al-Marri* cases. And the opinion surveys developments in the law relating to Guantanámo detainees, including *Boumediene*; the Obama administration memorandum to the D.C. District Court (the "March 2009 Memo") stating the government's position regarding its detention authority for detainees at Guantánamo; subsequent D.C. District Court rulings; and the D.C. Circuit's decision in *al-Bihani* and subsequent cases.

Viewing the NDAA against this backdrop, the Second Circuit held that the plaintiffs lacked Article III standing to challenge the NDAA. First, the U.S. citizen plaintiffs lacked standing because the NDAA said nothing about application to U.S. citizens. Second, the non-citizen plaintiffs lacked standing because they face a sufficient threat that the detention authority affirmed by the NDAA would be exercised against them. Excerpts follow from the opinion of the court of appeals (with footnotes omitted). For background on *Hamdi*, see *Digest 2004* at 1001-15; for *Padilla*, see *Digest 2005* at 1018; for *al-Marri*, see *Digest 2008* at 917-18; for *Boumediene*, see *Digest 2008* at 891-903; for the March 2009 memo, see *Digest 2009* at 732-40; for *al-Bihani*, see *Digest 2010* at 754-56 .

---

* * * *

The AUMF authorized 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." Section 1021(a) "affirms" that the AUMF authority includes the detention of a "covered person[ ]," which under Section 1021(b) means (1) a "person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks" or (2) a "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."

At first blush, Section 1021 may seem curious, if not contradictory. While Section 1021(b)(1) mimics language in the AUMF, Section 1021(b)(2) adds language absent from the AUMF. Yet Section 1021(a) states that it only "affirms" authority included under the AUMF, and Section 1021(d) indicates that Section 1021 is not "intended to limit or expand the authority of the President or the scope of the [AUMF]."

Fortunately, this apparent contradiction—that Section 1021 merely affirms AUMF

authority even while it adds language not used in the AUMF—is readily resolved. It is true that the language regarding persons who "planned, authorized, committed, or aided" the 9/11 attacks (or harbored those who did) is identical in the AUMF and Section 1021(b)(1). The AUMF, however, does not merely define persons who may be detained, as does Section 1021(b). Instead, it provides the President authority to use "force" against the "nations, organizations, or persons" responsible for 9/11. Section 1021(b)(1) (read with Section 1021(a)) affirms that the AUMF authority to use force against the *persons* responsible for 9/11 includes a power to detain such persons. But it does not speak to what additional detention authority, if any, is included in the President's separate AUMF authority to use force against the *organizations* responsible for 9/11.

This is where Section 1021(b)(2), a provision concerned with the organizations responsible for 9/11—al-Qaeda and the Taliban—plays a role. Section 1021(b)(2) naturally is understood to affirm that the general AUMF authority to use force against these organizations includes the more specific authority to detain those who were part of, or those who substantially supported, these organizations or associated forces. Because one obviously cannot "detain" an organization, one must explain how the authority to use force against an organization translates into detention authority. Hence, it is not surprising that Section 1021(b)(2) contains language that does not appear in the AUMF, notwithstanding Section 1021(d). Plaintiffs create a false dilemma when they suggest that either Section 1021 expands the AUMF detention authority or it serves no purpose.

Indeed, there are perfectly sensible and legitimate reasons for Congress to have affirmed the nature of AUMF authority in this way. To the extent that reasonable minds might have differed—and in fact very much did differ—over whether the administration could detain those who were part of or substantially supported al-Qaeda, the Taliban, and associated forces under the AUMF authority to use force against the "organizations" responsible for 9/11, Section 1021(b)(2) eliminates any confusion on that particular point. At the same time, Section 1021(d) ensures that Congress' clarification may not properly be read to suggest that the President did not have this authority previously—a suggestion that might have called into question prior detentions. This does not necessarily make the section a " 'legislative attempt at an ex post facto "fix" ... to try to ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF,' " as plaintiffs contend. Rather, it is simply the 112th Congress' express resolution of a previously debated question about the scope of AUMF authority.

* * * *

We thus conclude, consistent with the text and buttressed in part by the legislative history, that Section 1021 means this: With respect to individuals who are not citizens, are not lawful resident aliens, and are not captured or arrested within the United States, the President's AUMF authority includes the authority to detain those responsible for 9/11 as well as those who were a part of, or substantially supported, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners—a detention authority that Section 1021 concludes was granted by the original AUMF. But with respect to citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all.

* * * *

With this understanding of Section 1021, we may dispose of the claims of the citizen plaintiffs, Hedges and O'Brien. As discussed above, Section 1021 says nothing at all about the authority of the government to detain citizens. There simply is no threat whatsoever that they could be detained pursuant to that section. While it is true that Section 1021(e) does not foreclose the possibility that previously "existing law" may permit the detention of American citizens in some circumstances—a possibility that *Hamdi* clearly envisioned in any event—Section 1021 cannot itself be challenged as unconstitutional by citizens on the grounds advanced by plaintiffs because as to them it neither adds to nor subtracts from whatever authority would have existed in its absence. For similar reasons, plaintiffs cannot show that any detention Hedges and O'Brien may fear would be redressable by the relief they seek, an injunction of Section 1021.

* * * *

The claims of Jonsdottir and Wargalla stand differently. Whereas Section 1021 says nothing about the government's authority to detain citizens, it does have real meaning regarding the authority to detain individuals who are not citizens or lawful resident aliens and are apprehended abroad. It provides that such individuals may be detained until the end of hostilities if they were part of or substantially supported al-Qaeda, the Taliban, or associated forces. To be sure, Section 1021 in substance provides also that this authority was implicit in the original AUMF. But, as discussed above, that the 112th Congress in passing Section 1021 expressed such a view does not mean that Section 1021 itself is a nullity. It is not immediately apparent on the face of the AUMF alone that the President had the authority to detain those who substantially supported al-Qaeda, and indeed many federal judges had concluded otherwise prior to Section 1021's passage. Hence, Section 1021(b)(2) sets forth an interpretation of the AUMF that had not previously been codified by Congress. Where a statute codifies an interpretation of an earlier law that is subject to reasonable dispute, the interpretive statute itself may affect the rights of persons under the earlier law.

As the standing inquiry as to these two plaintiffs is more involved, we discuss the relevant facts and applicable law in detail.

1. Relevant Facts

Jonsdottir is a citizen of Iceland and a member of its parliament. She is an activist and spokesperson for a number of groups, including WikiLeaks, an organization famous for releasing troves of classified information of the United States government to the public. …

Wargalla, a German citizen, is an organizer and activist based in London, and is associated with the organizations Revolution Truth, Occupy London, and Justice for Assange UK. She testified that Occupy London has been listed as a terrorist group by the City of London police department. Moreover, she testified that she has been a supporter of WikiLeaks since 2010 ….

The district court found that both Jonsdottir and Wargalla had an actual fear of detention under Section 1021 and had incurred costs and other present injuries due to this fear.

* * * *

… [T]he government here disputes that plaintiffs are subject to the statute. Plaintiffs never articulate a precise theory on which they fear detention under Section 1021(b)(2)—that is, in what sense the government may conclude that they were a "part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners." The strongest argument would seem to be a contention that the work of Jonsdottir and Wargalla substantially, if indirectly, supports al-Qaeda and the Taliban as the term "support" is understood colloquially. The record demonstrates a number of ways in which the government has concluded, or would have a basis to conclude, that WikiLeaks has provided some support to al-Qaeda and the Taliban. This includes the evidence that the government is prosecuting Manning for aiding the enemy by his releases to WikiLeaks and news articles in the record or cited by the Jonsdottir declaration reporting on the immense amount of classified information that WikiLeaks made public, much of which is related specifically to the government's military efforts against al-Qaeda and the Taliban. One perhaps might fear that Jonsdottir's and Wargalla's efforts on behalf of WikiLeaks could be construed as making them indirect supporters of al-Qaeda and the Taliban as well.

The government rejoins that the term "substantial support" cannot be construed so in this particular context. Rather, it contends that the term must be understood—and limited—by reference to who would be detainable in analogous circumstances under the laws of war. It points to (1) the *Hamdi* plurality's limitation of the duration of the detention authority it recognized based on the laws of war, (2) the March 2009 Memo's repeated invocation of law-of-war limiting principles and the legislative history suggesting that Section 1021 was meant to codify the interpretation that the Memo set forth, (3) Section 1021(d), to the extent that *Hamdi* and the administration suggested that the laws of war inform AUMF authority, as bearing on how broadly "substantial support" may be construed, and (4) the references to "law of war" in Section 1021 itself, albeit not in Section 1021(b)(2). The government then contends that individuals like Jonsdottir and Wargalla are civilians who are not detainable under these law-of-war principles and so cannot reasonably fear detention under Section 1021.

In these circumstances, we are faced with a somewhat peculiar situation. The government has invited us to resolve standing in this case by codifying, as a matter of law, the meaningful limits it has placed on itself in its interpretation of Section 1021. We decline the government's invitation to do so. Thus, we express no view regarding whether the laws of war inform and limit detention authority under Section 1021(b)(2) or whether such principles would foreclose the detention of individuals like Jonsdottir and Wargalla. This issue presents important questions about the scope of the government's detention authority under the AUMF, and we are wary of allowing a preenforcement standing inquiry to become the vehicle by which a court addresses these matters unless it is necessary. Because we conclude that standing is absent in any event, we will assume without deciding that Section 1021(b)(2) covers Jonsdottir and Wargalla in light of their stated activities.

* * * *

…[T]here are several important differences between Section 1021 and a typical statute imposing criminal or civil penalties. Section 1021 is not a law enforcement statute, but an

affirmation of the President's military authority. As discussed above, it applies only to individuals who are not citizens, are not lawful resident aliens, and are apprehended outside the United States. It thus speaks entirely to the authority of the President in the context of military force, national security, and foreign affairs, areas in which the President generally enjoys "unique responsibility" and "broad discretion." The Supreme Court has recognized that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take" in the fields of national security and foreign affairs. As a result, "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."

Moreover, Section 1021 "at most *authorizes*—but does not *mandate* or *direct* "—the detention that plaintiffs fear. To be sure, the executive branch enjoys prosecutorial discretion with regard to traditional punitive statutes. Congress generally does not mandate or direct criminal prosecution or civil enforcement. But we can distinguish between Congress, on the one hand, proscribing a certain act and then leaving it to the President to enforce the law under his constitutional duty to "take Care that the Laws be faithfully executed" and Congress, on the other hand, authorizing the President to use a certain kind of military force against non-citizens abroad.

… In short, while it generally may be appropriate to presume for standing purposes that the government will enforce the law against a plaintiff covered by a traditional punitive statute, such a presumption carries less force with regard to a statute concerned entirely with the President's authority to use military force against non-citizens abroad.[FN183] Thus, in the circumstances of this case, Jonsdottir and Wargalla must show more than that the statute covers their conduct to establish preenforcement standing.

We need not quantify precisely what more is required because Jonsdottir and Wargalla have shown nothing further here. Indeed, they have not established a basis for concluding that enforcement against them is even remotely likely. We reach this conclusion independent of the government's litigation position on appeal that plaintiffs are "in no danger whatsoever" of being detained on the basis of their stated activities.

* * * *

4. Criminal Prosecutions and Other Proceedings

a. Al Bahlul v. United States

On July 10, 2013, the United States filed its brief in *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, No. 11-1324 in the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc. Mr. Bahlul had been convicted by a U.S. military commission of conspiracy, solicitation, and material support for terrorism based on his activities as a recruiter for al-Qaida; a secretary of public relations for Osama bin-Laden; and his involvement in preparation for the September 11, 2001 attacks. In January 2013, a panel of the D.C. Circuit vacated his conviction based on the decision of another panel of the D.C. Circuit in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) ("*Hamdan II*"),

which concluded that conspiracy and other crimes not recognized under the international law of war could not be the basis for prosecution under the 2006 Military Commissions Act ("MCA"). The U.S. brief argues that *Hamdan II* erred in finding that Article 21 of the Uniform Code of Military Justice ("UCMJ") limits the jurisdiction of military commissions to international law war crimes. Excerpts from the U.S. brief (with footnotes omitted) follow. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Since the founding of this Nation, the United States has used military commissions to try unprivileged enemy belligerents for crimes committed in the context of hostilities against the United States. *See Ex parte Quirin*, 317 U.S. 1, 26-27, 42 n.14 (1942). Congress has at times codified specific offenses as crimes subject to trial by military commission, *see* 10 U.S.C. § 904 (aiding the enemy); *id.* § 906 (spying), but prior to 2006 it had not "crystalliz[ed] in permanent form and in minute detail" the offenses triable by military commission, *Quirin*, 317 U.S. at 30. Instead, U.S. military commissions have exercised jurisdiction over offenses that have been traditionally recognized as such under the "system of common law applied by military tribunals." *Id.*; *cf. Parker v. Levy*, 417 U.S. 733, 743-47 (1974) (recognizing the traditional flexibility of the military's separate legal system).

After a plurality of the Supreme Court found in *Hamdan I* that conspiracy could not be tried by military commission in the absence of explicit legislation, Congress in the 2006 MCA codified common law offenses that it determined had traditionally been triable by military commission. The codified offenses include the crimes for which Bahlul was convicted: conspiracy to commit offenses triable by military commission, solicitation of others to commit such offenses, and providing material support for terrorism. 10 U.S.C. § 950v(b)(28) (2006) (conspiracy); *id.* § 950u (solicitation); *id.* § 950v(b)(25)(A) (material support for terrorism).

The 2006 MCA expressly authorizes prosecution of the codified offenses for conduct committed before the 2006 MCA's enactment. Congress included in the 2006 MCA an explicit finding that it was *not* creating new crimes but rather codifying offenses that had long been recognized as subject to military commission jurisdiction:

> The provisions of [the 2006 MCA] codify offenses that have traditionally been triable by military commissions. [The 2006 MCA] does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

10 U.S.C. § 950p(a) (2006). Congress therefore expressly permitted prosecution of offenses codified in the 2006 MCA for conduct committed before its enactment:

> Because the provisions of [the 2006 MCA] (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. § 950p(b). This language unambiguously establishes three principal points: (1) Congress specifically considered the question whether, in light of ex post facto principles, the statute should permit the codified offenses to be applied to preenactment conduct; (2) Congress determined that such application was appropriate because the statute codified pre-existing offenses; and (3) Congress authorized jurisdiction over pre-enactment conduct for all of the offenses codified in the 2006 MCA.

A separate provision setting forth the jurisdiction of military commissions under the 2006 MCA provides that such commissions "shall have jurisdiction to try *any offense made punishable by this chapter* or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001*." 10 U.S.C. § 948d(a) (2006) (emphasis added). That provision, like Section 950p, plainly authorizes military commission jurisdiction over conduct committed prior to 2006 for *all* of the codified offenses.

Congress reaffirmed military commissions' jurisdiction over pre-enactment conduct in its most recent action in this area. In 2009, Congress amended the 2006 MCA, *see* Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574, and adopted without change the 2006 MCA's definitions of conspiracy, solicitation, and material support offenses. *See* 10 U.S.C. § 950t(25), (29), (30) (2009). Congress also reaffirmed that "[b]ecause the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter." *Id.* § 950p(d); *see also id.* § 948d (authorizing military commission jurisdiction "for any offense made punishable by this chapter ... whether [the] offense was committed before, on, or after September 11, 2001"). Thus, the express terms of both the 2006 MCA and the 2009 MCA manifest the intent of two Congresses that the codified offenses apply to conduct predating the legislation's enactment. In enacting these statutes, Congress has specifically recognized and ratified this Nation's traditional use of military commissions to try conspiracy, solicitation, and material support for terrorism offenses, it has explicitly authorized jurisdiction over each of those offenses for pre-enactment conduct, and it has expressed its view that such jurisdiction is appropriate and consistent with ex post facto principles.

Although these provisions are clear enough to obviate the need to consider the 2006 MCA's background, purpose, and legislative history, that context nevertheless supports construing the statute, consistent with its plain language, as providing jurisdiction over the codified offenses for pre-enactment conduct. First, the references in the 2006 MCA to the attacks of September 11 and to the al Qaeda organization that perpetrated them indicate that a major purpose of the legislation was to provide a forum for bringing the September 11 conspirators and their cobelligerents to justice. *See* 10 U.S.C. § 948a (2006) (defining enemy combatants to include "a person who is part of the Taliban, al Qaeda, or associated forces"); *see also* 152 Cong. Rec. 20,727 (Sept. 29, 2006) (The 2006 MCA would "establish[] a system to prosecute the terrorists who on [September 11, 2001] murdered thousands of civilians and who continue to seek to kill Americans both on and off the battlefield.") (statement of Rep. Hunter); H.R. Rep. No. 109-664, Pt. I, at 24 (2006) ("[T]he committee firmly believes that trial for crimes that occurred before the date of the enactment of this chapter" is permissible.).

Moreover, the 2006 MCA is designed to establish a military commission system to try offenses arising out of the current armed conflict in which the Nation remains engaged. The

statute authorizing the President's use of force in that conflict refers specifically to the September 11 attacks, authorizing force against the "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September II, 2001." AUMF, § 2(a), 115 Stat. 224 (2001). Congress's purpose in enacting the 2006 MCA would be frustrated if some of the charges authorized could not be brought against the enemies who conspired to commit and otherwise supported the very terrorist attacks that gave rise to the AUMF and the current military commission system.

* * * *

Bahlul relies (Br. 16) on *Hamdan II*'s assumption that, "[i]f Congress had known" that a court would conclude, contrary to Congress's finding, that the only offenses previously triable by military commission were offenses against international law and that a codified offense was a "new war crime[]," Congress "would *not* have wanted [such] *new* crimes to be applied retroactively." 696 F.3d at 1247-48. That reliance is misplaced.

First, that construction is inconsistent with the statutory text. Nothing in the 2006 MCA suggests that Congress intended, as the *Hamdan II* court held, for its authorization of jurisdiction over pre-enactment conduct to depend on whether the offense was an international-law war crime and therefore clearly subject to military commission jurisdiction under Article 21. *See Hamdan II*, 696 F.3d at 1247 (holding that 10 U.S.C. § 821 (Article 21 of the UCMJ) was "the federal statute in effect" prior to the 2006 MCA and that military commissions could only prosecute war crimes under Article 21 for international-law war crimes). Had Congress intended that result, it easily could have referred explicitly to international law and expressly provided that *only* such offenses (along with the statutory offenses of spying and aiding the enemy) could be applied to pre-enactment conduct. But it did neither. To the contrary, Congress included a provision in the 2006 MCA that amended Article 21 to provide that "[t]his section does not apply to a military commission established under [the MCA]." 2006 MCA, § 4(a)(2), 120 Stat. 2631. That amendment establishes that, whatever limits Article 21 may impose on military commission jurisdiction, those limits do not apply to military commissions, such as the one here, established under the 2006 MCA. Thus, *Hamdan II*'s interpretation of the 2006 MCA, which reads Article 21 as an implicit limit on the 2006 MCA's express provision of pre-enactment jurisdiction for all of the codified offenses, cannot be squared with Congress's amendment of Article 21.

* * * *

With respect to Bahlul's conspiracy conviction, the government has acknowledged that conspiracy has not attained recognition at this time as an offense under customary international law. This is true even when the objects of the conspiracy are offenses prohibited by customary international law, as some of them are in this case. That concession, however, does not lead to the conclusion that Bahlul's conspiracy conviction for pre-enactment conduct under the 2006 MCA raises ex post facto concerns. The Ex Post Facto Clause bars retroactive application of a "statute which punishes as a crime an act previously committed, which was innocent when done." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (citation omitted). The Supreme Court has explained that the "central concerns" underlying the Ex Post Facto Clause are "the lack of fair

notice and governmental restraint" when the law changes the legal consequences of acts completed before the law's effective date. *Lynce v. Mathis,* 519 U.S. 433, 441 (1997) (citation omitted). Congress's decision to make conspiracy punishable by military commission for pre-2006 conduct does not run afoul of those principles because of the longstanding practice of trying conspiracy offenses in U.S. military commissions.

a. Although uncodified until the enactment of the 2006 MCA, the offense of conspiracy to violate the laws of war, including conspiracy to murder protected persons or to attack civilians and civilian objects, is both firmly rooted in our Nation's history and expressly recognized in "the long-standing public position of the United States Army." *Al Bahlul,* 820 F. Supp. 2d at 1264-65 (Sims, J., concurring) (citing FM 27-10, ¶ 500). As Justice Thomas observed in *Hamdan I*, "in the highest profile case to be tried before a military commission relating to [the Civil War], namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had 'combin[ed], confederat[ed], and conspir[ed] ... to kill and murder' President Lincoln." 548 U.S. at 699 (Thomas, J., dissenting) (quoting General Court-Martial Order ("G.C.M.O.") No. 356, War Dep't (July 5, 1865), *reprinted in* H.R. Doc. No. 55-314, at 696 (1899)); *see also Ex parte Mudd,* 17 F. Cas. 954, 954 (S.D. Fla. 1868) (holding that the Lincoln conspirators were properly subjected to trial by military commission because conspiring to assassinate "the Commander in Chief of the army for military reasons" was a violation of the law of war); G.C.M.O. No. 607, War Dep't (Nov. 6, 1865), *reprinted in* H.R. Doc. No. 55-314, at 785, 789 (conviction of former Confederate Army Captain Henry Wirz for "combin[ing], confederat[ing], and conspir[ing] with [others] ... in violation of the laws of war" to kill and mistreat Union prisoners); G.C.M.O. No. 452, War Dep't (Aug. 22, 1865), *reprinted in* H.R. Doc. No. 55-314, at 724-25 (approving conviction of G. St. Leger Grenfel for "[c]onspiring, in violation of the laws of war, to release the rebel prisoners" and "[c]onspiring, in violation of the laws of war, to lay waste and destroy the city of Chicago"); General Order ("G.O.") No. 9, HQ, Dep't of the Mississippi (Mar. 25, 1862), *reprinted in* 1 *The War of the Rebellion, Official Records of the Union and Confederate Armies* ("OR"), ser. II, at 470 (1894) (approving conviction of Joseph Sublett for conspiring to fire on trains); Opinion of the Judge Advocate General in the Matter of William Murphy (Mar. 21, 1866) (*available at* XVI JAG Record Books 280) (approving conviction by military commission for conspiracy to burn steamboats); William Winthrop, *A Digest of Opinions of the Judge Advocate General of the Army* 328-29 (1880) ("*Dig. Ops.*") (including "[c]onspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy" as an "offence[] against the laws and usages of war"); Charles Roscoe Howland, *A Digest of the Opinions of the Judge Advocate General of the Army* 1071 (1912) (noting that conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" was an offense against the law of war that was "punished by military commissions" throughout the Civil War).

Similarly, during the Second World War, enemy spies and saboteurs were convicted by military commissions of conspiring to commit war crimes. See *Quirin*, 317 U.S. at 23 (noting that military commission charges against eight Nazi saboteurs included, among other offenses, conspiracy to violate the laws of war); *Colepaugh v. Looney*, 235 F.2d 429, 431-33 (10th Cir. 1956) (noting that military commission convictions against other Nazi saboteurs included conspiring to clandestinely enter the United States for the purpose of spying and sabotage). And, during the Korean conflict, General MacArthur issued regulations making conspiracy to commit

war crimes an offense subject to trial by military commission. See Letter Order, Gen. HQ, United Nations Command, Tokyo, Japan, *Trial of Accused War Criminals* (Oct. 28, 1950) (Rules of Criminal Procedure for Military Commissions, Rule 4). In 1956, the United States Army reaffirmed its longstanding position that conspiracy is triable by military commission by providing explicitly in its field manual on the law of land warfare that conspiracy to commit war crimes is a punishable offense. See FM 27-10, ¶ 500.

* * * *

Because both providing material support to unlawful combatants and solicitation to commit offenses triable by military commission are themselves offenses that have long been punishable by military commission, neither offense raises a serious question under the Ex Post Facto Clause. Moreover, longstanding U.S. military doctrine, embodied in FM 27-10, *The Law of Land Warfare*, provides notice that the United States viewed "direct incitement" of a war crime and "complicity" in the commission of a war crime as punishable. *See id.* ¶ 500. Indeed, at the end of World War II, both the knowing facilitation of war crimes and solicitation to commit such acts were subject to punishment by international military tribunals. For example, in 1947, a U.S. military tribunal, sitting in Nuremberg, Germany, as an "international tribunal," convicted Friedrich Flick and Otto Steinbrinck of providing financial support to the Nazi S.S. *See The Flick Trial*, 9 L. Rep. Trials of War Criminals 1, 16, 28-29 (1949); *Flick v. Johnson*, 174 F.2d 983, 985 (D.C. Cir. 1949). Similarly, a British military tribunal sentenced to death the owner of a German chemical firm who, "in violation of the laws and usages of war," supplied the gas-producing substance Zyklon B to the S.S., "well knowing" that it would be used to murder concentration camp inmates. *The Zyklon B Case*, 1 L. Rep. Trials of War Criminals 93, 93 (1947). The Nuremburg International Military Tribunal convicted Nazi propagandist Julius Streicher, publisher of the anti-Semitic weekly *Der Sturmer*, of inducing others to commit murder of protected persons "on political and racial grounds in connection with War Crimes, as defined by the [Nuremberg] Charter." 1 *Trial of the Major War Criminals Before the International Military Tribunal* 301, 304 (1947); *see also* 820 F. Supp. 2d at 1240-41 (finding Bahlul's conduct analogous to Streicher's). Prosecution of such conduct under the 2006 MCA accordingly raises no concerns under the Ex Post Facto Clause.

* * * *

b. New Military Commission Charges

On June 10, 2013, the Department of Defense announced that military commission charges had been sworn against Guantanamo detainee Abd al Hadi al Iraqi, an Iraqi national. The charges are described in a Department of Defense news release, available at *http://www.defense.gov/releases/release.aspx?releaseid=16086*.

c. Periodic Review Process

The periodic review process established by Executive Order 13567 (for Guantanamo detainees designated for continued detention or referred for prosecution, but not yet charged or convicted) commenced in 2013. See *Digest 2011* at 576-79 for a discussion of E.O. 13567. As described in an October 9, 2013 Department of Defense news release, available at *http://defense.gov/releases/release.aspx?releaseid=16302*, the periodic review board process:

> makes an important contribution toward the Administration's goal of closing Guantanamo Bay by ensuring a principled and sustainable process for reviewing and revisiting prior detention determinations in light of the current circumstances and intelligence, and identifying whether additional detainees may be designated for transfer.

Cross References

Report to UN Committee Against Torture, **Chapter 6.H.**
ILC's work on protection of the environment in relation to armed conflict, **Chapter 7.D.3.**
Gulf Cooperation Council's eligibility under Arms Export Control Act, **Chapter 7.E.4.**
Sanctions relating to armed conflict, **Chapter 16.A.7.**
Arms Export Control Act and International Trafficking In Arms regulations, **Chapter 16.B.**
Syria, **Chapter 17.B.1.**
Responsibility to protect, **Chapter 17.C.3.**
Syrian chemical weapons, **Chapter 19.F.1.**
Arms Trade Treaty, **Chapter 19.J.**

CHAPTER 19

Arms Control, Disarmament, and Nonproliferation

A. GENERAL

On June 19, 2013, President Obama announced the U.S. intention to pursue additional reductions in U.S. and Russian deployed strategic nuclear weapons in a speech delivered at the Brandenburg Gate in Berlin, Germany. The Berlin speech followed up on the President's 2009 speech in Prague. See *Digest 2009* at 761-64. Excerpts follow from President Obama's Berlin speech, which is available in full at *www.whitehouse.gov/the-press-office/2013/06/19/remarks-president-obama-brandenburg-gate-berlin-germany*.

---

* * * *

We may no longer live in fear of global annihilation, but so long as nuclear weapons exist, we are not truly safe. We may strike blows against terrorist networks, but if we ignore the instability and intolerance that fuels extremism, our own freedom will eventually be endangered. We may enjoy a standard of living that is the envy of the world, but so long as hundreds of millions endure the agony of an empty stomach or the anguish of unemployment, we're not truly prosperous.

* * * *

Peace with justice means pursuing the security of a world without nuclear weapons—no matter how distant that dream may be. And so, as President, I've strengthened our efforts to stop the spread of nuclear weapons, and reduced the number and role of America's nuclear weapons. Because of the New START Treaty, we're on track to cut American and Russian deployed nuclear warheads to their lowest levels since the 1950s.

But we have more work to do. So today, I'm announcing additional steps forward. After a comprehensive review, I've determined that we can ensure the security of America and our allies, and maintain a strong and credible strategic deterrent, while reducing our deployed strategic nuclear weapons by up to one-third. And I intend to seek negotiated cuts with Russia to move beyond Cold War nuclear postures.

At the same time, we'll work with our NATO allies to seek bold reductions in U.S. and Russian tactical weapons in Europe. And we can forge a new international framework for peaceful nuclear power, and reject the nuclear weaponization that North Korea and Iran may be seeking.

America will host a summit in 2016 to continue our efforts to secure nuclear materials around the world, and we will work to build support in the United States to ratify the Comprehensive Nuclear Test Ban Treaty, and call on all nations to begin negotiations on a treaty that ends the production of fissile materials for nuclear weapons. These are steps we can take to create a world of peace with justice.

* * * *

Coinciding with President Obama's speech in Berlin, the White House released a fact sheet on the nuclear weapons employment strategy of the United States in which the President's new guidance is explained. The fact sheet is excerpted below and available at *www.whitehouse.gov/the-press-office/2013/06/19/fact-sheet-nuclear-weapons-employment-strategy-united-states*.

---

* * * *

Following the release of the 2010 Nuclear Posture Review (NPR) and ratification of the New START Treaty, the President directed the Department of Defense (DOD), the Department of State, Department of Energy, and the intelligence community, to conduct a detailed analysis of U.S. nuclear deterrence requirements and policy in order to ensure U.S. nuclear posture and plans are aligned to address today's security environment. This review was based on the principle that a robust assessment of today's security environment and resulting Presidential guidance must drive nuclear employment planning, force structure, and posture decisions.

The President's new guidance:

- affirms that the United States will maintain a credible deterrent, capable of convincing any potential adversary that the adverse consequences of attacking the United States or our allies and partners far outweigh any potential benefit they may seek to gain through an attack.
- directs DOD to align U.S. defense guidance and military plans with the policies of the NPR, including that the United States will only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners. The guidance narrows U.S. nuclear strategy to focus on only those objectives and

missions that are necessary for deterrence in the 21st century. In so doing, the guidance takes further steps toward reducing the role of nuclear weapons in our security strategy.

- directs DOD to strengthen non-nuclear capabilities and reduce the role of nuclear weapons in deterring non-nuclear attacks.
- directs DOD to examine and reduce the role of launch under attack in contingency planning, recognizing that the potential for a surprise, disarming nuclear attack is exceedingly remote. While the United States will retain a launch under attack capability, DOD will focus planning on the more likely 21st century contingencies.
- codifies an alternative approach to hedging against technical or geopolitical risk, which will lead to more effective management of the nuclear weapons stockpile.
- reaffirms that as long as nuclear weapons exist, the United States will maintain a safe, secure and effective arsenal that guarantees the defense of the U.S. and our allies and partners. The President has supported significant investments to modernize the nuclear enterprise and maintain a safe, secure, and effective arsenal. The administration will continue seeking congressional funding support for the enterprise.

After a comprehensive review of our nuclear forces, the President has determined that we can ensure the security of the United States and our allies and partners and maintain a strong and credible strategic deterrent while safely pursuing up to a one-third reduction in deployed strategic nuclear weapons from the level established in the New START Treaty. The U.S. intent is to seek negotiated cuts with Russia so that we can continue to move beyond Cold War nuclear postures.

This analysis did not set out to address weapons forward deployed in Europe in support of NATO. The role of nuclear weapons in NATO was examined as part of the last year's Deterrence and Defense Posture Review, which affirmed Allies' support for further U.S.-Russian nuclear reductions, and underscored that any changes in NATO's nuclear posture must be an Alliance decision.

As we continue to implement the NPR, we are focused on maintaining and improving strategic stability with both Russia and China.

In sum, this review was essential to advance the policies laid out in the NPR. The resulting strategy will maintain strategic stability with Russia and China, strengthen regional deterrence, and reassure U.S. allies and partners, while laying the groundwork for negotiations with Russia on how we can mutually and verifiably reduce our strategic and nonstrategic nuclear stockpiles and live up to our commitments under the Nuclear Nonproliferation Treaty.

The President has directed DOD to use the new guidance to begin the process of updating and aligning its directives and contingency plans in order for this policy to be implemented over the course of the next year.

* * * *

B. NUCLEAR NONPROLIFERATION

On April 25, 2013, Acting Under Secretary for Arms Control and International Security Rose Gottemoeller* addressed the spring meeting of the American Bar Association International Law Section in Washington, DC. Her remarks, excerpted below, are available at *www.state.gov/t/us/208078.htm*.

* * * *

The grand bargain of the NPT, where nuclear weapon states pursue disarmament, non-nuclear weapon states abstain from the pursuit of nuclear weapons and all countries are able to access the benefits of peaceful nuclear energy, sets an enduring standard that is as relevant today as it was at the Treaty's inception. For over forty years, the regime has bent and frayed in places, but it has never broken or collapsed. It has slowed the tide of proliferation; it has facilitated cooperation among its States Parties; and it has institutionalized the norms of nonproliferation and disarmament.

There have been a number of important arms control and nonproliferation treaties negotiated and ratified since then—some of the most far-reaching were conceived by the Reagan Administration. Past brave leaders in the Executive Branch Administration and in Congress doggedly sought out international arrangements that drove the levels of nuclear weapons in the world down by the tens of thousands. Each dismantled weapon was one that could never be used by a terrorist or a rogue state. That work also had tangible benefits to our foreign policy writ large. Our treaty-based arms control interactions with the Soviets paved the way for dialogue on other issues, as well.

The United States believes that the NPT and other treaties have allowed us to make great strides in disarmament and nonproliferation objectives since 2010, but we still have far to go.

To fulfill our disarmament goals, the New START Treaty was an excellent step, but only one step among others to be taken. It is very satisfying to see how pragmatic, business-like and positive its implementation has been so far. I have actually just returned from Geneva, where Russian Defense Minister Anatoly Antonov—my counterpart during the New START negotiations—and I gave a briefing on the Treaty's implementation at the NPT PrepCom. That briefing is available on the State website.

The concrete measures that the United States and Russian Federation are taking to reduce nuclear weapons are measurable and significant and have set an essential foundation for pursuing additional measures in keeping with our Article VI commitments under the Non-Proliferation Treaty.

So now it is time for the next step; we should get back to the table. President Obama made it clear when he signed New START that the United States would pursue discussions with the Russian Federation on reductions in all categories of nuclear weapons—strategic, non-strategic, deployed and non-deployed.

* Editor's note: Rose E. Gottemoeller was sworn in as Under Secretary for Arms Control and International Security on March 7, 2014. She had served as Acting in this position since February 7, 2012.

As the President said in Seoul in 2012, we can already say with confidence that we have more nuclear weapons than we need. We can ensure the security of the United States and our allies, maintain a strong deterrent against any threat to ourselves and our allies, and still pursue further reductions in our nuclear arsenal.

While I know that the next steps in reductions with Russia attract a lot of attention, I don't think that people pay nearly enough attention to our ongoing engagement with other P5 states on disarmament-related matters. We were in Geneva just last week for our fourth P5 meeting on these issues. Senior officials from China, France, Great Britain, Russia and the United States have had constructive talks on a number of issues, including NPT reporting, safeguards and verification technologies, spanning P5 commitments under the NPT and the 2010 Review Conference Action Plan.

In short, we have come a long way since our first meeting in London in 2009 and are moving beyond discussions around a conference table. We are beginning to engage at expert levels on some important arms control issues. For example, the Chinese Delegation has taken the lead on the nuclear definitions and terminology working group for the P5. I think that project is going to yield some really interesting discussions—such as considering what defines a strategic or nonstrategic nuclear weapon. I know that sounds a little dull to people, but a room full of lawyers can surely appreciate the importance of defining terms and developing a shared understanding of concepts.

Beyond bilateral treaties, ratification and entry into force of the Comprehensive Nuclear Test-Ban Treaty (CTBT) remains a top priority for the United States. 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."

The Administration thanks the International Law Section for its work on the ABA Resolution in support of the ratification of the CTBT. We hope for your support going forward, and appreciate your partnership.

As we look towards ratification we will continue to engage Congress. I like to think of our efforts thus far as an "information exchange." 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.

While we pursue ratification at home, the Administration has been calling on the remaining Annex 2 States to join us in moving forward toward ratification. There is no reason to wait on us. An in-force CTBT benefits all nations.

We also remain committed to launching negotiations on a Fissile Material Cutoff Treaty (FMCT). An FMCT is a logical and absolutely essential next step in the path towards global nuclear disarmament.

The Conference on Disarmament (CD) remains our preferred venue for negotiating an FMCT, since it includes every major nuclear-capable state and operates by consensus. Nonetheless, we are more concerned with getting negotiations started than we are with the venue. So long as our principles are met, that negotiations be governed by consensus, include the key states, and be based on the so-called Shannon Mandate, we are prepared to move forward.

We will continue to press this issue. Our focus has been to find a way to convince others that commencement of negotiations is not something to fear. Consensus-based negotiations allow all to protect their vital national security interests. To those for whom the continued existence of the CD is vital, I say come to the negotiating table and get to work, while we still have a table from which to work.

Pivoting to nonproliferation issues, despite our past and recent successes, there are very pressing challenges all around us and on the horizon. Most critically, we have grave concerns about the actions of a few countries. North Korea, Iran and Syria have consistently violated their NPT obligations and have failed to take the steps necessary to rectify these violations. The United States is deeply concerned about all of these programs, as I am sure is the case for everyone in this room. These transgressions threaten international security and undermine confidence in the nonproliferation regime. They also stand directly in the way of our shared disarmament goals.

The United States is committed to supporting and strengthening the nonproliferation obligations of the NPT. Nonproliferation is the fundamental purpose of the NPT, which supports and draws strength from the other pillars of disarmament and peaceful uses of nuclear energy. The Treaty's pillars are mutually reinforcing and only by ensuring the strength of all three can we lay the groundwork for the peace and security of a world free from the threat of nuclear catastrophe.

The United States will continue to lead efforts to ensure member states fully comply with their NPT obligations, to ensure that there are costs for non-compliance with the Treaty, and to strengthen IAEA safeguards to account for evolving proliferation challenges.

An important goal we share with the international community is the achievement of a Middle East zone free of all weapons of mass destruction. The United States stands ready to help facilitate discussions among states in the region at the proposed Helsinki conference. The United States continues to fully support this goal. But we do so recognizing that the mandate for a zone can only come from within the region; it cannot be imposed from outside or without the consent of all concerned states. We remain committed to working with our partners and the states in the region to create conditions for a successful dialogue.

Another immediate concern is securing vulnerable nuclear materials in order to keep them out of the hands of terrorists. Under President Obama's direction, we have held two Nuclear Security Summits, with a third to take place in The Hague next year. In anticipation of the Hague Summit in 2014, we will continue to build on pledges that are resulting in more material secured, removed and eliminated.

The United States is also working to update the legal framework for cooperative threat reduction (CTR) activities with the Russian Federation. We have been working closely with Russia over the past year to continue our cooperation under an updated legal framework that reflects our maturing bilateral partnership and allows us to build on the achievements made under the expiring CTR agreement.

The past success of CTR gives us a lot to be proud of and we aim to continue this success. As President Obama said, "missile by missile, warhead by warhead, shell by shell,

we're putting a bygone era behind us." We are working hard to advance continued U.S.-Russian cooperation in nonproliferation and arms control.

The United States has also recently worked with the international community to negotiate the Arms Trade Treaty (ATT), aimed at stemming the illicit trade in conventional arms and reducing the risk that such arms will be used to carry out the world's worst crimes. The ATT aims to bring other countries closer to the high standard set by U.S. import and export control systems. There is nothing in the treaty that is inconsistent with the rights of U.S. citizens – including the Second Amendment – impedes the legitimate international arms trade, or requires changes to U.S. laws or practices. We appreciate the ABA's white paper on this particular Treaty and will value the chance to work with you in the future.

* * * *

1. Non-Proliferation Treaty ("NPT")

a. Fourth P5 Conference

In 2013, the permanent five members of the UN Security Council, or P5 (China, France, Great Britain, Russia, and the United States), continued to confer in preparation for the 2015 NPT Review Conference. After their fourth conference on April 18-19 in Geneva, Switzerland, the P5 issued a joint statement, available at *www.state.gov/r/pa/prs/ps/2013/04/207768.htm*, and excerpted below.

---

* * * *

The five Nuclear Non-Proliferation Treaty (NPT) nuclear-weapon states, or "P5," met in Geneva on April 18-19, 2013 under the chairmanship of the Russian Federation to build on the 2009 London, 2011 Paris, and 2012 Washington P5 conferences. The P5 reviewed progress towards fulfilling the commitments made at the 2010 NPT Review Conference, and continued discussions on issues related to all three pillars of the NPT—non-proliferation, the peaceful uses of nuclear energy, and disarmament, including confidence-building, transparency, and verification experiences. The P5 also had a positive exchange with representatives of civil society during the Geneva P5 Conference.

The P5 reaffirmed their commitment to the shared goal of nuclear disarmament and general and complete disarmament as provided for in Article VI of the NPT, and emphasized the importance of continuing to work together in implementing the 2010 NPT Review Conference Action Plan. The P5 reviewed the outcome of the 2012 Preparatory Committee for the 2015 NPT Review Conference, and significant developments in the context of the NPT since the 2012 Washington P5 Conference. They assessed issues relating to strategic stability and international security, and exchanged views concerning prospects for further steps to promote dialogue and mutual confidence in this area, including in a multilateral format.

In addition, the P5 welcomed a briefing by the Russian Federation and the United States on the ongoing implementation of the New START Treaty and its success to date. The P5 were also briefed by the Russian Federation and the United States on the joint 2012 inspection in Antarctica conducted pursuant to the Antarctic Treaty of 1959 and its Environmental Protocol. This joint inspection included verification that the international stations are implementing relevant environmental rules and that facilities are used only for peaceful purposes. The P5 shared views on objectives for the 2013 Preparatory Committee, the intersessional period thereafter, and looked ahead to the 2014 Preparatory Committee and 2015 Review Conference.

The P5 discussed the latest developments in the area of multilateral disarmament initiatives including the situation at the Conference on Disarmament. They expressed their shared disappointment that the Conference on Disarmament continues to be prevented from agreeing on a comprehensive program of work, including work on a legally binding, verifiable international ban on the production of fissile material (FMCT) for use in nuclear weapons, and discussed efforts to find a way forward in the Conference on Disarmament, including by continuing their efforts with other relevant partners to promote such negotiations within the CD. The P5 reiterated their support for the immediate start of negotiations on a treaty encompassing such a ban in the Conference on Disarmament. They noted the Group of Governmental Experts (GGE) on FMCT, and expressed the hope that its work will help spur negotiations in the Conference on Disarmament. The P5 reaffirmed the historic contribution of the pragmatic, step-by-step process to nuclear disarmament and stressed the continued validity of this proven route. In this context, they also emphasized their shared understanding of the serious consequences of nuclear weapon use and that the P5 would continue to give the highest priority to avoiding such contingencies.

The P5 advanced their previous discussions of an approach to reporting on their relevant activities across all three pillars of the NPT Action Plan at the 2014 NPT Preparatory Committee Meeting, consistent with the NPT Action Plan, and resolved to continue working on this issue under France's leadership. They plan to 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. They welcomed the progress made on the development of the P5 glossary of key nuclear terms under China's leadership and discussed next steps. They stressed the importance of this work, which will increase P5 mutual understanding and facilitate further P5 discussions on nuclear matters. The P5 reaffirmed their objective to submit a P5 glossary of key nuclear terms to the 2015 NPT Review Conference. The P5 are working toward the establishment of a firm foundation for mutual confidence and further disarmament efforts. They shared further information on their respective bilateral and multilateral experiences in verification and resolved to continue such exchanges.

The P5 recalled their Joint Statement of 3 May 2012 at the Preparatory Committee of the NPT Review Conference and pledged to continue their efforts in different formats and at various international fora to find peaceful diplomatic solutions to the outstanding problems faced by the non-proliferation regime. They reiterated their call on the states concerned to fulfill without delay their international obligations under the appropriate UN Security Council resolutions, undertakings with the International Atomic Energy Agency (IAEA), and other appropriate

international commitments. In the context of the nuclear test conducted by the DPRK on 12 February 2013 and the continued pursuit of certain nuclear activities by Iran, both contrary to the relevant UN Security Council resolutions and IAEA Board of Governors resolutions, the P5 reaffirmed their concerns about these serious challenges to the non-proliferation regime.

The P5 underlined the fundamental importance of an effective IAEA safeguards system in preventing nuclear proliferation and facilitating cooperation in the peaceful uses of nuclear energy. The P5 stressed the need for strengthening IAEA safeguards including through the promotion of the universal adoption of the Additional Protocol and the development of approaches to IAEA safeguards implementation based on objective state factors. They also discussed the role of the P5 in assisting the IAEA in cases involving possible detection of nuclear weapon programs in non-nuclear weapons states (NNWS) in conformity with the provisions of the NPT.

The P5 continued their previous discussions of efforts to achieve the entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT), and reviewed the recent UK-hosted P5 Experts Meeting on CTBT, at which the P5 identified a number of areas for future P5 collaboration and decided to pursue further intersessional work, in particular ahead of the Integrated Field Exercise in 2014. The P5 called upon all States to uphold their national moratoria on nuclear weapons-test explosions or any other nuclear explosions, and to refrain from acts that would defeat the object and purpose of the Treaty pending its entry into force.

The P5 shared their views on how to prevent abuse of NPT withdrawal (Article X). 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. They resolved to make efforts to broaden consensus among NPT States Party on the latter issue at the 2014 PrepCom, thus making a further contribution to the NPT Review Process.

The P5 reiterated the importance of the implementation of the 2010 NPT Review Conference decisions related to the 1995 Resolution on the Middle East, in particular those related to the convening of a conference to be attended by all the States of the Middle East on the establishment of the Middle East zone free of nuclear weapons and all other weapons of mass destruction on the basis of arrangements freely arrived at by the states of the region. They underlined their support for all States concerned, making all efforts necessary for the preparation and convening of the Conference in the nearest future. They also reiterated their full support to the ongoing efforts of the facilitator.

The P5 reviewed their efforts to bring about the entry into force of the relevant legally binding protocols of nuclear-weapon-free zone treaties. They reaffirmed their view that establishment of such zones helps to build confidence between nuclear and non-nuclear weapon states, enhance regional and international security, and reinforce the NPT and the international nuclear non-proliferation regime. They reaffirmed their readiness to sign the Protocol to the Treaty on the Southeast Asia Nuclear-Weapon-Free Zone as soon as possible. They underlined the importance of holding consultations, including on the margins of the Second PrepCom, with the States Party to the Treaty on a Nuclear Weapon-Free-Zone in Central Asia. They noted also

the parallel declarations, adopted by the P5 and Mongolia concerning Mongolia's nuclear-weapon-free status, at the United Nations headquarters in New York on 17 September 2012.

The P5 pledged to continue to meet at all appropriate levels on nuclear issues to further promote dialogue and mutual confidence. The P5 plan to follow up their discussions and hold a fifth P5 conference in 2014.

* * * *

b. NPT Preparatory Committee

The Second Session of the Preparatory Committee for the 2015 NPT Review Conference met in Geneva in April 2013. On April 22, 2013, Assistant Secretary of State Thomas Countryman delivered a statement for the U.S. delegation that includes opening remarks from Secretary of State John Kerry. Mr. Countryman's remarks are excerpted below and available at *www.state.gov/t/isn/npt/207859.htm*.

---

* * * *

I would like to begin my remarks by reading a message from Secretary of State John Kerry to the 2013 NPT Preparatory Committee:

> On behalf of the United States, please accept my hopes for and personal commitment to a successful and productive meeting of the preparatory committee for the 2015 Review Conference of the Nuclear Non-proliferation Treaty (NPT).
>
> This summer, we celebrate the 45th anniversary of the signing of the NPT. Although conceived in a different era when the hands of the Doomsday Clock pointed precariously towards disaster, the treaty's goal of preventing the proliferation of nuclear weapons remains no less relevant today. This is why, in 2009, President Obama re-affirmed our nation's support for the treaty and called on all countries to join us in working to secure the peace and security of a world free of the threat of nuclear catastrophe.
>
> The President's agenda is rooted in the interest almost all of us share in preserving the treaty as a basis for global cooperation. We will continue to do our part by taking action to reduce the number of nuclear weapons, their roles, and the likelihood of their use. At the same time, we will work to strengthen international safeguards and encourage peaceful uses of nuclear energy by states that meet their obligations. In response to those who abuse the treaty, we will continue to insist that violations be confronted with the urgency they require. A treaty that is universally followed will best advance international security and nuclear energy's contribution to peace, health, and prosperity.

> I wish this conference well and offer my hope for a productive discussion that builds on the consensus action plan approved by the 2010 NPT Review Conference and that puts us on a path to success in 2015.

Mr. Chairman, we share the view of many here that agreement on the 2010 Action Plan was an important achievement. It was not only the first of its kind in the NPT's history, but it reset the NPT and each of its three pillars at the center of efforts to build a safer world: one in which the barriers to nuclear proliferation remain high; violators are held accountable; and progress to reduce nuclear weapons, contain risks of nuclear terrorism, and expand peaceful uses of nuclear energy is not only possible but underway. This is the direction we seek. It is one that we believe all NPT parties should support and which will keep us on course toward our ultimate goal of achieving the peace and security of a world without nuclear weapons.

Some may argue that the Action Plan is not perfect. We agree; it does not reflect every U.S. priority and others view it similarly from their perspective. Imperfection is to be expected given the complexities of a multilateral negotiation among the Treaty's diverse membership. But even an imperfect document is still valuable. And in this instance, the NPT membership should take pride in having adopted a forward-looking set of principles and commitments that so clearly reinforce the NPT and its underlying purposes.

Progress on the Action Plan should naturally be the subject of review by NPT parties. We encourage such a review, and a dialogue that is balanced, addressing all action items and each of the Treaty's three pillars; substantive; candid; and pursued with the aim of preserving collective support for the Treaty as an instrument of security.

Disarmament

The United States acknowledges its special responsibility to work toward nuclear disarmament and to help create the conditions for a world without nuclear weapons. President Obama has made clear our unequivocal support for this goal. It will not be achieved overnight or absent further improvements in the international security environment. But as our President has said, we must continue this journey with concrete steps.

Mr. Chairman, the United States is making good on that pledge. We are reducing the role and numbers of nuclear weapons in our national security strategy. We have committed not to develop new nuclear warheads or pursue new military missions for nuclear weapons. We are implementing the New START Treaty with Russia that will reduce deployed nuclear warheads to levels not seen since the 1950s—more than a decade before the NPT entered into force. President Obama has committed the United States to pursue still deeper cuts. And let me be clear: We share concerns about the profound and serious consequences of nuclear weapons use and have articulated our deep and abiding interest in extending forever the 68-year record of non-use. And we will continue our diligent work with our P5 partners to meet our commitments under the Action Plan.

Nonproliferation

Let me state clearly that disarmament is not an obligation limited to the five nuclear-weapon states. It will require action by all NPT Parties, who collectively share a responsibility to support the nonproliferation regime and ensure its rules are robust and fully respected.

The Action Plan makes clear the importance of resolving all cases of noncompliance with IAEA safeguards. The United States regards noncompliance by Iran and Syria as the most serious threat to the integrity and relevance of the nonproliferation regime. NPT Parties must stand shoulder-to-shoulder in demanding these governments return to full compliance with the NPT, consistent with their international obligations. We will comment later in the Conference on North Korea's dangerous challenge to regional peace. States must be held accountable for their violations of the Treaty or for abusing the withdrawal provision. This should be of concern to all NPT Parties.

Looking forward, we must ensure the IAEA continues to have the resources and authorities it needs to verify peaceful nuclear uses in conformity with Article III of the Treaty. A system of IAEA safeguards that enjoys broad political support and is technically sound benefits the security of all NPT Parties. It demonstrates to everyone the commitment not to pursue nuclear weapons and makes peaceful nuclear cooperation possible. So we will continue working with Parties to gain acceptance of the Additional Protocol, along with a Comprehensive Safeguards Agreement, as the standard for NPT verification and encourage further IAEA work to strengthen safeguards implementation so that the international community can be assured that a state's nuclear activities are entirely peaceful.

The United States also wishes to highlight the indispensable role of nuclear security and prevention of nuclear terrorism in advancing our nonproliferation goals. We have made great strides to address this threat through the Nuclear Security Summit process launched by President Obama in 2010 and look forward to expanding our partnerships, accelerating cooperation, and establishing durable institutions to carry on this vital work. The IAEA's International Conference on Nuclear Security this July will be an important gathering to advance this urgent priority.

Peaceful Uses

Mr. Chairman, when nuclear security and nonproliferation are reinforced, we are in a stronger position to promote the safe and responsible use of nuclear energy. We recognize the right of NPT Parties to access peaceful nuclear energy consistent with the Treaty's nonproliferation provisions. There is no more generous partner than the United States in technical cooperation. We contribute more than any single state to IAEA promotional programs that benefit the Treaty's non-nuclear weapon states, and pledged to provide $50 million over five years to a new IAEA Peaceful Uses Initiative (PUI). More than 120 IAEA Member States have benefited from PUI assistance.

Nations will make their own choices about nuclear energy. But international cooperation can offer new and beneficial opportunities that empower those choices and ensure the safe, secure and peaceful use of nuclear energy. President Obama has called for new frameworks for civil nuclear cooperation, and my government supports the establishment of an IAEA fuel bank

and related measures to assure nuclear fuel supply and that contributes to the Treaty's nonproliferation goals.

Conclusion

Before closing, I would like to comment on efforts to hold a conference on a WMD-free zone in the Middle East, a subject on which the United States will have more to say later. I emphasize that the United States supports the goal of establishing a WMD-free zone in the Middle East and the convening of a conference involving all states in the region to discuss it. Although it proved not possible to meet in Helsinki last year, my government remains firmly committed to working with the Facilitator, the other conveners, and with all states in the region to take steps that will create conditions for a successful and meaningful conference. On that basis, we hope the relevant parties can agree to hold it soon. Reaching Helsinki, and success at Helsinki, will require the states of the region to engage with each other and I know that all State Parties support such engagement.

Mr. Chairman, the NPT remains the cornerstone of the nuclear nonproliferation regime and a basis for international nuclear cooperation. The regime has its challenges, but none are insurmountable and none are beyond discussion.

We look forward to a productive dialogue at this Preparatory Committee meeting. We will work together to ensure the Treaty's contributions to international peace and security are strengthened and endure. Thank you.

* * * *

The U.S. delegation participated in a session of the Preparatory Committee on security assurances on April 25, 2013. The remarks at that session by Jeffrey Eberhardt, Director of the Office of Multilateral and Nuclear Affairs in the Bureau of Arms Control, Verification and Compliance at the U.S. Department of State, are excerpted below and available at *www.state.gov/t/isn/rls/rm/2013/208047.htm*.

* * * *

Mr. Chairman, the United States recognizes the importance of security assurances to states that have forsworn nuclear weapons and that abide by their nuclear nonproliferation obligations. We would like to summarize once again the U.S. commitment to providing such assurances.

The United States released its Nuclear Posture Review in April 2010, after completing a comprehensive assessment of U.S. nuclear deterrence policy, strategy, and force posture. One result of that assessment was that the United States strengthened its long-standing negative security assurance associated with the Nuclear Non-Proliferation Treaty (NPT) in several ways.

Specifically, the 2010 Nuclear Posture Review declared that the United States 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 nonproliferation obligations. This revised assurance is intended to underscore the security benefits of adhering to and fully complying with the NPT.

Even for states not eligible for this assurance, the 2010 Nuclear Posture Review made clear that the United States would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or our allies and partners. It is in the U.S. interest and that of all nations that the nearly 68-year record of non-use of nuclear weapons be extended forever.

At their 2012 Chicago Summit, NATO Allies acknowledged the importance of the negative security assurances offered by the United States, the United Kingdom and France. The Allies further recognized the value that these statements can have in seeking to discourage nuclear proliferation.

Mr. Chairman, the United States also supports well-crafted nuclear-weapon-free zones (NWFZs) that are vigorously enforced and developed in accordance with the guidelines adopted by the United Nations Disarmament Commission. We are a Party to both Protocols to the Treaty of Tlatelolco, one of which provides a legally-binding negative security assurance. In recent years, the United States has worked toward extending legally binding negative security assurances by pursuing ratification of protocols to a number of other nuclear-weapon-free zone treaties. The United States has signed the Protocols to the African and South Pacific NWFZs, and the Obama Administration sent those Protocols to the U.S. Senate for its advice and consent. The nuclear-weapon States (or "P5") and ASEAN have negotiated a revised Protocol to the Southeast Asia NWFZ (SEANWFZ) Treaty that resolved outstanding differences, and we hope that the Protocol signing can take place soon. The United States also remains committed to consulting with the Central Asia NWFZ (CANWFZ) Parties to reach an agreement that would allow the P5 to sign the Protocol to that treaty. A longer term goal is achievement of a Middle East zone free of all weapons of mass destruction. The United States supports the goal of a Middle East zone free of all weapons of mass destruction and remains committed to working actively with the facilitator, co-conveners and all states in the region, to create the conditions for a successful Helsinki Conference, an issue we will address further under Cluster II. Allow me to note that consistent with the UN Disarmament Commission guidelines, the mandate for any zone cannot be imposed from outside or without the consent of all concerned states.

Mr. Chairman, in closing, we recognize that NPT States that forgo nuclear weapons and are in compliance with their nuclear nonproliferation obligations have a legitimate interest in not being subject to nuclear threats or attacks. The strengthened U.S. negative security assurance announced in the 2010 Nuclear Posture Review, together with our support of nuclear-weapon-free zones, demonstrates an enduring commitment on the part of the United States to providing such negative security assurances. At the same time, it underscores the security benefits of adhering to and fully complying with the NPT and affirming the responsibility we all share to strengthen the nuclear nonproliferation regime.

* * * *

On April 29, 2013, Mr. Countryman again addressed the Preparatory Committee in Geneva, providing the U.S. statement on NPT regional issues, addressing in particular the Middle East. That statement is excerpted below and available at *www.state.gov/t/isn/rls/rm/2013/208531.htm*.

---

* * * *

The United States continues to support universal adherence to the Treaty, and we seek to further strengthen and uphold the Treaty. Developments in the Middle East continue to present challenges to the NPT and to our collective security.

The United States remains committed to convening a conference on a Middle East zone free of weapons of mass destruction. We regret that it proved impossible to meet last year as envisioned in the 2010 NPT Review Conference Final Document. This was not a breach of the Action Plan as some suggest—but it was a major disappointment. Still, we are not discouraged. We missed an important deadline—but we have not yet missed the opportunity to transform the security environment of the region.

In fact, unprecedented diplomatic efforts continue to be directed at making the conference a reality. But the responsibility to hold the conference does not fall solely to the Conveners and Facilitator. We remain prepared to assist in any way requested, but leadership must also come from the states of the region. They will be responsible for the big idea—creating the political and security conditions that would make a WMD-free zone an achievable concept. And they need to start now by showing creative thinking on a scale that is smaller, but big enough to get us to the first step, to Helsinki.

Direct engagement of the concerned parties is the pathway to a successful and meaningful conference. Participation in Helsinki of all regional states, as the Action Plan foresees, will only be possible if each State believes its key concerns can be addressed within the agenda of the Conference. And that agenda simply cannot be dictated from outside the region—it must be consensual among the States who must live with the agenda. To agree to dialogue, with the aim of reaching consensus on such an agenda, is not a concession. To impose pre-conditions on a dialogue serves only to delay its initiation, without changing its substance.

* * * *

This brings us to the important role of the Facilitator. The United States has full confidence in Ambassador Laajava and welcomes his report. Laajava is the most fair-minded, creative, and patient diplomat I know. His team has been untiring in an effort to take the first step on an initiative that has never been attempted on the planet, creation of a weapons-free zone in a region where both states and non-state actors daily use weapons, one against another. We agreed with his conclusion: before we can take a step to Helsinki, we need first to take one half-step—to direct multilateral consultations. We urge all states of the region to recognize the opportunity presented by these preparatory consultations and that they can be arranged soon. I continue to

believe that a conference could be held at an early date, within months, if there existed the political will of the relevant parties to reach consensus on an agenda and other arrangements for the conference.

* * * *

The United States is gravely concerned about the Iranian nuclear program. Iran is not just in violation of its international nuclear obligations, but is contemptuous of those obligations, and of the instruments that create those obligations: the United Nations Security Council, the IAEA Board of Governors, and the Non-Proliferation Treaty itself.

Since many undeclared elements of its nuclear program became public in 2002, Iran has yet to cooperate fully with the IAEA or negotiate seriously with the P5+1 to address the international community's legitimate concerns. As detailed in numerous reports by the IAEA Director General, the IAEA has credible information that raises serious concerns regarding possible military dimensions to Iran's nuclear program, including activities by Iran related to the development of a nuclear payload for delivery by a ballistic missile. The IAEA's findings, compounded by Iran's longstanding noncompliance with its international nuclear obligations, call into question Iran's stated claims that its nuclear program is exclusively peaceful. We are disappointed that Iran has missed numerous opportunities to address the international community's concerns.

Mr. Chairman, the United States does not dispute the right of states that comply with their nonproliferation obligations to pursue nuclear energy for peaceful purposes. Regrettably, Iran has persistently failed to respect multiple Security Council resolutions that Iran must cooperate with the IAEA and suspend its proliferation-sensitive nuclear activities, including uranium enrichment. As President Obama has stated, Iran can enjoy peaceful nuclear power while still meeting its international obligations and providing clear assurances to the international community that it is not pursuing a nuclear weapon.

With regard to Syria, it has been nearly two years since IAEA Director General Amano reported that the facility destroyed in 2007 at Dair Alzour was "very likely" a nuclear reactor that should have been declared to the Agency pursuant to Syria's safeguards agreement. Consequently, in June 2011 the IAEA Board of Governors found Syria in noncompliance with its safeguards agreement and, in accordance with the IAEA Statute, referred the matter to the UN Security Council. To date, Syria has not taken any concrete steps to address the outstanding serious questions about its clandestine nuclear activities. The Assad regime's brutal campaign of violence against the Syrian people and the resulting unrest cannot be an excuse for not cooperating with the IAEA. Syria remains obligated to remedy its noncompliance immediately and demonstrate a constructive approach in its relations with the IAEA and the international community.

Noncompliance should be a matter of serious concern to NPT Parties. As agreed in the 2010 Action Plan, it is vitally important that all NPT Parties support the resolution of all cases of noncompliance with IAEA safeguards and other nonproliferation requirements. The Treaty and the regime can only be as strong as the Parties' will to uphold the Treaty's integrity.

* * * *

On April 30, 2013, John Fox, Director of the Office for Multilateral Nuclear and Security Affairs, in the Bureau of International Security and Nonproliferation of the Department of State delivered the U.S. statement on peaceful uses of nuclear energy at the Preparatory Committee. Mr. Fox's statement appears below and is available at *www.state.gov/t/isn/rls/rm/2013/208642.htm*.

---

* * * *

I am very pleased to have the chance to speak today to reaffirm the commitment of the United States to promoting the peaceful uses of nuclear energy, as called for under Article IV of the Treaty. …

The United States has consistently been a leader in providing financial, technical, and political support to strengthen this important pillar of the Treaty, including through bilateral agreements and our contributions to programs being implemented by the International Atomic Energy Agency (IAEA). U.S. support to the IAEA's Technical Cooperation program has been significant and long-standing. Last year, the United States contributed nearly 22 million dollars to the Technical Cooperation Fund (TCF), and we pledged over four million dollars in additional funding towards training, fellowships, and cost-free experts. We encourage all countries to meet their TCF obligations, which provide critical stability in the planning and implementation processes.

Over and above our TCF contributions, the United States in 2010 pledged $50 million over five years to a new IAEA Peaceful Uses Initiative (PUI), and to work with others to match that pledge. PUI support provides the Agency with additional resources and flexibility to respond to urgent and unanticipated needs, such as monitoring radioactivity in the marine environment from the Fukushima accident and responding to sustained drought in the Sahel region.

The United States has now contributed nearly $26 million to the PUI. This includes over $2 million in new PUI funding to enhance nuclear infrastructure capacity building in states introducing or expanding nuclear power. And in the next several weeks we will commit additional PUI funding for projects on food safety in Latin America, sustainable uranium mining and milling in Africa, protection of the marine environment, and a pilot project to strengthen national capacities to interpret hydrological data and improve the sustainable use of water resources.

* * * *

The catastrophe at Fukushima in 2011 has not altered the underlying factors that have led to an increased interest in nuclear power, including increasing global demand for energy and concerns about climate change, energy security, and uncertainty about fossil fuel supplies. The

United States strongly supports the safe and secure expansion of nuclear power for NPT Parties that are in compliance with their obligations under the Treaty, and we look forward to participating in the upcoming International Ministerial Conference on Nuclear Power in the 21st Century in St. Petersburg. We appreciate the efforts of the IAEA, the Nuclear Energy Agency of the Organization for Economic Co-operation and Development, and Russia for organizing and hosting this important event.

Such conferences can usefully highlight the global scale of ongoing nuclear cooperation. For our part, the United States has in place bilateral nuclear cooperation agreements with 48 countries, the IAEA, and Taiwan, and we are negotiating others with States that share our commitment to peaceful uses of nuclear energy and nonproliferation. The global market for access to peaceful nuclear technology is robust and working: from 2009-2012, for example, U.S. exports to NPT Parties were valued at $13.6 billion.

We also strongly support international efforts to develop multilateral approaches to the fuel cycle. This includes the IAEA fuel bank that has been funded through contributions from the United States, the EU, the UAE, Kuwait, Norway and the U.S. Nuclear Threat Initiative, as well as complementary initiatives approved by the IAEA Board of Governors. The United States also recently established the American Assured Fuel Supply, which is using over 17 metric tons of highly enriched uranium removed from military programs and down-blending it to low enriched uranium to be available to states facing an interruption in fuel supply. This serves as a powerful example of the mutually reinforcing nature of the NPT's pillars.

Such multilateral approaches to the fuel cycle will help facilitate implementation of Article IV, support our common goal of expansion of peaceful nuclear energy without increasing the risk of nuclear weapons proliferation, and reinforce the option of states to rely on the global market for their fuel service needs.

* * * *

2. Comprehensive Nuclear Test Ban Treaty

On September 27, 2013, the States Signatories to the Comprehensive Nuclear Test Ban Treaty ("CTBT") met in New York for a conference held in accordance with Article XIV of the Treaty to discuss concrete measures to facilitate the entry into force of the CTBT. The Final Declaration of the conference is available at *www.ctbto.org/fileadmin/user_upload/Art_14_2013/Statements/Final_Declaration.pdf*. The statement of the United States, as delivered at the conference, is excerpted below and also available at *www.ctbto.org/fileadmin/user_upload/Art_14_2013/Statements/united_states.pdf*.

* * * *

In June of this year, President Obama reaffirmed that "we will work to build support in the United States to ratify the Comprehensive Nuclear-Test-Ban Treaty." The President's words in Berlin underscore our policy, as stated in the 2010 Nuclear Posture Review, that "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." The United States has observed a moratorium on nuclear explosive testing since 1992. Hence, even before the completed negotiation of the CTBT, the United States was in compliance with what would become the central prohibition of the treaty.

Furthermore, with a global ban on nuclear explosive tests in place, states interested in pursuing or advancing their nuclear weapons programs would have to either risk deploying weapons with uncertain effectiveness or face international condemnation, and possible sanctions, for conducting nuclear explosive tests.

A CTBT that has entered into force would further benefit national and international security by facilitating greater international cooperation on other arms control and nonproliferation priorities.

In the 17 years since the Treaty was opened for signature, the Provisional Technical Secretariat (PTS), and the States Signatories have made great strides in building out the Treaty's verification regime. What was, nearly two decades ago, just a concept is now a nearly complete International Monitoring System (IMS) that has effectively demonstrated its capabilities under real-world conditions, detecting and helping states identify the three nuclear explosive tests conducted by North Korea over the past several years. In addition, following the Fukushima nuclear crisis, we saw how the IMS can be useful for non-verification related purposes, such as tsunami warnings and tracking radioactivity from reactor accidents.

In addition, the On-Site Inspection (OSI) element has developed into a useful tool that will be capable of conducting robust and effective inspections at entry into force. Next year's Integrated Field Exercise, to be held in Jordan, is poised to demonstrate that capability and help ensure that an OSI capability is ready to go as soon as the Treaty enters into force.

The United States applauds the efforts of the Provisional Technical Secretariat (PTS) to plan and prepare for this exercise. We are interested particularly in testing how the integration of the various inspection techniques allowed under the Treaty will help provide States Parties with the most detailed and robust set of technical data and information on which to make a judgment of compliance with the Treaty.

With advancements in verification and the U.S. Stockpile Stewardship Program in mind, we have begun the process of engaging the American public. We know that the Treaty is not at the forefront of people's minds these days and that it is very technical in nature. We want people to take their time and absorb and understand the rationale behind it. There are no set timeframes to bring the Treaty to a vote, and we are going to be patient, but we also will be persistent in our outreach efforts.

Of course, we do not expect people to be in receive-only mode, so we are eager to start a discussion. It is only through discussion and debate that we will work through questions and concerns about the Treaty.

Madame President, ladies and gentleman, the United States is committed to the CTBT and we want to see it enter into force, but we cannot do it alone. We call on all governments to declare or reaffirm their commitment not to test. The CTBT is in the security interest of every nation, so there is absolutely no reason for any other State to wait on us or any other Annex 2 State.

Before I conclude, I would like to congratulate Iraq for becoming the 161st nation to ratify the CTBT. Also, congratulations to Chad, Guinea-Bissau, Guatemala, Indonesia, and Brunei Darussalam, all of whom have ratified the Treaty since our last conference. Ratifying the CTBT provides a strong example of the positive leadership role all states can play in the global effort to prevent the spread of nuclear weapons. We call on the remaining Annex 2 States to move forward toward ratification.

This Administration realizes that this will be a difficult task on many levels, but it is nonetheless committed to building support for the CTBT. For our part, we will continue efforts to convince the Senate and the American people of what we know to be true: that the CTBT will benefit the security of the United States and of the world.

* * * *

3. Fissile Material Cut-off Treaty

On March 12, 2013, Ambassador Laura Kennedy, U.S. Permanent Representative to the Conference on Disarmament, delivered a statement (excerpted below) to the Conference on Disarmament in Geneva regarding the Fissile Material Cut-off Treaty ("FMCT"). Ambassador Kennedy's statement, available at *http://geneva.usmission.gov/2013/03/12/ambassador-kennedy-on/*, refers to UN General Assembly Resolution 67/53, adopted in December 2012. U.N. Doc. A/RES/67/53. Resolution 67/53 created a group of governmental experts ("GGE") to make recommendations that could contribute to the conclusion of a FMCT.

---

* * * *

Madam President, thank you for the opportunity to address this plenary on the Fissile Material Cutoff Treaty—FMCT. The negotiation of an FMCT has been an issue at the core of this Conference's agenda for many years. It is a central tenet of President Obama's Prague vision of a world without nuclear weapons — part of the step by step mutually reinforcing process to get there. Many times the international community has underlined the centrality of FMCT to nuclear disarmament. The international community has long been ready to negotiate FMCT. For no other nuclear disarmament measure has the technical and conceptual ground work been better prepared than it has for FMCT. The 2010 NPT Review Conference Action Plan reaffirms

FMCT's priority and the primacy of achieving it as a logical and essential next step on the path towards global nuclear disarmament. We much prefer that FMCT be dealt with here in the CD, a well-established venue for negotiations that includes every major nuclear-capable state and operates by consensus.

But while there are no technical or conceptual obstacles to the commencement of FMCT negotiations, there are political ones. As you are well aware, these are self-inflicted. A Program of Work including FMCT negotiations, CD/1864, was approved by this Conference in the spring the CD have been blocked and the will of the international community has been repeatedly thwarted. Efforts by several CD members to craft sensible, compromise language have all failed, including two promising Program of Work proposals offered by the distinguished representatives of Egypt and Hungary, respectively, and an earlier effort by Brazil, when the equally distinguished Brazilian Ambassador presided over the CD. The deadlock in the CD over FMCT appears as intractable today as it ever has, though it need not be.

Years of frustration and inactivity led to a predictable result, with the 2012 UNGA First Committee taking action. While not enthusiastic about increasing UNGA involvement in CD-related issues, the United States assessed that the Canadian-sponsored FMCT resolution (67/53) establishing a Group of Government Experts (GGE) was balanced, consensus-based, and could lead to future FMCT negotiations in the CD. This is why in the end we decided to support the Canadian resolution and why we will encourage others to support its work. It's not a substitute for the CD; it's an impetus for the CD to regain lost credibility by returning to the role carved out for it as a forum for multilateral disarmament negotiations. We intend to actively participate in the GGE, if invited, and we will encourage other countries that would be directly affected by an FMCT to do the same. As the Canadian Ambassador noted, the UN Secretary General invited views on FMCT in this regard. The U.S. will provide such views by May 15, as requested, and hopes all other states will do so as well.

Madam President, my delegation has already outlined our substantive views on a Fissile Material Cutoff Treaty in past plenaries, and in other meetings held over the past two years on the "margins" of the Conference on Disarmament. The U.S. shares the international goal of a non-discriminatory treaty that halts the production of fissile material for use in nuclear weapons or other nuclear explosive devices, and that is internationally verifiable. An FMCT would be an important, international achievement, both for nonproliferation and disarmament. It would effectively cap the fissile materials available for use in nuclear weapons. Put alongside the Comprehensive Nuclear-Test-Ban Treaty (CTBT), measures that constrain the technological sophistication of a country's nuclear arsenal, and its size, would be in place. An FMCT would also fold additional enrichment and reprocessing facilities into the international monitoring regime of IAEA safeguards. It would help consolidate the advancements in arms control since the end of the Cold War, and provide the basis for further, deeper reductions in nuclear arsenals globally.

Consistent with the Shannon mandate, the ultimate scope of the Treaty will be an issue for negotiations. The U.S. position on FMCT scope is well known. It is that FMCT obligations, including verification obligations, should cover new production of fissile material. Existing stockpiles should be dealt with separately, through other agreements and voluntary measures.

We have already undertaken such agreements with Russia, and have taken unilateral steps in addition. In 1994, the United States removed 174 metric tons of highly enriched uranium from its weapons program. In 2005, the United States announced that an additional 200 metric tons would be removed, which would be enough for more than 11,000 nuclear weapons. In an arrangement with Russia, 472 metric tons of Russian highly enriched uranium has now been down-blended for use as commercial reactor fuel and that number is expected to reach the 500 MT target this year. In addition, more than 60 metric tons of plutonium was removed from U.S. defense stocks, of which 34 metric tons was included in the U.S.-Russia Plutonium Management and Disposition Agreement (PMDA). That agreement commits each country to dispose of at least 34 metric tons of excess weapon-grade plutonium, enough in total for approximately 17,000 nuclear weapons. Disposition will be subject to IAEA monitoring and will transform the material into forms that cannot be used for nuclear weapons.

President Obama has accompanied this steady drawdown of fissile material stocks with an accelerated focus on securing fissile material worldwide—a high level, international focus, which he initiated at the Nuclear Security Summit in 2010, followed by the Seoul Summit in 2012. We look forward to the next summit in The Hague.

In short, the U.S. and Russia, the two countries with the largest fissile material stocks have been reducing our stockpiles over the course of many years–more specifically in the 18 years since the Shannon Mandate. The old debate over FMCT scope in the CD is behind the curve in this respect. Attempts to address existing stocks multilaterally and link them to a ban on new production for weapons purposes will only complicate consensus on beginning a negotiation on an FMCT—we know that and have chosen to address stocks by other means. Furthermore, the longer production is not banned, the more stocks will accrue in countries, unlike the United States, that have not imposed a moratorium on production. All of this said, we are well aware that others have a differing view on the scope issue. That is what negotiations are for. It is not possible to resolve such difficult issues before negotiations even begin. Efforts to do so seem to have the effect, whether by design or inadvertently, of preventing negotiations.

As others here today, we have begun the 2013 session of the CD with renewed commitment to the negotiation of an FMCT, despite the stagnation of this body the last many years. Negotiations in the CD would neither discount nor override the national security concerns of any member; on the contrary, the security interests of all are assured by consensus in this Conference. Of course, our deliberations here today, no matter how substantive, are not a substitute for negotiations. The CD should take this important step in multilateral nuclear disarmament and initiate FMCT negotiations as soon as possible. We are ready to launch them.

* * * *

4. Nuclear Security

On January 31, 2013, Ambassador Bonnie Jenkins, U.S. Special Envoy and Coordinator for Threat Reduction Programs at the Department of State, addressed the 24th UN Conference on Disarmament. Her remarks are available in full at

www.state.gov/t/isn/rls/rm/2013/203779.htm. Excerpts below relate to nuclear security. Other excerpts from Ambassador Jenkins' remarks appear in sections C. and D., *infra*.

---

* * * *

…[T]he nuclear security summit process obviously focuses on just one type of these serious threats. As envisioned, the 2010 Nuclear Security Summit in Washington brought high-level attention and prominence to the issue of nuclear security as countries develop a common understanding of the threat posed by nuclear terrorism and agreed on effective measures to prevent nuclear terrorism.

The 2010 Summit produced a Communique and detailed Work Plan that articulated a common commitment to focus collectively on minimizing the use and locations of sensitive nuclear materials and continually exchanging information on best practices and practical solutions.

The Summit achieved crucial international consensus on three key areas:

- The danger of nuclear terrorism is one of the greatest threats to our collective security
- Terrorist networks such as al Qaeda have tried to acquire the material for a nuclear weapon, and if they ever succeeded, they would surely use it, and
- Were they to do so, it would be a catastrophe for the world – causing extraordinary loss of life, and striking a major blow to global peace and stability

The 2010 Washington communique, agreed amongst the participants, also:

- Committed leaders to the principles of nuclear security
- Reaffirmed the fundamental responsibility of States, consistent with their respective international obligations, to maintain effective security of all nuclear materials
- Promoted focused national efforts to improve security of all weapons-usable nuclear materials
- Committed States to work cooperatively as an international community to advance nuclear security, requesting and providing assistance where necessary
- Called for securing all vulnerable nuclear material in four years

The 2012 Nuclear Security Summit in Seoul brought together 58 world leaders to report on their progress in meeting goals set out at the 2010 Washington Summit. The Summit highlighted that eighty percent of the commitments made by nations at the 2010 Summit have been fulfilled. These are all efforts that combat the threat of nuclear terrorism.

For this reason, the Seoul Summit was another milestone in our global efforts at securing vulnerable nuclear material and preventing nuclear terrorism. Other major accomplishments we have seen since the 2010 Summit include

Summit participants and others are also using every tool at their 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

Nearly 20 nations have now ratified treaties and international partnerships that are at the center of these efforts

Mexico and Ukraine joined the ranks of nations that have removed all the highly enriched uranium from their territory.

The United States and Sweden announced the successful removal of plutonium from Sweden.

The Japan-U.S. Nuclear Security Working Group made progress on promoting robust security for nuclear materials at civilian nuclear facilities and during transport.

The United States, Russia and Kazakhstan unveiled the near competition of a joint project to eliminate the remnants of past nuclear testing activities at a former nuclear test site

More than a dozen weapons worth of nuclear material was entombed using special cement and security barriers and is now safely secured

Summit participants also discussed some topics new to the Summit process such as nuclear safety and radiological terrorism. However, the Summit was about more than just reporting on past progress.

At the end of the Summit, countries agreed to a detailed Communiqué that advances important nuclear security goals. The Seoul Communique sets out 11 priority areas in nuclear security, including:

1. security, accounting, and control of nuclear materials and minimizing the use of highly-enriched uranium
2. radioactive sources
3. nuclear security and safety
4. transportation security
5. combating illicit trafficking
6. nuclear forensics
7. nuclear security culture
8. information security

Many countries agreed to a number of multilateral joint commitments or what we called "gift baskets," each of which has detailed work plans to ensure their success. These gift baskets include work on:

thwarting the illicit trafficking of nuclear or other radioactive materials

drafting national legislation to implement nuclear security agreements

measures to detect and prevent nuclear terrorism

commitments among the United States and several European nations to work toward eliminating the use of potentially vulnerable highly enriched uranium (HEU) in isotope production by the end of 2015, while maintaining a reliable supply of medical isotopes used to diagnose cancer and heart disease

promoting the security of nuclear materials while in transit

establishing and coordinating centers of excellence

Despite the successes, there is still work to be done to ensure all nuclear material is secure and we have done all we can to prevent nuclear terrorism. Nuclear material continues to be stored without adequate protection, at risk of exploitation by terrorists and criminal gangs that have expressed an interest. We look forward to working with our international partners to further secure vulnerable nuclear material and make progress toward the President's nonproliferation agenda.

The next summit will be in 2014 and hosted by The Netherlands. We seek additional progress at that event in the global effort to secure all nuclear material to ensure those materials do not get into the hands of terrorists. Two Dutch priorities for the 2014 summit are ratification of the amended CPPNM by countries that have not yet done so and promoting/advancing the use of voluntary IAEA IPPAS (International Physical Protection Advisory Service) missions.

* * * *

5. Nuclear Safety

In 2013, there was significant progress toward the establishment of a global nuclear liability regime allowing for compensation in the event of a nuclear accident, as called for by the IAEA's Action Plan on Nuclear Safety. In particular, 2013 saw progress toward bringing into force the Convention on Supplementary Compensation for Nuclear Damage ("CSC"). See *Digest 2008* at 993-99 for background on the CSC.

First, on August 29, 2013, the United States and France issued a Joint Statement on Civil Liability for Nuclear Damage, identifying their shared views on civil nuclear liability and support for the establishment of a global nuclear liability regime in accordance with the IAEA's Action Plan on Nuclear Safety. A Department of Energy article about the Joint Statement, available at *http://energy.gov/articles/united-states-and-france-sign-joint-statement-civil-liability-nuclear-damage*, quotes U.S. Secretary of Energy Ernest Moniz as follows:

> The signing of this joint statement by our two countries marks a major milestone in moving towards an important recommendation of the IAEA: the creation of a global nuclear liability regime, and I urge every country to take the steps necessary to become a member. In addition, this statement recognizes the importance of bringing the Convention on Supplementary Compensation for Nuclear Damage (CSC) into effect as an initial step. The United States is working to bring the CSC into effect during the next twelve months.

The DOE article also summarizes the Joint Statement commitments of the United States and France to:

- Work together towards achieving a global regime based on treaty relations among the United States, France, and other countries that might be affected by a nuclear accident;
- Coordinate their actions in encouraging adherence to the enhanced international nuclear liability instruments, including, as appropriate, the revised Paris Convention (together with the revised Brussels Convention) or the revised Vienna Convention, which may be linked by the Joint Protocol, and the CSC, with an initial step being the entry into force of the CSC; and
- Encourage countries to have national laws that fully incorporate international principles, including channeling all liability for nuclear damage exclusively to the operator on the basis of strict liability, and recent enhancements to those principles, as well as best practices designed to improve compensation of nuclear damage.

Second, on November 4, 2013, at the Second Meeting of the United States-Japan Bilateral Commission on Civil Nuclear Cooperation, the United States welcomed Japan's announcement of its intention to join the CSC. A Department of Energy fact sheet about the November 4 meeting, available at *http://energy.gov/articles/factsheet-second-meeting-united-states-japan-bilateral-commission-civil-nuclear-cooperation*, includes the following regarding the CSC and the significance of Japan joining:

> Japan and the United States noted that this important Convention will enter into force 90 days after Japan's deposit of its appropriate instrument. They recognize that Japan's joining the CSC helps to facilitate U.S. commercial engagement in the Japanese nuclear sector, including support to the ongoing cleanup of contaminated water at the Fukushima NPS [Nuclear Power Station], as well as the decommissioning activities at the site.
>
> Japan and the United States committed to work together to establish a global nuclear liability regime by encouraging other countries to join the CSC, thereby achieving a major objective of the Action Plan on Nuclear Safety adopted by the International Atomic Energy Agency.

Third, Canada signed the CSC on December 3, 2013, bringing to 17 the number of signatories and bringing the treaty closer to entering into force. Mauritius became the 16th signatory to the CSC on June 24, 2013. See IAEA June 26, 2013 news story, available at *www.iaea.org/newscenter/news/2013/mauritius.html*. The CSC will come into force on the ninetieth day after the ratification, acceptance or approval by at least five signatory states with a minimum of 400,000 units of installed nuclear capacity. Four signatory states had ratified the CSC as of December 2013, including the United States.

6. Country-Specific Issues

a. Democratic People's Republic of Korea ("DPRK" or "North Korea")

After North Korea conducted a third nuclear test in violation of previous UN Security Council resolutions, the Security Council responded. On February 12, 2013, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, delivered the remarks excerpted below and available at *http://usun.state.gov/briefing/statements/204033.htm*. For discussion of sanctions on North Korea, see Chapter 16.

---

* * * *

…The Security Council, as you know, just met to discuss North Korea's highly provocative nuclear test. Countries around the world, including every member of the Security Council, agreed that this test was an extremely regrettable act that further undermines international peace and security, as well as that of the region.

The nuclear test directly violates the DPRK's obligations under several unanimous Security Council resolutions, including 1718, 1874, and 2087. Moreover, the test contravenes North Korea's commitments under the September 2005 Joint Statement of the Six-Party Talks and increases the risk of proliferation of weapons of mass destruction.

North Korea does not and will not benefit from violating international law. Far from achieving its stated goal of becoming a strong and prosperous nation, the DPRK has instead increasingly isolated and impoverished its people through its ill-advised pursuit of weapons of mass destruction and their means of delivery.

North Korea's continued work on its nuclear and missile programs seriously undermines regional and international peace and security and threatens the security of a number of countries, including the United States. When the Council responded to the last DPRK provocation and violation of its obligations, we said—and the Council said—that it was clearly committed in Resolution 2087 to take, and I quote, "significant action" in the event of any further launch using ballistic missile technology or another nuclear test. And indeed, we will do so.

To address the persistent danger posed by North Korea's threatening activities, the UN Security Council must and will deliver a swift, credible, and strong response by way of a Security Council resolution that further impedes the growth of DPRK's nuclear weapons and ballistic missile programs and its ability to engage in proliferation activities. In the days ahead, we will consult closely with other Council members and concerned UN member states to pursue appropriate further action.

* * * *

On March 7, 2013, Ambassador Glyn Davies, U.S. Special Representative for North Korea Policy, testified before the U.S. Senate Committee on Foreign Relations. His testimony, excerpted below, is available at *www.state.gov/p/eap/rls/rm/2013/03/205691.htm*.

---

* * * *

Nearly sixty years have passed since the conclusion of the armistice that ended the hostilities of the Korean War, yet North Korea still persists as one of the thorniest challenges confronting the United States and the international community. Pyongyang's February 12 announcement of a third nuclear test—conducted in brazen defiance of the demands of the United Nations Security Council—and its subsequent threats to conduct even more follow-on "measures" are only the latest in a long line of reminders that the DPRK's nuclear weapons and ballistic missile programs and proliferation activities pose serious threats to U.S. national security, to regional security in the Asia-Pacific, and to the global nonproliferation regime.

Pyongyang continues to violate its international obligations and commitments, including to denuclearize. Its human rights record remains deplorable. Its economy is stagnant. Its people are impoverished. It pours significant sums into nuclear and ballistic missile programs that are forbidden by the United Nations. The leadership's choices are isolating North Korea from the international community. International outrage against North Korea and its provocative and threatening actions, meanwhile, continues to grow.

The DPRK has consistently failed to take advantage of the alternatives available. The United States offered—and has continued to offer—Pyongyang an improved relationship with the United States and integration into the international community, provided North Korea demonstrated a willingness to fulfill its denuclearization commitments and address other concerns. The DPRK rebuffed these offers and instead responded with a series of provocations that drew widespread international condemnation.

Pyongyang appeared prepared to enter a period of serious diplomatic engagement in mid-2011, and the United States responded with a proactive, nearly-year-long diplomatic effort to push forward on denuclearization in a way that would lay the groundwork for improved bilateral relations. Starting in July 2011 and continuing over the next ten months, the United States and the DPRK held three rounds of bilateral denuclearization talks on three continents. In our meetings, we worked to forge the conditions necessary for resuming the Six-Party Talks, which had been stalled since 2008. Shortly after Kim Jong Un's assumption of power, we reached a modest but potentially important bilateral understanding announced on February 29, 2012.

Pyongyang announced its commitment to, among other things, a moratorium on nuclear tests, long-range missile launches, and all nuclear activity, including uranium enrichment activity, at the Yongbyon nuclear complex. North Korea also committed to allow International Atomic Energy Agency inspectors to return to Yongbyon to monitor the cessation of uranium enrichment and confirm the disablement of plutonium-related facilities there.

But just 16 days later, North Korea reneged on these commitments by announcing its intent to launch a satellite into orbit. Such launches use ballistic missile technology proscribed by multiple UN Security Council resolutions (UNSCRs), and we had made it abundantly clear during our negotiations that such a launch, even if characterized as a satellite launch, would be a deal-breaker. Pyongyang nevertheless conducted such a launch on April 13 and was greeted by deep international opprobrium. All five Six-Party partners—China, Russia, the United States, the Republic of Korea (ROK), and Japan—joined a long list of states publicly condemning Pyongyang's provocation. The UN Security Council unanimously issued a Presidential Statement condemning the act as a "serious violation" of UNSCRs 1718 and 1874, tightened existing sanctions, and made clear its commitment to "take action accordingly" in the event of another launch.

North Korea again brazenly defied the international community on December 12, 2012, with another long-range missile launch, again characterized by the DPRK as a satellite launch, in flagrant violation of UN Security Council resolutions 1718 and 1874 and in the face of united public and private calls by the international community to desist. Over 60 countries and international organizations issued statements criticizing the launch. The UN Security Council unanimously adopted UNSCR 2087, which condemned the launch, further expanded the scope of sanctions on the DPRK, and promised "significant action" in the event of a future DPRK missile launch or nuclear test.

The DPRK's February 12 announcement of a nuclear test, which Pyongyang proclaimed was targeted against the United States, represents an even bolder threat to U.S. national security, the stability of the region, and the global nonproliferation regime. The international response has been unprecedented. Over 80 countries and international organizations from all corners of the world have decried the test. Many are speaking out against DPRK provocations for the first time. As the list continues to grow, it is increasingly clear that an international consensus is coalescing in opposition to North Korea's destabilizing activities.

We are working with the international community to make clear that North Korea's nuclear test has costly consequences. In adopting Resolution 2087 in January after the December launch, the UN Security Council pledged to take "significant action" in the event of a nuclear test; we are working hard at the UN Security Council to make good on that pledge. We are intensively engaged with our Six-Party partners, members of the UN Security Council, and other UN member states on a strong and credible response by the international community.

China's support for firm action remains key, and we are deeply engaged with the Chinese in shaping an appropriate response. We are strengthening our close coordination with our Six-Party partners and regional allies. And—through a whole-of-government approach, working closely with our partners in the Department of Defense and other agencies—we will take the steps necessary to defend ourselves and our allies, particularly the ROK and Japan. We have reassured both Seoul and Tokyo, at the highest levels, of our commitment to extended deterrence through the U.S. nuclear umbrella, conventional capabilities, and missile defense.

North Korea's WMD, ballistic missile, conventional arms, and proliferation activities constitute a serious and unacceptable threat to U.S. national security, to say nothing of the integrity of the global nonproliferation regime, which many around the world have labored—

over generations—to devise, nurture, and enforce. Effective, targeted multilateral and national sanctions will consequently remain a vital component of our efforts to impede the DPRK's efforts to advance its nuclear weapons and ballistic missile programs and proliferation activities. UNSCR 2087 was an important step forward in this regard. Combined with the measures in resolutions 1718 and 1874, UNSCR 2087 further constricts North Korea's efforts to procure weapons components, send agents abroad, smuggle dual-use items, and make headway on its nuclear weapons and ballistic missile programs.

Full and transparent implementation of these resolutions by all UN member states, including China, is critical. We are actively engaged with the international community to underscore the importance of full enforcement of these measures.

We also continue to exercise national authorities to sanction North Korean entities, individuals, and those that support them in facilitating programs that threaten the American people. Most recently, on January 24, the Departments of State and the Treasury designated a number of North Korean individuals and entities under Executive Order 13382, which targets actors involved in the proliferation of weapons of mass destruction and their supporters. The Department of State designated the Korean Committee for Space Technology—North Korea's space agency—and several officials directly involved in North Korea's April 2012 and December 2012 launches, which contributed to the DPRK's long-range ballistic missile development efforts. The Department of the Treasury designated several Beijing-based North Korean officials linked to the DPRK's Tanchon Commercial Bank, which has been designated by the UN and the United States for its role in facilitating the sales of conventional arms, ballistic missiles, and related items. The Treasury Department also targeted Leader (Hong Kong) International Trading Limited, a Hong Kong-based firm, for its links to the Korea Mining Development Trading Corporation, the DPRK's premier arms dealer and exporter of missile- and weapon-related goods.

We will continue to take national measures as appropriate. We are also working closely with the UN Security Council's DPRK sanctions committee and its Panel of Experts, the EU and like-minded partners, and others around the globe to harmonize our sanctions programs and to ensure the full and transparent implementation of UNSCRs 1718, 1874, and 2087, which remain the heart of the multilateral sanctions regime.

Sanctions are not a punitive measure, but rather a tool to impede the development of North Korea's nuclear and missile programs and proliferation-related exports, as well as to make clear the costs of North Korea's defiance of its international obligations. Working toward our endgame—the verifiable denuclearization of the Korean Peninsula in a peaceful manner—will require an openness to meaningful dialogue with the DPRK. But the real choice is up to Pyongyang.

We remain committed to authentic and credible negotiations to implement the September 2005 Joint Statement of the Six-Party Talks and to bring North Korea into compliance with its international obligations through irreversible steps leading to denuclearization. The President made this clear last November when he said, "…let go of your nuclear weapons and choose the path of peace and progress. If you do, you will find an extended hand from the United States of

America." But let me state the obvious: North Korea's reckless provocations have certainly raised the bar for a return to dialogue.

The United States will not engage in talks for the sake of talks. Rather, what we want are negotiations that address the real issue of North Korea's nuclear program. Authentic and credible negotiations therefore require a serious, meaningful change in North Korea's priorities demonstrating that Pyongyang is prepared to meet its commitments and obligations to achieve the core goal of the September 2005 Joint Statement: the verifiable denuclearization of the Korean Peninsula in a peaceful manner.

This leads to some other important principles. First and foremost, the United States will not accept North Korea as a nuclear-armed state. We will not reward the DPRK for the absence of bad behavior. We will not compensate the DPRK merely for returning to dialogue. We have also made clear that U.S.-DPRK relations cannot fundamentally improve without sustained improvement in inter-Korean relations and human rights. Nor will we tolerate North Korea provoking its neighbors. These positions will not change.

In the meantime, active U.S. diplomacy on North Korea—on a wide range of issues—continues. Close coordination with our valued treaty allies, the ROK and Japan, remains central to our approach.

ROK President Park Geun-hye and President Obama agree on the need for continued close U.S.-ROK coordination on a range of security issues, including North Korea. We are confident of President Park's commitment to the U.S.-ROK alliance and anticipate close consultation with her administration on its North Korea strategy. Close consultation will also continue with Japan. During his visit to Washington in late February, Japanese Prime Minister Shinzo Abe and President Obama agreed to continue working together closely in responding to the threat posed by North Korea, including through coordination on sanctions measures.

We have also expanded our engagement by developing new dialogues on North Korea with key global actors who have joined the rising chorus of regional and global voices calling on North Korea to fulfill its commitments, comply with its international obligations, and refrain from provocative acts that undermine regional security and the global nonproliferation regime.

China, however, remains central to altering North Korea's cost calculus. Both geography and history have endowed the People's Republic of China with a unique—if increasingly challenging—diplomatic, economic, and military relationship with the DPRK. Close U.S.-China consultations on North Korea will remain a key locus of our diplomatic efforts in the weeks and months ahead as we seek to bring further pressure to bear on North Korea and, over the longer term, seek genuine diplomatic openings to push forward on denuclearization.

While denuclearization remains an essential focus of U.S. policy, so, too, does the welfare of North Korea's nearly 25 million people, the vast majority of whom bear the brunt of their government's decision to perpetuate an unsustainable, self-impoverishing military-first policy. While the DPRK devotes limited resources to developing nuclear weapons and ballistic missiles and devising ways to avoid sanctions, one in three North Korean children is chronically malnourished, according to a 2009 UNICEF estimate. An elaborate network of political prison camps in the country is reportedly estimated to contain 100,000-200,000 inmates, who are subjected to forced labor, torture, and starvation. It has been reported that whole families have

been condemned—in most cases without trial—when one member commits an alleged crime. The courageous and charismatic Shin Dong-hyuk, whose life story is chronicled in Blaine Harden's excellent book, Escape from Camp 14, was born in one of the most infamous political prison camps and spent the first 23 years of his life there. He was not only tortured and subjected to forced labor, but was also cruelly made to witness—at the age of 14—the execution of his mother and his brother.

Even outside this prison-camp system, the North Korean government dictates nearly all aspects of people's lives through a highly structured social classification system called songbun, which it uses to divide North Korea's population into categories. This system, in turn, determines access to education and health care, employment opportunities, place of residence, and marriage prospects. Improving human rights conditions is an integral part of our North Korea policy, and how the DPRK addresses human rights will have a significant impact on prospects for improved U.S.-DPRK ties.

The world is increasingly taking note of the grave, widespread, and systematic human rights violations in the DPRK and demanding action. UN High Commissioner for Human Rights Navi Pillay has called for an in-depth international inquiry to document abuses. We support this call, and next week, my colleague Special Envoy for North Korean Human Rights Issues Robert King will travel to Geneva to attend the UN Human Rights Council's 22nd session, where he will call attention to North Korea's human rights record and urge the adoption of an enhanced mechanism of inquiry into the regime's abuses against the North Korean people.

We continue, meanwhile, to engage countries across the globe to raise awareness about North Korea and enlist their help in pushing for action. We are also working with international and non-governmental organizations to improve the situation on the ground for the North Korean people, including by supporting the flow of independent information into the DPRK. Working with the Broadcasting Board of Governors, Voice of America, Radio Free Asia, and independent broadcasters in the ROK, we aim to provide information to the North Korean people and—over the longer term—plant the seeds for the development of civil society.

The Obama Administration's dual-track policy of engagement and pressure toward the DPRK reflects a bipartisan recognition that only a policy of openness to dialogue when possible, combined with sustained, robust pressure through sanctions when necessary, can maximize prospects for progress in denuclearizing North Korea.

Progress on this decades-old problem will not be achieved easily or quickly. We cannot and should not dignify or, worse, feed the North Korean narrative that U.S. actions determine DPRK behavior. North Korea makes its own choices, selects its own timing, and is alone responsible for its actions. Similarly, we need to bear in mind that this is certainly not now—if it ever truly was—solely or even primarily a bilateral U.S.-DPRK issue. It is, rather, increasingly a global issue that requires an entrepreneurial approach, multilateral diplomacy and—yes—continuing, robust American leadership.

But above all else, genuine progress requires a fundamental shift in North Korea's strategic calculus. The DPRK leadership must choose between provocation or peace, isolation or integration. North Korea will not achieve security, economic prosperity, and integration into the international community while it pursues nuclear weapons, threatens its neighbors, tramples on

international norms, abuses its own people, and refuses to fulfill its longstanding obligations and commitments.

The international community has been increasingly clear about this, and so have we. The DPRK leadership in Pyongyang faces sharp choices. And we are working to further sharpen those choices. If the North Korean regime is at all wise, it will re-embark on the path to denuclearization for the benefit of the North Korean people, the Northeast Asia region, and the world.

* * * *

b. Iran

On May 13, 2013, the United States provided a statement in protest of Iran's rotation as President of the Conference on Disarmament ("CD"). Erin Pelton, spokesperson for the U.S. Mission to the UN, delivered the statement, excerpted below, and available at *http://usun.state.gov/briefing/statements/209337.htm*.

* * * *

Iran's upcoming rotation as President of the Conference on Disarmament (CD) is unfortunate and highly inappropriate. The United States continues to believe that countries that are under Chapter VII sanctions for weapons proliferation or massive human-rights abuses should be barred from any formal or ceremonial positions in UN bodies.

While the presidency of the CD is largely ceremonial and involves no substantive responsibilities, allowing Iran--a country that is in flagrant violation of its obligations under multiple UN Security Council Resolutions and to the IAEA Board of Governors--to hold such a position runs counter to the goals and objectives of the Conference on Disarmament itself. As a result, the United States will not be represented at the ambassadorial level during any meeting presided over by Iran.

* * * *

On October 3, 2013, Under Secretary of State for Political Affairs Wendy R. Sherman testified before the Senate Foreign Relations Committee on "Reversing Iran's Nuclear Program." Her testimony, excerpted below, is available at *www.state.gov/p/us/rm/2013/215094.htm*.

* * * *

As requested, I will speak about recent talks with the Iranian government at the UN General Assembly in New York, the status of our negotiations, our continued effort to put pressure on the Iranian government, and a potential path forward for diplomacy—including the core actions needed to reach a verifiable agreement with Iran.

* * * *

The Iranian presidential election last June focused on the economy. Questions of how to engage with the international community on the nuclear file were front and center as President Rouhani, a former nuclear negotiator himself, ran against candidates that included then-current negotiator Saeed Jalili. Rouhani made the case that the failure to pursue a serious agreement on Iran's nuclear program was devastating the Iranian economy—and he won the election.

President Rouhani says he has a mandate—both a popular mandate from the Iranian people and a mandate from Supreme Leader Khamenei—to secure sanctions relief and improve Iran's economic situation, which can only be accomplished by pursuing an agreement that satisfies the international community's concerns over Iran's nuclear program.

As the President reaffirmed last week, we are prepared to test that proposition in a serious way. But we must do our part to ensure the success of this effort and to avoid any measures that could prematurely inhibit our ability to secure a diplomatic solution. Here it will be important that we—the Executive and U.S. Congress—remain in close consultation with each other, and that we ensure we can continue to show the Iranian government that the international community remains finnly united as we begin this process.

Review of Last Week's P5+1 Meeting

Last week, Secretary Kerry and I met with Foreign Minister Zarifand the Foreign Ministers of the P5+ I countries in New York on the margins of the UN General Assembly. Although we have indicated we are open to bilateral dialogue with the Iranians, we have emphasized that a nuclear deal would be concluded and implemented by the P5+ I.

In our New York meeting, we made clear that we seek an agreement that respects the right of the Iranian people to access peaceful nuclear energy while ensuring to the world that Iran meets its responsibilities under the Nuclear Non-Proliferation Treaty and UN Security Council resolutions.

Foreign Minister Zarif gave a thoughtful presentation and set forth some ideas on how to proceed. He told us that Iran does not seek nuclear weapons and detailed the reasons why it did not make sense for Iran to possess nuclear weapons. We also made clear in return that his words alone, while welcome, are not enough. The test will lie in Iran's actions, to include the development and implementation of specific confidence building measures as well as actions that ultimately address all of our concerns.

So in the coming weeks, we will be looking to the Iranian government to translate its words into transparent, meaningful, and verifiable actions. We enter this period hopeful, but sober. As Secretary Kerry said, no deal is better than a bad deal. So now it is time to see if negotiations can begin in earnest and generate a positive result.

Future Prospects

Let me give you an idea of how we see this process moving forward.

Given the scope of Iran's nuclear program and its history of noncompliance with lAEA Board of Governors and UN Security Council resolutions, as well as the deep mistrust between our two countries, any productive path forward must start with mutual confidence building.

Meaningful, transparent, and verifiable steps are necessary. We will be looking for specific steps by Iran that address core issues, including but not limited to the pace and scope of its enrichment program, the transparency of its overall nuclear program, and stockpiles of enriched uranium. The Iranians, in tum, will doubtless be seeking some relief from the comprehensive international sanctions that are now in place. We have been clear that only concrete verifiable steps can offer a path to sanctions relief. We look forward to hearing Foreign Minister Zarifs suggested plan when the P5+ I next meet with the Iranian delegation in Geneva on October 15 and 16.

We need to ensure throughout that the international community remains united and does not permit sanctions to prematurely unravel. Let me assure you that we will also continue to vigorously enforce the sanctions that are in place as we explore a negotiated resolution, and will be especially focused on sanctions evasion and efforts by the Iranians to relieve the pressure.

* * * *

c. Russia

On May 15, 2013, the United States deposited its instrument of acceptance for the Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation ("MNEPR Agreement") with the Organization for Economic Cooperation and Development ("OECD") done at Stockholm on May 21, 2003. The OECD received the U.S. instrument of acceptance and confirmed that, in accordance with Article 18, paragraph 1 of the MNEPR Agreement, the MNEPR Agreement entered into force for the United States on June 14, 2013.

On June 14, 2013, the United States and Russia signed a bilateral protocol to MNEPR, as well as a related implementing agreement. As described below, the United States and Russia will use MNEPR, the bilateral protocol, and the related implementing agreement as the basis for their future cooperation on a range of nuclear nonproliferation matters. This new legal framework took the place of the 1992 Agreement between the United States of America and the Russian Federation Concerning the Safe and Secure Transportation, Storage and Destruction of Weapons and the Prevention of Weapons Proliferation (commonly known as the Nunn-Lugar Cooperative Threat Reduction ("CTR") Umbrella Agreement), which expired on June 17, 2013. The State Department issued a fact sheet, excerpted below and available at

www.state.gov/r/pa/prs/ps/2013/06/210913.htm, on cooperation under the new legal framework.

---

* * * *

As long-time partners with a mutual interest in promoting nuclear security, the United States and the Russian Federation have successfully worked together on a broad range of activities designed to prevent the spread of weapons of mass destruction (WMD) by securing and eliminating WMD-related materials and technology, and engaging relevant expertise. This close cooperation will continue under a new framework that reflects the evolution of this longstanding partnership, recognizes common threats, and provides for the continuation of a range of cooperative projects to reduce nuclear threats. It also allows for the addition of new activities in the future.

Future joint nuclear security activities in the Russian Federation will be conducted under the 2003 Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation (MNEPR) and a related bilateral Protocol signed on June 14, 2013 in Washington, D.C.

Under the new bilateral protocol to MNEPR, U.S.-Russian cooperation will continue in a broad array of nuclear security and nonproliferation areas, including but not limited to:

- improving security of nuclear and radiological material;
- customs control of nuclear and radioactive material;
- recovery and securing of radioactive sources;
- consolidation of nuclear material and conversion of excess highly enriched uranium (HEU) to low enriched uranium (LEU);
- conversion of HEU research reactors to operate with LEU; and
- nuclear submarine dismantlement.

The new framework includes provisions that will authorize and facilitate bilateral cooperation in these areas and are based on the provisions of the previous agreement on bilateral nuclear security cooperation. We anticipate a number of U.S. government organizations, including the Departments of State, Energy, and Defense, will remain involved under this new agreement.

Under the new framework, the Russian Federation will assume the costs and complete without further U.S. assistance two areas of bilateral CTR cooperation previously covered by the CTR framework: ballistic missile elimination and chemical weapons destruction. Projects in both areas were winding down this year after many years of successful cooperation. The parties continue to discuss potential technical cooperation on chemical weapons destruction outside the new framework. Additionally, we have worked together intensively over the years with Russia on its nuclear warhead protection systems. We are proud of these joint efforts, and Russia will now take full responsibility over this mission.

The United States looks forward to continued partnership on nuclear security with the Russian Federation in this new era of nonproliferation cooperation. The citizens of both of our nations are safer for the work that was completed under the Cooperative Threat Reduction

program, and we are strongly committed to making further progress under this new cooperative agreement.

* * * *

On September 16, 2013, on the margins of the International Atomic Energy Agency's General Conference in Vienna, Russia and the United States signed an agreement to expand their cooperation in the field of nuclear research and development. As described in a State Department news article, available at *http://iipdigital.usembassy.gov/st/english/article/2013/09/20130917283046.html#axzz2pd2wc3yI*:

> The agreement will complement provisions of the U.S.-Russian Agreement for Cooperation in the Field of Peaceful Uses of Nuclear Energy, which came into force in January 2011 and opened new opportunities to work together on a wide range of issues in this sphere, according to the U.S. Energy Department.
>
> …
>
> Potential projects covered by the agreement could include international safeguards, establishment of a Multi-Purpose Fast Research Reactor International Research Center, irradiation of fuels and materials in the fast-spectrum research reactor BOR-60, and defense from asteroids, among others. The United States and Russia are equal partners under the agreement, with each country bearing its own costs.

The United States and Russia also signed an amendment to the Agreement on the Establishment of Nuclear Risk Reduction Centers ("NRRCs") on October 7, 2013. The NRRCs are used to send notifications in conjunction with at least 13 different conventional and other kinds of treaties between the United States and Russia, serving as a critical component in helping the two sides to apply the rules and avoid misunderstanding. Secretary Kerry said of the amendment, "by upgrading the centers, it provides vital support for our strategic and our conventional arms treaties and agreements, like the New START Treaty." Joint press availability with Russian Foreign Minister Sergey Lavrov after their meeting in Indonesia, available at *www.state.gov/secretary/remarks/2013/10/215162.htm*. The State Department media note on the amendment is excerpted below and available at *www.state.gov/r/pa/prs/ps/2013/10/215165.htm*.

---

* * * *

The original agreement, between the United States of America and the Union of Soviet Socialist Republics, was signed on September 15, 1987, and established Centers in Washington, DC and in Moscow to provide the time-sensitive communications required by arms control treaties and security agreements. With over 26 years' experience, the Centers continue to support a robust array of conventional and strategic arms control treaties and agreements and confidence-building measures.

The new agreement further strengthens the connection between the two Nuclear Risk Reduction Centers. Today's NRRC-to-NRRC relationship and communications link continue to provide vital transparency in strategic and conventional forces, facilitate verification of arms control treaties and agreements and support strategic stability. For instance, the two Centers have exchanged over five thousand notifications under the New START Treaty since its entry into force in 2011.

* * * *

d. Republic of Korea

The United States and the Republic of Korea ("ROK") continued negotiations in 2013 to replace their existing agreement for peaceful nuclear cooperation, set to expire in March 2014. On April 24, 2013, the State Department issued a media note explaining that the parties had decided to extend the agreement for two years in order to allow time for resolution of significant technical issues. The media note, available at *www.state.gov/r/pa/prs/ps/2013/04/207922.htm*, is excerpted below.[**]

---

* * * *

The United States and the Republic of Korea (ROK) are global leaders and partners in the peaceful uses of nuclear energy. To renew and modernize this fruitful and longstanding partnership, we have made significant progress in negotiations to replace the current agreement for peaceful nuclear cooperation, which is set to expire March 19, 2014. We seek to conclude a successor agreement that serves as a strong foundation for U.S.-ROK bilateral civil nuclear cooperation for the future, reinforces our partnership as major nuclear suppliers, bolsters our overall bilateral relationship, and reaffirms our common commitment to nonproliferation. We also seek to work together to address common challenges, including those related to spent nuclear fuel management and reliable supplies of nuclear fuel to undergird our respective nuclear industries.

[**] Editor's note: The agreement was extended for two years in early 2014, before it expired.

Because our cooperation is increasingly broad and deep, there are several complex technical issues that will take some additional time and effort to resolve. To provide time for our negotiators to finalize an agreement that meets these important goals, and to meet our respective legal requirements for approval of such an agreement, the United States and the ROK have decided to seek a two-year extension of the current agreement. The Administration will begin immediately to consult with Congress on extending the existing agreement. An extension would ensure there is no lapse in ongoing cooperation and would maintain stability and predictability in our joint commercial activities.

During this extended period, the United States and the ROK will continue negotiations in order to finalize a successor agreement. We expect to hold our next round of discussions on that successor agreement in June 2013 and intend to meet approximately quarterly thereafter.

* * * *

On June 27, 2013, Assistant Secretary of State Thomas Countryman testified before the House Foreign Affairs Committee on the ongoing negotiations with the ROK of a successor agreement on nuclear cooperation. His testimony, excerpted below, is available at *www.state.gov/t/isn/rls/rm/2013/211328.htm*.

---

* * * *

The current agreement for peaceful nuclear cooperation, or 123 Agreement, between the United States and the Republic of Korea entered into force in March 1973 and expires in March 2014. The United States and the Republic of Korea began negotiating a successor agreement in 2010, and we have made substantial progress in creating a text that properly reflects both our governments' roles as global leaders in nuclear energy and our mutual commitment to the highest standards of nonproliferation. Because of the breadth and depth of our current and future nuclear cooperation with the Republic of Korea, it takes some time and effort to resolve complex technical issues. I have no doubt that we will get there.

To allow sufficient time to resolve these complicated issues, the United States and the Republic of Korea decided in April to seek a two-year extension of the existing agreement. An extension would facilitate the efforts of both our governments to finalize the text of an agreement that promotes United States and R.O.K. nonproliferation and civil nuclear cooperation objectives and priorities, and which fulfills our respective domestic requirements to bring that agreement into force. An extension would also ensure there is no lapse in our ongoing civil nuclear cooperation, preserving stability and predictability in our joint commercial activities.

It is for these reasons that the Administration is seeking Congressional support for an extension of the existing agreement. We are grateful for your consideration of this request, and I would like to thank Chairman Royce, Ranking Member Engel, and the other members of the Committee who have co-sponsored the pending draft legislation authorizing the President to

extend the term of the current U.S.-Republic of Korea agreement for peaceful nuclear cooperation for a period not to exceed March 19, 2016, notwithstanding any other provision of law. The Administration stands ready to work with Congress to achieve the extension of the existing agreement. Early passage of such legislation would provide confidence to both countries, including our respective nuclear industries, that cooperation will continue smoothly.

Draft Successor Agreement Text

Let me also say a few words about our efforts to negotiate the successor U.S.-Republic of Korea 123 agreement. Our two governments are working together to conclude an agreement that builds on our fruitful and longstanding partnership, reinforces our shared status as global leaders in nuclear energy, and reaffirms our mutual commitment to the highest standards of nuclear nonproliferation. We will continue to focus on working together to address common practical challenges facing our nuclear industries as outlined by President Obama and President Park this May. The two leaders talked about making progress on spent fuel management, maintaining a reliable supply of reactor fuel, and strengthening our respective nuclear industries. We conducted a round of negotiations in June and made progress in coming closer to an agreed text. The United States and the ROK intend to meet about every quarter to conclude negotiations on a successor agreement as soon as possible.

* * * *

On July 25, 2013, a nuclear technology transfer agreement between the United States and the Republic of Korea entered into force. The agreement was effected by an exchange of diplomatic notes, available at *www.state.gov/s/l/c8183.htm.* Prior to entry into force, on May 31, 2013, the U.S. Department of Energy published in the Federal Register a notice of the nuclear technology transfer agreement as a proposed subsequent arrangement pursuant to the Atomic Energy Act. 78 Fed. Reg. 32,640 (May 31, 2013). Excerpts from the Federal Register notice appear below.

---

* * * *

The agreement being processed as a subsequent arrangement is the proposed Agreement between the Government of the United States of America and the Government of the Republic of Korea Relating to the Transfer of Certain Nuclear Technologies in the Course of the Joint Fuel Cycle Study (the Agreement) being conducted by authorized technical experts from the United States of America and the Republic of Korea (ROK). The Joint Fuel Cycle Study (JFCS) will explore the technical and economic feasibility and the nonproliferation acceptability of the electrochemical recycling process and of other spent fuel management options. The purpose of the Agreement is to establish legal procedures and controls governing the transfer of technologies under the course of the JFCS that are necessary for its successful completion.

The U.S. Government has concluded that electrochemical recycling technology as defined in the Agreement is sensitive nuclear technology (SNT) within the meaning of Section

4(a)(5) of the Nuclear Non-Proliferation Act of 1978 (22 USC 3203(a)(5)), and that the transfer of such technology to the ROK is necessary for the successful completion of the JFCS. Sections 127 and 128 of the Atomic Energy Act of 1954, as amended (AEA), impose certain requirements on the export of SNT. In order to meet those requirements and proceed with the transfer of SNT as part of this cooperation, the U.S. Government must obtain the ROK government's agreement to conditions on the transferred SNT and any nuclear material or equipment produced through its use. The Agreement was explicitly developed to meet the requirements of AEA Sections 127 and 128 regarding the transfer of SNT to the ROK and contains all the terms and conditions required therein.

The Agreement would impose reciprocal obligations on both the U.S. Government and the ROK government regarding all technology transferred under the Agreement, including SNT, except insofar as the Agreement reflects the different obligations of the two governments under their respective safeguards agreements with the International Atomic Energy Agency (IAEA).

Although the Agreement would not be concluded pursuant to an agreement for nuclear cooperation entered into pursuant to Section 123 of the AEA, the results of the collaboration eventually may be applicable to spent nuclear fuel in the ROK that is subject to the Agreement for Cooperation Between the Government of the United States of America and the Government of the Republic of Korea Concerning Civil Uses of Atomic Energy, signed at Washington November 24, 1972, as amended, or a successor agreement.

Moreover, as noted above, the U.S. Government considers electrochemical recycling technology, as defined in the Agreement, to be SNT under U.S. law, as it constitutes information not available to the public that is important to the design, construction, fabrication, operation or maintenance of a nuclear fuel reprocessing facility. Taking these factors into account, the Department of Energy and the Department of State have concluded that it would be appropriate to follow the consultation and review procedures in AEA Section 131a. concerning subsequent arrangements prior to entering into the Agreement and for the Department of State to prepare a Nuclear Proliferation Assessment Statement.

* * * *

e. Taiwan

On December 20, 2013, President Obama made a determination pursuant to section 123b. of the Atomic Energy Act, regarding the proposed agreement for cooperation between the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") concerning the peaceful uses of nuclear energy. 78 Fed. Reg. 80,447 (Dec. 31, 2013). Specifically, President Obama determined "that the performance of the Agreement will promote, and will not constitute an unreasonable risk to, the common defense and security." *Id*. Accordingly, President Obama approved the proposed agreement and authorized the Secretary of State to arrange for its execution. *Id*.

f. Arrangement with Lithuania on Cooperation in Countering Nuclear Smuggling

On April 23, 2013, at NATO headquarters in Brussels, Secretary Kerry and Lithuanian Foreign Minister Linas Linkevicius signed the Joint Action Plan between the Government of the United States of America and the Government of the Republic of Lithuania on combating illicit trafficking of nuclear and radioactive materials and related technology. The joint action plan with Lithuania is the 11th such plan concluded by the Department of State. Secretary Kerry's remarks at the signing ceremony are available at *www.state.gov/secretary/remarks/2013/04/207875.htm*. The State Department issued a media note on April 23, 2013, available at *www.state.gov/r/pa/prs/ps/2013/04/207862.htm*, summarizing the political arrangement by the United States and Lithuania to work together in their efforts to counter nuclear smuggling:

> This "Joint Action Plan…" … is also one of the many steps the United States and Lithuania are taking to implement the commitments both nations made at the 2012 Nuclear Security Summit in Seoul.
>
> The newly signed plan includes steps to enhance Lithuania's control of its radioactive materials, foster cooperation among its domestic agencies, expand the country's role as a mentor to regional partners, and review and strengthen the Lithuanian Penal Code to ensure all types of nuclear smuggling cases can be prosecuted. Lithuania also has established a Nuclear Security Center of Excellence, and the United States is supporting Lithuania's efforts to develop a counter nuclear smuggling curriculum for this center and host regional training courses.

C. G8 GLOBAL PARTNERSHIP

On January 31, 2013, Ambassador Jenkins, U.S. Special Envoy and Coordinator for Threat Reduction Programs at the Department of State, addressed the 24th UN Conference on Disarmament. Her remarks are available in full at *www.state.gov/t/isn/rls/rm/2013/203779.htm*. Excerpts below relate to the G8 Global Partnership. Other excerpts from Ambassador Jenkins' remarks appear in sections B.4 *supra* and D. *infra*.

---

* * * *

The Global Partnership was established by the G8 in 2002 as a 10-year, $20 billion initiative to prevent terrorists, or states that support them, from acquiring or developing weapons of mass destruction. While it was established within the G8 structure, the GP has grown over the years, and now has 25 members.

To date, the Global Partnership has spent over $21 billion towards preventing terrorists from acquiring or developing weapons of mass destruction. The Global Partnership has been a positive model of cooperation and coordination in efforts to combat these threats.

For those first 10 years, the majority of work within the Global Partnership was focused on dismantling nuclear submarines and chemical weapons in Russia, though funding also went to some other activities and programs within Russia and the former Soviet Union.

The Global Partnership has:

Improved accounting, control, and physical protection of nuclear and radiological materials;

Enhanced nuclear, biological, and chemical security;

Dismantled nuclear submarines and safe storage of removed spent fuel;

Improved detection of nuclear and radiological materials and prevented illicit trafficking by improving border security capabilities;

Engaged and redirected to peaceful purposes scientists, technicians, and engineers who have WMD, missile, and related expertise; and

Provided enhanced training on nuclear safeguards and security.

However, as the Global Partnership neared its 10 year conclusion in 2012, the partners began to realize that the programs and activities of the initiative had to evolve to reflect changes in the threat of WMD terrorism that faced the world. The threat of WMD terrorism does not originate from any one region but it is a global threat; the threat is not limited to nuclear submarines and chemical weapons, and more nations need to play a role in the work to reduce the threat. With this in mind, the Global Partnership worked towards extending the mandate of the Global Partnership beyond 2012 and to be much more global in its activities and in its spirit.

In the G8 Global Partnership Assessment and Options for Future Programming document of 2011, the GP noted some activities it could engage in the area of nuclear and radiological security under an extended mandate beyond 2012. Those areas include the following:

Projects related to the 4 year effort to secure all vulnerable nuclear material;

Physical protection of nuclear material and facilities in use, storage and transport;

Provision of radiation detection equipment and training at land borders and ports to prevent illicit trafficking;

Improvement of countries' capacities in nuclear security and detection and prevention of nuclear smuggling;

Protection or removal of radiological sources and implementation of the IAEA Code of Conduct;

Capacity building to either establish or enhance efficiency of national export control systems, including missile technology transfers; and

Support of implementation, on a voluntary basis, of the political commitments made at the 2010 Nuclear Security Summit and those reflected in the Nuclear Security Summit Communiqué and Work Plan."

The GP could also focus on priorities established at the 2012 Nuclear Security Summit and look for areas where the GP can help to facilitate progress and encourage program implementation toward those priorities.

The GP recognized the links between its mission and the Nuclear Security Summit process, which aims to enhance the physical protection of nuclear materials and strengthen capacities to prevent illicit trafficking. For example, the Global Partnership is already a critical mechanism for implementing the political commitments arising from the Summits.

More broadly, the GP provides its members a forum to discuss specific Summit-related activities appropriate for GP engagement and coordination, to exchange information on current GP member program activities and those of the relevant IOs, and to identify potential gaps and specific opportunities for GP members to partner or leverage each others' implementation efforts.

A more dedicated focus on nuclear and radiological security within the GP could contribute in the area of nuclear and radiological security by:

Providing a forum for communication between countries, international organizations, non-governmental organizations, representatives from Centers of Excellence (CoEs) and CBRN threat mitigation support centers, and other GP participants to identify or deepen specific opportunities for cooperation and partnering

Helping to raise the profile of key Nuclear Security Summit priorities

Developing tangible implementation areas that directly benefit the advancement of nuclear security globally.

At the G8 Summit in Deauville, France, in 2011, the Leaders decided to extend the Global Partnership beyond 2012 and to bring it more in line with what is needed to combat today's WMD threats.

While some funds will still be dedicated to activities in Russia, the Leaders mandated that the partners also focus more programming globally in the area of nuclear and radiological security, biosecurity, scientist engagement, and particularly for implementation of UNSCR 1540. The leaders also agreed to "work with all partners in discussing assistance needs and coordinating possible projects in the above-mentioned areas."

Leaders also agreed that new members should be sought so that the partnership will have a truly global representation and, as a result, the GP has done outreach with a number of countries about joining. In this respect, the GP has reached out to some countries in Asia.

As a deliverable at the 2012 Nuclear Security Summit, the GP submitted a joint statement that highlighted the funding by GP members to the IAEA Nuclear Security Fund (NSF), from January 2010 to March 2012. The NSF was created in 2001 to support the IAEA's nuclear security related activities, including those to prevent, detect, and respond to nuclear terrorism. The statement noted that since January 2010, Global Partnership countries contributed more than $55 million to the NSF. Because 24 of 25 GP members are also participants in the Nuclear

Security Summit process, areas of synergy between the Global Partnership and the Summit process can be developed and strengthened.

At the October GP meeting, the Global Partnership agreed to establish a Nuclear and Radiological Security Sub-working Group. Its first meeting will take place next week in London, at the first meeting of the GP under the UK Chairmanship. The work effort associated with the NSRWG should be supportive of member nations' work leading up to the 2014 Summit.

* * * *

On June 17, 2013, the U.S. Department of State issued a media note welcoming the Philippines as the 26th member of the Global Partnership. The media note, available at *www.state.gov/r/pa/prs/ps/2013/06/210737.htm*, states: "The Philippines' membership marks an important expansion of Southeast Asian representation in the GP, a subsidiary body of the G8, which addresses nuclear and radiological security, biosecurity, chemical security, and scientist engagement, as well as facilitates the implementation of UN Security Council Resolution 1540 through cooperative projects."

D. IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTION 1540

On January 31, 2013, Ambassador Jenkins addressed the 24th UN Conference on Disarmament. Her remarks are available in full at *www.state.gov/t/isn/rls/rm/2013/203779.htm*. Excerpts below relate to UN Security Council Resolution 1540. Other excerpts from Ambassador Jenkins' remarks appear in sections B.4 and C. *supra*.

* * * *

The prevention of nuclear terrorism in Asia and globally cannot be effectively achieved without the full implementation of UN Security Council Resolution 1540. The resolution, unanimously adopted by the Security Council, identified the threat posed by the nexus of terrorists and proliferation of nuclear, chemical, biological weapons, their means of delivery and related materials. It creates legally binding obligations on all States to not provide any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear weapons or their means of delivery. It also obliges all States to take appropriate measures to ensure the security of production, use, storage, and transport of nuclear weapons related materials, among other requirements, as a means to deny access to these items by non-state actors and reduce our vulnerability to nuclear terrorism. UNSCR 1540 provides a clear roadmap for States in regard to developing and implementing protective measures, establishing

border, export, and financial controls, and the use of effective laws and regulations to achieve the goal of reducing and eliminating the threat of nuclear terrorism, and is an indispensable component of the formula to ensure international peace and security.

Within the Asia-Pacific region, the United States believes that regional cooperation is a highly effective strategy to pursue 1540 implementation, and can be utilized to develop strong practices to prevent nuclear terrorism throughout the entire region. The United States supports efforts by the ASEAN Regional Forum and other regional and sub-regional organizations in the Asia-Pacific region in their efforts to promote full implementation of UNSCR 1540. Such organizations can provide leadership in education and awareness, develop effective practices, engage in capacity-building, and serve as an information clearinghouse for the countries in the region seeking guidance on 1540 implementation and ways to reduce the threat of nuclear terrorism. The United States stands ready to work cooperatively with other nations, regional and intergovernmental organizations, industry, and civil society in the Asia-Pacific region to reach the goal of universal implementation of this critically important resolution as part of our effort to eliminate the threat of nuclear terrorism.

* * * *

E. PROLIFERATION SECURITY INITIATIVE

On May 28, 2013, the United States met with the more than 70 other partner states of the Proliferation Security Initiative ("PSI") to mark the PSI's tenth anniversary. A State Department media note issued on the occasion of the tenth anniversary meeting is available at *www.state.gov/r/pa/prs/ps/2013/05/210010.htm* and excerpted below.

---

* * * *

On May 28, the United States, Poland, and 70 other partner states of the Proliferation Security Initiative (PSI), and three international organizations marked the Tenth Anniversary of the PSI with a High-Level Political Meeting in Warsaw. Acting Under Secretary of State for Arms Control and International Security Rose Gottemoeller led the U.S. delegation to the event.

At the meeting, PSI partners recognized the critical role the Initiative has played in countering the spread of weapons of mass destruction (WMD). The U.S. welcomed the announcements by PSI states to take specific, concrete steps to further the Initiative in the years ahead, which includes deterring proliferators through more regular and robust PSI exercises; promoting legally binding international treaties to criminalize international WMD-related trafficking by commercial ships and aircraft; sharing expertise and resources to build critical interdiction capabilities and practices; and expanding the influence of the PSI globally through outreach to new states and the public. Over 70 states affirmed four joint statements pledging specific actions in these areas.

As one part of these efforts, the United States announced its intention to join with five other PSI states to form an annual rotation of PSI exercises in the Asia-Pacific region and to promote similar efforts in other regions. These exercises will help strengthen the capacity of partner states to interdict WMD-related cargoes; and the expansion of bilateral and multilateral outreach efforts to potential PSI endorsers, international and regional institutions and associations, and the public. The United States also pledged to finalize accession to two key international treaties that criminalize the trafficking in WMD using commercial ships and aircraft, the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Protocol") and the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation ("Beijing Convention".)

* * * *

F. CHEMICAL AND BIOLOGICAL WEAPONS

1. Chemical Weapons

The landmark achievement in 2013 in the area of preventing proliferation of chemical weapons is the international commitment embodied in a UN Security Council Resolution ("UNSCR") to rid Syria of its chemical weapons in cooperation with the Organization for the Prohibition of Chemical Weapons ("OPCW"). Leading up to that UNSCR, the United States took a firm stand condemning the Syrian government's use of chemical weapons in the ongoing civil war in Syria. On March 21, 2013, Ambassador Rice welcomed the announcement by UN Secretary-General Bank Ki-Moon regarding the UN's planned investigation into the use of chemical weapons in Syria. Ambassador Rice's statement is excerpted below and available at *http://usun.state.gov/briefing/statements/206494.htm*.

* * * *

The United States welcomes today's announcement by United Nations Secretary-General Ban Ki-moon regarding an investigation into the possible use of chemical weapons in Syria. The United States supports an investigation that pursues any and all credible allegations of the possible use of chemical weapons in Syria, and underscores the importance of launching this investigation as swiftly as possible. We demand the full cooperation of the Assad regime in particular, as well as Syrian authorities throughout the country, including by providing full and unfettered access to all relevant individuals and locations. In addition, humanitarian workers seeking to assist injured individuals should be given complete access to provide medical care and assistance as needed.

We call on the Organization for the Prohibition of Chemical Weapons to provide full support to the UN's investigation, including information, expertise, and resources. As the UN proceeds with these efforts, we will also continue to work closely with our partners to obtain further information regarding any and all credible allegations of the potential or actual use of chemical weapons in Syria.

President Obama has been clear that the use or transfer of chemical weapons is totally unacceptable. If Bashar Al-Assad and those under his command make the mistake of using chemical weapons, or fail to meet their obligation to secure them, then there will be consequences. Those responsible will be held accountable.

* * * *

Ambassador Rice again condemned the Syrian government's use of chemical weapons on June 14, 2013 in remarks at the UN Security Council after the United States delivered a letter to the Secretary-General providing the U.S. assessment that the Assad regime had used chemical weapons, including sarin, against the Syrian opposition on multiple occasions. Her remarks are available at *http://usun.state.gov/briefing/statements/210674.htm*. Ambassador Rice said:

> We believe that the Assad regime maintains control of these weapons. We have no reliable, corroborated reporting to indicate that the opposition has acquired or used chemical weapons.
>
> We regret that the Assad regime has failed to cooperate with the United Nations investigation by providing the necessary unfettered access and the ability to investigate any and all credible allegations of chemical weapons use.
>
> We will continue our own investigation and analysis, along with friends and allies, even as we continue to maintain that the United Nations investigation should be allowed to go forward.
>
> The Assad regime could prove that its request for a UN investigation was not just a diversionary tactic by granting the UN fact-finding mission immediate and unfettered access to conduct on-site investigations to help elucidate the truth about chemical weapons use in Syria.

On June 7, 2013, the Chair of the Australia Group issued a press release at the conclusion of its annual plenary which addressed the developments in Syria. The Australia Group is a voluntary organization which seeks to counter the proliferation of chemical and biological weapons. The press release at the conclusion of the 2013 Australia Group Plenary, excerpted below, is available at *www.state.gov/t/isn/rls/prsrl/2013/210581.htm*.

* * * *

[T]he Group reaffirmed its view that chemical weapons in Syria continue to pose a serious threat of further destabilising the Middle East and a challenge to global non-proliferation norms. Australia Group members are gravely concerned by the growing body of evidence pointing to the use of chemical weapons and by the danger of more and larger-scale use. The threat of chemical weapon use on the people of Syria underlines the necessity for the complete eradication of chemical weapons for all time and for the universalisation of the CWC.

The Australia Group underlined that the use of chemical weapons under any circumstances is unacceptable and against the legal norms of the international community. The Group urged support for the UN mission to investigate all allegations of chemical weapon use in Syria.

The Australia Group Plenary urged all parties to the Syrian conflict to renounce chemical weapons and their use in any circumstances, and to take steps to eliminate all stocks of those weapons. In the meantime Syria must assure the international community about the security of its chemical weapons stockpiles.

Building on its appeal at the 2012 Plenary, Australia Group participants emphasised the need for all countries to exercise increased vigilance with regard to dual-use exports to Syria of items potentially relevant to chemical and biological weapons, and to subject such exports to Syria to particular scrutiny.

.

* * * *

On September 10, 2013, the State Department published its formal determination regarding chemical weapons use in Syria under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991. 78 Fed. Reg. 55,326 (Sep. 10, 2013). The notice stated:

> The United States Government has determined on August 2, pursuant to Section 306(a) of the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 22 U.S.C. 5604(a), that the Government of Syria has used chemical weapons in violation of international law or lethal chemical weapons against its own nationals.
>
> In addition, the United States Government has determined and certified to Congress pursuant to section 307(d) of the Act (22 U.S.C. 5605(d)) that it is essential to the national security interests of the United States to partially waive the application of the sanctions required under Section 307(a) of the Act (22 U.S.C. 5605(a)) with respect to activities in furtherance of United States policies regarding the Syrian conflict.

On December 4, 2013, the State Department made the further determination of additional sanctions required within three months of the original sanctions determination on August 2, in accordance with the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991. 78 Fed. Reg. 74,218 (Dec. 10, 2013). The U.S. government decided on November 1, 2013 to impose such additional sanctions on the Government of Syria. The U.S. government also determined "that it is essential to the national security interests of the United States to partially waive the application of these additional sanctions with respect to activities in furtherance of United States policies regarding the Syrian conflict." *Id.* The additional sanctions imposed are: (1) a prohibition on U.S. bank loans, except for purchasing food or other agricultural products; (2) further export restrictions; (3) suspension of the authority of foreign air carriers owned or controlled by Syria to engage in transportation to or from the United States.

The Syrian government carried out a chemical weapons attack in the suburbs of Damascus on August 21, 2013, causing mass civilian casualties. The U.S. government's assessment of the attack is available at *www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21*. In September 2013, under mounting international pressure, the Syrian government acceded to the Chemical Weapons Convention and expressed its unilateral intention to provisionally apply the CWC pending its entry into force for Syria on October 14, 2013. In light of this action, the United States Government and the Russian Government met to work out a framework document to guide the elimination of Syria's chemical weapons program. The State Department issued the following media note on September 14, 2013, available at *www.state.gov/r/pa/prs/ps/2013/09/214247.htm*, providing the Framework for Elimination of Syrian Chemical Weapons.

---

* * * *

Taking into account the decision of the Syrian Arab Republic to accede to the Chemical Weapons Convention and the commitment of the Syrian authorities to provisionally apply the Convention prior to its entry into force, the United States and the Russian Federation express their joint determination to ensure the destruction of the Syrian chemical weapons program (CW) in the soonest and safest manner.

For this purpose, the United States and the Russian Federation have committed to prepare and submit in the next few days to the Executive Council of the OPCW a draft decision setting down special procedures for expeditious destruction of the Syrian chemical weapons program and stringent verification thereof. The principles on which this decision should be based, in the view of both sides, are set forth in Annex A. The United States and the Russian Federation

believe that these extraordinary procedures are necessitated by the prior use of these weapons in Syria and the volatility of the Syrian civil war.

The United States and the Russian Federation commit to work together towards prompt adoption of a UN Security Council resolution that reinforces the decision of the OPCW Executive Council. This resolution will also contain steps to ensure its verification and effective implementation and will request that the UN Secretary-General, in consultation with the OPCW, submit recommendations to the UN Security Council on an expedited basis regarding the UN's role in eliminating the Syrian chemical weapons program.

The United States and the Russian Federation concur that this UN Security Council resolution should provide for review on a regular basis the implementation in Syria of the decision of the Executive Council of the OPCW, and in the event of non-compliance, including unauthorized transfer, or any use of chemical weapons by anyone in Syria, the UN Security Council should impose measures under Chapter VII of the UN Charter.

The proposed joint US-Russian OPCW draft decision supports the application of Article VIII of the Chemical Weapons Convention, which provides for the referral of any cases of non-compliance to the United Nations General Assembly and the United Nations Security Council. In furtherance of the objective to eliminate the Syrian chemical weapons program, the United States and the Russian Federation have reached a shared assessment of the amount and type of chemical weapons involved, and are committed to the immediate international control over chemical weapons and their components in Syria. The United States and the Russian Federation expect Syria to submit, within a week, a comprehensive listing, including names, types, and quantities of its chemical weapons agents, types of munitions, and location and form of storage, production, and research and development facilities.

We further determined that the most effective control of these weapons may be achieved by removal of the largest amounts of weapons feasible, under OPCW supervision, and their destruction outside of Syria, if possible. We set ambitious goals for the removal and destruction of all categories of CW related materials and equipment with the objective of completing such removal and destruction in the first half of 2014. In addition to chemical weapons, stocks of chemical weapons agents, their precursors, specialized CW equipment, and CW munitions themselves, the elimination process must include the facilities for the development and production of these weapons. The views of both sides in this regard are set forth in Annex B. The United States and the Russian Federation have further decided that to achieve accountability for their chemical weapons, the Syrians must provide the OPCW, the UN, and other supporting personnel with the immediate and unfettered right to inspect any and all sites in Syria. The extraordinary procedures to be proposed by the United States and the Russian Federation for adoption by the OPCW Executive Council and reinforced by a UN Security Council resolution, as described above, should include a mechanism to ensure this right.

Under this framework, personnel under both the OPCW and UN mandate should be dispatched as rapidly as possible to support control, removal, and destruction of Syria's chemical weapons capabilities.

The United States and the Russian Federation believe that the work of the OPCW and the UN will benefit from participation of the experts of the P5 countries.

The United States and the Russian Federation strongly reiterate their position on Syria as reflected in the Final Communique of the G-8 Summit in Northern Ireland in June 2013, especially as regards chemical weapons.

The two sides intend to work closely together, and with the OPCW, the UN, all Syrian parties, and with other interested member states with relevant capabilities to arrange for the security of the monitoring and destruction mission, recognizing the primary responsibility of the Syrian Government in this regard.

The United States and the Russian Federation note that there are details in furtherance of the execution of this framework that need to be addressed on an expedited basis in the coming days and commit to complete these details, as soon as practicable, understanding that time is of the essence given the crisis in Syria.

Annex A

Principles for Decision Document by OPCW Executive Council

1. The decision should be based on para 8. Art. IV and para. 10 of Art V of the CWC.

2. The decision should address the extraordinary character of the situation with the Syrian chemical weapons.

3. The decision should take into account the deposit by Syria of the instrument of accession to the CWC.

4. The decision should provide for the easy accessibility for States Parties of the information submitted by Syria.

5. The decision should specify which initial information Syria shall submit to the OPCW Technical Secretariat in accordance with a tightly fixed schedule and also specifies an early date for submission of the formal CWC declaration.

6. The decision should oblige Syria to cooperate fully on all aspects of its implementation.

7. The decision should address a schedule for the rapid destruction of Syrian chemical weapons capabilities. This schedule should take into account the following target dates:

A. Completion of initial OPCW on-site inspections of declared sites by November.

B. Destruction of production and mixing/filling equipment by November.

C. Complete elimination of all chemical weapons material and equipment in the first half of 2014.

The shortest possible final deadline, as well as intermediate deadlines, for the destruction of Syrian chemical weapons capabilities should be included into the schedule.

8. The decision should provide stringent special verification measures, beginning within a few days, including a mechanism to ensure the immediate and unfettered right to inspect any and all sites.

9. The decision should address the issue of duties of the OPCW Technical Secretariat in this situation and its need for supplementary resources to implement the decision, particularly technical and personnel resources, and call upon states with relevant capacities to contribute to this end.

10. The decision should refer to the provisions of the CWC obliging the Executive Council, in cases of non-compliance with the Convention, to bring the issues directly to the attention of the UN General Assembly and the UN Security Council.

Annex B

Joint Framework on Destruction of Syrian CW

The Russian Federation and the United States of America agree on the need to achieve rapid elimination of Syria's chemical weapons, thus reducing the threat posed to the people of Syria. They are each prepared to devote high-level attention and resources to support the monitoring and destruction mission of the OPCW, both directly and in cooperation with the United Nations and other States concerned. They agree to set an ambitious goal of eliminating the threat in a rapid and effective manner.

Both parties agree that a clear picture of the state of Syrian chemical weapons could help advance a cooperative development of destruction options, including possible removal of chemical weapons outside of the Syrian territory. We agree on the importance of rapid destruction of the following categories:

1. Production equipment
2. Mixing and filling equipment
3. Filled and unfilled weapons and delivery systems
4. Chemical agents (unweaponized) and precursor chemicals. For these materials, they will pursue a hybrid approach, i.e., a combination of removal from Syria and destruction within Syria, depending upon site-specific conditions. They will also consider the possibility of consolidation and destruction in the coastal area of Syria.
5. Material and equipment related to the research and development of chemical weapons

The two parties agree to utilize the "universal matrix", developed in the course of consultations by our two National Security Councils, as the basis for an actionable plan.
They agree that the elimination of chemical weapons in Syria should be considered an urgent matter to be implemented within the shortest possible time period.
The parties agree to set the following target dates:

A. Completion of initial OPCW on-site inspections by November.
B. Destruction of production and mixing/filling equipment by November.
C. Complete elimination of all chemical weapons material and equipment in the first half of 2014.

The Russian Federation and the United States will work together closely, including with the OPCW, the UN and Syrian parties to arrange for the security of the monitoring and destruction mission, noting the primary responsibility of the Syrian government in this regard.

* * * *

As described in the framework above, the United States and Russia accepted that a UN Security Council resolution would be essential to proceeding with the plan to eliminate Syrian chemical weapons. On September 26, 2013, U.S. Ambassador to the UN

Samantha Power[***] addressed the Security Council after the tabling of a draft resolution. Her remarks, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/214832.htm*.

* * * *

Just two weeks ago, tonight's outcome seemed utterly unimaginable. Two weeks ago the Syrian regime had not even acknowledged the existence of its chemical weapons stockpiles. But tonight we have a shared draft resolution that is the outcome of intense diplomacy and negotiations over the past two weeks.

Our overarching goal was and remains the rapid and total elimination of Syria's chemical weapons program. This is a class of weapons that the world has already judged must be banned because their use is simply too horrific. This is a fundamental belief shared by the United States, all members of the Security Council and 98% of the world.

Tonight, the Council discussed a draft resolution that will uphold this international norm by imposing legally binding obligations on Syria—on the government—to eliminate this chemical weapons program.

This resolution will require the destruction of a category of weapons that the Syrian government has used ruthlessly and repeatedly against its own people. And this resolution will make clear that there are going to be consequences for noncompliance.

This is very significant. This is the first time since the Syria conflict began 2 ½ years ago that the Security Council has imposed binding obligations on Syria—binding obligations of any kind. The first time. The resolution also establishes what President Obama has been emphasizing for many months: that the use of chemical weapons anywhere constitutes a threat to international peace and security. By establishing this, the Security Council is establishing a new international norm.

As you know, we went into these negotiations with a fundamental red line, which is that we would get in this resolution a reference to Chapter VII in the event of non-compliance, that we would get the Council committing to impose measures under Chapter VII if the Syrians did not comply with their binding, legal obligations.

If implemented fully, this resolution will eliminate one of the largest previously undeclared chemical weapons programs in the world, and this is a chemical weapons program—I don't have to tell you—that has sat precariously in one of the most volatile countries and in one of the most horrific civil wars the world has seen in a very long time.

In the span of a few weeks, the curtain that hid this secret chemical weapons program has been lifted and the world is on the verge of requiring that these terrible weapons to be destroyed.

This resolution breaks new ground in another critical respect. For the first time, the Security Council is on the verge of coming together to endorse the Geneva Communiqué, calling

[***] Editor's Note: Susan Rice left her post as U.S. Ambassador to the UN on June 25, 2013 to become National Security Adviser to President Obama. On August 5, 2013 Samantha Power was sworn in as U.S. Ambassador to the UN.

for the establishment of a transitional governing body with full executive powers. If adopted, we will have achieved what we were unable to do before—unable to do for the last 2 ½ years—which is to fully endorse the Communiqué and call for the convening, as soon as possible, of an international conference on its implementation.

As Ambassador Churkin, with whom we've worked very productively, has just stated, we are hoping for a vote tomorrow in the OPCW Executive Council on the OPCW Executive Council decision. And then in the wake of that vote – and we hope in the immediate wake of that vote—we would have Security Council adoption of this text, which we are optimistic is going to be received very warmly. We're optimistic for an overwhelming vote.

Before closing, just let me—bear in mind, or note that we should bear in mind, even as we express appreciation for the cooperation that brought us to this moment—but let us bear in mind the sobering catalyst for all of this: the use on August 21st of chemical weapons against people who were just sleeping in their beds, against children who will never get to share their dreams.

The precipitant for this effort was as ghastly as anything we have ever seen. And I think the Council members are well aware of that. A number of the Council members referred to the events of August 21 and the importance of keeping the victims of that attack and other chemical weapons attacks in their minds as we seek to move forward.

The second sobering note, of course, goes beyond chemical weapons, which is that every day Syrians are dying by artillery, by air power, by Scuds. This monstrous conflict has to come to an end. And we are hopeful that the spirit of cooperation that we carried from Secretary Kerry and Foreign Minister Lavrov's negotiations in Geneva back to New York, that that spirit of cooperation will carry over now on humanitarian issues and, fundamentally, on the political solution we all know is needed to this horrific conflict.

* * * *

On September 27, 2013, Secretary Kerry also addressed the Security Council during its consideration of the resolution on Syria's chemical weapons. His remarks, excerpted below, are available at *www.state.gov/secretary/remarks/2013/09/214890.htm*.

---

* * * *

Five weeks ago, the world saw rows upon rows of murdered children lying on a hospital floor alone or beside slain parents, all wrapped in un-bloodied burial shrouds. And the world's conscience was shocked, but our collective resolved hardened. Tonight, with a strong, enforceable, precedent-setting resolution requiring Syria to give up its chemical weapons, the United Nations Security Council has demonstrated that diplomacy can be so powerful, it can peacefully defuse the worst weapons of war.

So tonight, we are declaring together, for the first time, that the use of chemical weapons, which the world long ago determined beyond the bounds of acceptable human behavior, are also a threat to international peace and security anywhere they might be used, anytime they might be used, under any circumstances. As a community of nations, we reaffirm our responsibility to defend the defenseless, those whose lives remain at risk every day that anyone believes they can use weapons of mass destruction with impunity. Together, the world, with a single voice for the first time, is imposing binding obligations on the Assad regime requiring it to get rid of weapons that have been used to devastating effect as tools of terror. This important resolution reflects what President Obama and President Putin and colleagues around the world set out to do.

I want to thank Foreign Minister Lavrov for his personal efforts and cooperation, beginning before Geneva and continuing through this week, so that we could find common ground. I also want to thank my good friends and counterparts, Foreign Secretary Hague and Foreign Minister Fabius, who have been partners every step of the way.

Our original objective was to degrade and deter Syria's chemical weapons capability, and the option of military force that President Obama has kept on the table could have achieved that. But tonight's resolution, in fact, accomplishes even more. Through peaceful means, it will for, the first time, seek to eliminate entirely a nation's chemical weapons capability, and in this case specifically Syria's. On-site inspections of the places that these weapons are stored will begin by November, and under the terms of this agreement, those weapons will be removed and destroyed by the middle of next year.

Our aim was also to hold the Assad regime publicly accountable for its horrific use of chemical weapons against its own people on August 21st. And this resolution makes clear that those responsible for this heinous act must be held accountable.

In this resolution, the Council has, importantly, endorsed the Geneva Communique, which calls for a transfer of power to a transitional governing body, paving the way for democratic elections and a government that can be chosen by the people of Syria to represent the people of Syria.

We sought a legally binding resolution, and that is what the Security Council has adopted. For the first time since Syria's civil war began, the Security Council is spelling out in detail what Syria must do to comply with its legal obligations. Syria cannot select or reject the inspectors. Syria must give those inspectors unfettered access to any and all sites and to any and all people.

We also wanted a resolution that would be enforced. And again, that is what the Security Council has adopted. We are here because actions have consequences. And now, should the regime fail to act, there will be consequences. Progress will be reported back to the Security Council frequently, and in the event of noncompliance, the Council will impose measures under Chapter 7 of the UN Charter.

Just two weeks ago, when the Syrian regime would not even acknowledge the vast supply of chemical weapons and say that they existed, this outcome, frankly, would have been utterly unimaginable. But thanks to the cooperation within the P-5 of the United Nations, and thanks to our friends and partners around the world, many of whom are here in this room, the Security Council has shown that when we put aside politics for the common good, we are still capable of

doing big things. Provided this resolution is fully implemented, we will have eliminated one of the largest chemical weapons programs on earth from one of the most volatile places on earth.

The Assad regime carries the burden of meeting the terms of this agreement. And when it comes to those who murder their own citizens, the world's patience needs to be short. But make no mistake: The rest of the world still carries the burden of doing what we must do to end mass killing by other means. We must work together with the same determination and the same cooperation that has brought us here tonight in order to end the conflict that continues to tear Syria apart even this very day. We must continue to provide desperately needed humanitarian aid. And neither Assad nor anyone else should stand between that aid and the people who need it. Only when we do these things will we have fulfilled our responsibility to the Syrian people and to ourselves. Only then will we have advanced our own interests and our own security and that of our allies in the region. Only then will we have shown that the UN Security Council is meeting its responsibility to enforce international peace and security.

So we are here united tonight in support of our belief that international institutions do matter, that international norms matter. We say with one voice that atrocities carried out with the world's most heinous weapons will not be tolerated. And when institutions like the Security Council stand up to defend the principles and values that we all share, when we put violent regimes on notice that the world will unite against them, it will lead not only to a safer Syria, but it will lead to a safer world.

* * * *

On September 27, 2013, at the 33rd meeting of the Executive Council of the OPCW, U.S. Permanent Representative to the OPCW Robert Mikulak delivered remarks regarding Syrian chemical weapons. Ambassador Mikulak's remarks are excerpted below and were circulated as an official document of the conference. OPCW Doc. No. EC-M-33/NAT.17.

* * * *

By any measure, this meeting of the Executive Council is the most important held in the 16-year history of the Chemical Weapons Convention. Everything about the matter we address here today is extraordinary. After years of denial, the Assad regime has finally admitted to the international community that it possesses a chemical weapons stockpile; a stockpile present in a State ravaged by a more than two-year long civil war that has already claimed more than 100,000 lives. What the regime continues to deny to the world is the lives it has taken over the last year through the use of chemical weapons against its own people. Only a month ago, on 21 August, regime forces unleashed the nerve agent sarin against an opposition-controlled suburb of Damascus killing 1,400 innocent men, women, and children. The report by the United Nations Investigation Mission conclusively found that sarin was used in this brutal incident. The Head of

the United Nations Mission, Dr Åke Sellström, noted that "[t]his result leaves us with the deepest concern."

Just three weeks ago, in the wake of the horrifying events of 21 August, the United States and the Russian Federation undertook an intensive diplomatic effort to prevent further use of chemical weapons in Syria. Secretary Kerry and his Russian counterpart Sergei Lavrov were able to find common ground through the same vision that binds us all as States Parties to the Chemical Weapons Convention—our commitment, for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons. On 14 September, this diplomatic initiative successfully yielded the "Framework for the Elimination of Syrian Chemical Weapons."

The Kerry-Lavrov framework provided fundamental principles and an ambitious plan for eliminating the Assad regime's chemical weapons programme, which are now embedded in the decision adopted by this Executive Council on 27 September as well as in the United Nations Security Council resolution adopted the same day. It is uncertain, however, whether the regime will follow through and faithfully implement those requirements. Let us not forget that just one month ago, the Syrian regime gassed civilians in a Damascus suburb in blatant violation of international law. Prudence requires that we be both determined and circumspect, hopeful and cautious.

Since its inception, the implementation of the Chemical Weapons Convention has been predicated upon the assumed good faith of new States Parties. In this extraordinary case, however, good faith cannot and should not be assumed. It would be foolhardy while leaving the people of Syria at a continued risk of chemical attack if we were to simply assume that Syria has, in but a single month, undergone a heartfelt moral and political transformation. Certainly, public outrage, the threat of military action and international pressure have been the most critical factors in prompting the apparent shift in the calculus of the Syrian Government.

By using chemical weapons, the Assad regime chose a path that is repugnant to the conscience of mankind. On 14 September, the regime deposited its instrument of accession to the Chemical Weapons Convention with the United Nations Secretary-General, and expressed its intention to be bound immediately pending the Convention's entry into force for Syria. On 19 September, it submitted preliminary information to the OPCW Technical Secretariat regarding its chemical weapons programme. The United States acknowledges the importance of Syria's actions in this regard, but with guarded optimism. Syria, however, has ascended only the first rungs of the ladder. We must with open eyes see if it truly intends to climb the rest of the way. The next few weeks will be an important test of Syria's commitment to the decision the Council has adopted, to its obligations under the resolution of the United Nations Security Council, and to the obligations under the Convention.

-- By 4 October, Syria must submit to the Technical Secretariat further and more detailed information on its chemical weapons programme to supplement the information it provided on 19 September.

-- By 27 October, Syria must submit to the Technical Secretariat the very comprehensive declaration required under Articles III and VI of the Convention.

-- Also by 27 October, Syria must submit a general destruction plan for its chemical weapons programme. Given the expedited destruction timelines embedded in the Executive Council decision, this plan will need to be detailed and comprehensive, especially with respect to the destruction of production and mixing/filling equipment which must be completed by 1 November under OPCW verification.

-- OPCW inspectors are now in Syria to conduct inspections at all chemical weapons facilities in Syria. It remains to be seen if Syria will fully cooperate with the OPCW and accord inspectors the immediate and unfettered right of access to any and all sites mandated by the Council decision and the Security Council resolution.

Last Friday night, the OPCW Executive Council—followed shortly thereafter by the United Nations Security Council—turned the promise of the framework between Russia and the United States into an international plan for achieving the complete elimination of all chemical weapons in Syria. This is a truly historic development. However, effective verification and vigilant commitment on the part of the Technical Secretariat, the Executive Council, and all the States Parties to the Convention will be essential to successfully complete the journey to a Syria completely free of chemical weapons.

* * * *

On October 24, 2013, the U.S. delegation participated in the 68th UN General Assembly First Committee thematic discussion on other weapons of mass destruction. Katharine C. Crittenberger spoke on behalf of the U.S. delegation in remarks excerpted below and available at *www.state.gov/t/avc/rls/2013/215839.htm*.

---

* * * *

A year ago in this forum, as reports of chemical weapons use in Syria were prompting increasing concerns, the United States emphasized the very real possibility that the world may be faced with a situation where the use of chemical weapons could become a reality. With the confirmation of the senseless killing, on August 21, of over 1000 Syrians including hundreds of young children by the use of chemical weapons, the world saw that horrible reality come true. The United States and the international community quickly and unconditionally condemned such actions. We continue to stand firm on such use as reprehensible; it goes against what has been an international norm for nearly a century. The use of chemical weapons anywhere constitutes a threat to international peace and security.

It remains our overarching goal, and that of 98% of the world community, to exclude completely the possibility of the use of chemical weapons. However, the United States believes that such a commitment should be reflected in deeds and not just words, which is why the United States was prepared to take the action that led to the historic U.S.-Russia Framework and subsequently the adoption on September 27th of the Organization for the Prohibition of Chemical Weapons (OPCW) Executive Council Decision and UN Security Council Resolution 2118, that

imposes legally binding obligations on Syria to cooperate fully in the rapid elimination of its chemical weapons program under stringent verification procedures.

The fact that just a month ago the Syrian regime did not even acknowledge it possessed chemical weapons, and now inspectors are not only on the ground but they are overseeing the initial stages of destruction, is a step forward. UN Security Council Resolution 2118 requires that the Syrian Government provide the OPCW, the UN and designated personnel with immediate and unfettered access to any and all sites in Syria. Such access will be critical for the elimination of the Syrian CW program. The OPCW reports that the process of destroying Syria's chemical weapons program began on October 6. We believe that the OPCW, UN and other designated personnel on the ground will see whether the Syrians are prepared to allow this kind of access and consent to efforts to move forward rapidly and comprehensively. It is now up to the Syrian Government and there is clearly more work to be done. The international community will be paying close attention to whether the Syrian regime is abiding by all of its obligations under the Chemical Weapons Convention, OPCW Executive Council decision and UNSCR 2118.

In this regard, we welcome and strongly support the successful efforts of the Director General of the OPCW, Ahmet Uzumcu, and the extraordinary work being done by him and the experts in the OPCW Technical Secretariat. The recent awarding of the Nobel Peace Prize to the OPCW for its long-standing efforts to eliminate chemical weapons is further validation of its commitment and resolve toward eliminating an entire class of WMD. The OPCW has been instrumental in verifying the elimination of chemical weapons around the world and is dedicated to the vision of a world free of chemical weapons and the prevention of the reemergence of such weapons.

It is also equally important to recognize UN Secretary-General Ban Ki-moon and his staff of professionals who are partnering with the OPCW in the important work going on in Syria. We acknowledge the bravery and professionalism of the staffs that make up the OPCW-UN teams and the important mission they have undertaken despite the dangers involved. Their efforts are to be commended and remembered.

Mr. Chairman,

On other CWC related matters, the OPCW held its Third CWC Review Conference (RevCon) in April of this year. Its final document provides a strong, balanced, and forward-looking call for continued and improved implementation of the Convention. It provides guidance on chemical weapons for the next five years and focuses on CW destruction, verification, chemical industry, economic cooperation, and preserving the expertise of the Technical Secretariat.

I would like to emphasize that the United States remains encouraged by the progress made by the OPCW in working toward a world free of chemical weapons. Since entry into force of the Chemical Weapons Convention (CWC), the OPCW has accomplished a great deal and remains an indispensable multilateral body with a global responsibility. With a near universal membership of 190 member states, with Somalia and Syria joining this year, over 81% of all declared chemical weapon stockpiles verifiably destroyed, and over 5,200 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 States Parties, along with the OPCW's Technical Secretariat.

For our part, the United States has safely destroyed nearly 90 percent of its chemical weapons stockpile under OPCW verification. 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 amount of chemical weapons.

The United States remains fully committed to the nonproliferation 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 reemergence 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. 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.

Mr. Chairman,

The United States, as one of the depositaries of the Biological and Toxin Weapons Convention (BWC), would like to congratulate Cameroon, Guyana, Malawi, the Marshall Islands, and Nauru for becoming States Parties to the Convention since the last meeting of this Committee. The BWC now has 170 States Parties, and we urge all to make efforts toward the universality of this important treaty.

The Seventh BWC Review Conference (RevCon) in 2011 was an opportunity for greater imagination and collective effort in confronting the threat of biological weapons, and for continuing the important work of adapting our international efforts to a changing world and a changing threat. While the RevCon did not achieve everything the United States hoped it would, we were satisfied with the outcome, and believe the stage is set for enhancing the important work of the BWC Intersessional Process.

The RevCon adopted a five-year work plan with agenda items for 2012-2013 on international cooperation and assistance, developments in science and technology (S&T), strengthening national implementation, and Confidence-Building Measures (CBMs). Since then, we have made progress on the work plan, both at the December 2012 BWC Meeting of States Parties, which produced a constructive final report, and at the August 2013 Meeting of Experts, which held useful discussions on many details of these agenda items in a positive atmosphere.

Mr. Chairman,

Discussions and briefings at these two meetings on international cooperation and assistance have demonstrated the diversity and extensiveness of ongoing global exchanges in the life sciences, including in areas of particular importance to the Convention such as biosecurity. With regard to S&T, Parties acknowledged that the rapid pace of technological change presents both challenges and opportunities for the BWC. An important focus was the challenge presented

by dual-use research of concern and the utility of voluntary codes of conduct, education and awareness-raising for addressing it.

States Parties also continued to share information on the status of national implementation of the Convention and on the assistance available for effectively implementing it, and considered ways in which they could promote confidence in their compliance through transparency about implementation. Finally, a range of proposals to enhance the value of CBMs to States Parties were discussed, though it is still unclear why many Parties do not submit CBMs and what challenges they face in making use of them. More broadly, the 2013 BWC meetings reflected the link of the Convention to global health security, emphasizing the need to strengthen adherence to international norms, such as the International Health Regulations, and the value of working with international organizations such as the World Health Organization, the Food and Agriculture Organization, and the World Organization for Animal Health. The United States recognizes that the unique nature of the biological threat makes it essential to accelerate progress to achieve global health security, including international capacity to prevent, detect and respond to infectious disease threats whether the result of a naturally occurring outbreak, accidental release or intentional event.

We look forward to reaching clear understandings and pragmatic, meaningful actions to strengthen the Biological Weapons Convention in each of these areas and demonstrate the value of effective multilateralism at the BWC Meeting of States Parties in December. It is also important for Parties to remember that, while agreeing on new understandings and new actions is important, we all have much work 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 these challenges.

* * * *

On October 31, 2013, Secretary Kerry reported on the progress in eliminating Syria's chemical weapons program in a press statement available at *www.state.gov/secretary/remarks/2013/10/216143.htm*. The October 31st press statement is excerpted below.

---

* * * *

International inspectors have worked with unprecedented speed to accomplish the first milestone in eliminating Syria's chemical weapons and reducing the possibility that they will ever be used again. Now we must make sure the job is finished and that every one of these banned weapons is removed and destroyed. This is meaningful progress which many believed would be impossible. The progress must continue.

We must also be crystal clear that eliminating Syria's chemical weapons is not a substitute for ending the civil war nor does it end the humanitarian catastrophe that continues to unfold. If weapons inspectors can carry out their critical mission, then I refuse to believe we

can't find a way for aid workers to carry out their equally critical mission delivering food and medical treatment to Syrians in need.

But where chemical weapons are concerned, we cannot lose sight of what has been accomplished thus far and what continues every day. Backed by the full weight of the United Nations and the international community, OPCW inspectors have responded to an unspeakable atrocity with unparalleled action. Nothing less would be acceptable after events that shocked the conscience of the world and left 1,400 innocent Syrians dead. Under the U.S.-Russia Framework, Syria must provide all UN and OPCW personnel unfettered access to any and all sites in order to fulfill their critical mission of verifying the full extent, and the eventual elimination, of Syria's chemical weapons program. Syria's obligations are clear, and it will need to fully comply with the requirements established by UNSCR 2118 and the OPCW Executive Council's decision. To borrow from President Reagan's maxim, where the Assad regime is concerned, there is no 'trust,' only 'verify.'

To date, the United States has provided approximately $6 million in financial and in-kind assistance to support the efforts of the OPCW-UN Joint Mission to eliminate Syria's chemical weapons program, including armored vehicles, training, protective equipment, and medical CW countermeasures for the inspection team. We intend to continue to provide available assistance to help the Joint Mission fulfill its mandate.

* * * *

On November 15, 2013, the OPCW Executive Council approved a detailed plan of destruction to eliminate Syria's chemical weapons stockpile. According to the plan, Syrian chemical weapons will be transported for destruction outside the territory to ensure their destruction in the "safest and soonest manner." The plan sets June 30, 2014 as the deadline for completing the destruction.

2. Biological Weapons

On April 8, 2013, the United States congratulated new members of the Biological Weapons Convention in a press release available at *www.state.gov/t/isn/rls/prsrl/2013/207204.htm*. The press release states3:

> The Republics of Cameroon, Guyana, Malawi, and Nauru have recently joined the Biological and Toxin Weapons Convention (BWC), bringing the total number of its States Parties to 170. On March 26, 2013, Guyana deposited an instrument of ratification of the BWC with the United States, one of the three depositary states of the Convention. Cameroon (January 18), Nauru (March 5), and Malawi (April 2) have also joined the BWC this year, having deposited instruments of accession also with the United States.

The United States warmly congratulates these countries for taking this significant step. Their actions advance the BWC—one of the pillars of the global architecture against the proliferation of weapons of mass destruction—and its universality, both of which are strongly supported by the United States.

G. BALLISTIC MISSILE DEFENSE

On April 18, 2013, Deputy Assistant Secretary of State Frank Rose delivered remarks in Warsaw, Poland on implementation of the European Phased Adaptive Approach to ballistic missile defense. Mr. Rose's remarks are excerpted below and available at *www.state.gov/t/avc/rls/2013/207679.htm*. Mr. Rose delivered similar remarks in Bucharest, Romania on May 1, 2013, available at *www.state.gov/t/avc/rls/2013/208667.htm*.

* * * *

Since 2009, the United States Government has focused on carrying out the vision articulated by President Obama when he announced that the EPAA would "provide stronger, smarter, and swifter defenses of American forces and America's Allies," while relying on "capabilities that are proven and cost-effective."

As you know, we have made great progress in implementing the President's vision in Europe.

EPAA Phase One gained its first operational elements in 2011 with the start of a sustained deployment of an Aegis BMD-capable multi-role ship to the Mediterranean and the deployment of an AN/TPY-2 radar in Turkey. With the declaration of Interim Operational Capability at the NATO Summit in Chicago, this radar transitioned to NATO operational control.

Demonstrating their support for both NATO and the EPAA, Spain agreed in 2011 to host four U.S. Aegis-capable ships at the existing naval facility at Rota. These ships will arrive in the 2014- 2015 timeframe, in time for EPAA Phase Two.

For Phase Two of the EPAA, we have an agreement with Romania that was ratified in December of 2011 to host a U.S. land-based SM-3 interceptor site beginning in the 2015 timeframe. This site, combined with BMD-capable ships in the Mediterranean, will enhance coverage of NATO from short- and medium-range ballistic missiles launched from the Middle East.

And finally there is Phase 3, which is centered on the first of the three host nations to ratify their hosting agreement – Poland. The Ballistic Missile Defense Agreement between the U.S. and Poland entered into force in September of 2011. This agreement places a land-based

interceptor site, similar to Phase 2, in Redzikowo, and includes the SM-3 Block IIA interceptor. This EPAA Phase 3 site is on schedule and on budget for deployment in the 2018 timeframe. The interceptor site here in Poland will be key to the EPAA. Not only will it protect Poland itself, but when combined with the rest of the EPAA assets, Phase 3 will be able to protect all of NATO Europe against ballistic missile threats from the Middle East.

On March 15, Secretary Hagel announced changes to U.S. missile defense policy to strengthen U.S. homeland missile defenses due to the growing ballistic missile threat from Iran and North Korea. One of these policy changes is that the SM-3 IIB missile defense interceptor program—the core element of EPAA Phase 4—is being restructured into a technology development program.

With the SM-3 IIB interceptor, Phase 4 would have provided an intercept capability against ICBMs launched at the U.S. homeland from the Middle East. But the SM-3 IIB program also experienced significant delays, in part due to the U.S. Congress underfunding this interceptor. So as you know, the SM-3 IIB interceptor will no longer be developed or procured. The United States will instead strengthen its homeland defense by procuring additional Ground Based Interceptors—GBIs—for deployment at our existing missile defense site in Fort Greely, Alaska.

As Secretary Hagel announced, we will increase the number of deployed GBIs from the current 30 to 44, providing a nearly 50 percent increase in our capability.

The other two steps that Secretary Hagel announced include:

- Deploying, with the support of the Japanese Government, an additional AN/TPY-2 radar in Japan. This will provide improved early warning and tracking of any missile launched from North Korea at the United States and/or Japan; and
- Conducting studies for a potential additional GBI site in the United States. While the Obama Administration has not made any decision on whether to proceed with an additional site, conducting these studies would shorten the timeline for construction should that decision be made.

Finally, let me emphasize that the U.S. commitment to Phases One through Three of the EPAA and NATO missile defense remains ironclad, including the planned sites in Poland and Romania. Like the Administration, the U.S. Congress has supported, and continues to support full funding for Phases 1 through 3.

These U.S. missile defense deployments to Europe will provide the necessary capabilities to provide ballistic missile defense coverage of all NATO European territory in the 2018 timeframe.

I know that some may believe that not fielding Phase 4 may weaken the Transatlantic connection of the EPAA. I would tell you that the connection is still strong. I would emphasize that Phases One through Three of the EPAA will continue to provide important contributions to the defense of the United States homeland and U.S. deployed forces in Europe. For example, the radar deployed in Turkey as part of EPAA can provide important early tracking data on any Iranian missile launches against the United States. The interceptor site to be deployed in Poland, as well as BMD-capable ships at sea, will also be key to protecting the U.S. radar at Fylingdales, which is important to the defense of the U.S. homeland.

Cooperation With NATO Allies

Beyond our bilateral cooperation, we have also worked with our NATO Allies, including Poland, to implement a NATO missile defense effort.

After thorough and steady progress within NATO, on May 20-21 of 2012, the NATO Heads of State and Government met in Chicago for a 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 the Supreme Allied Commander Europe as the commander for this mission, and announced 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 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. NATO BMD will be more effective should Allies provide sensors and interceptors to complement the U.S. EPAA contributions. Several NATO Allies already possess land- and sea-based sensors that could potentially be linked into the system, as well as lower tier systems that can be integrated and used to provide point defense such as PATRIOT. It is important that the systems contributed by Allies be interoperable with NATO's Active Layered Theater Ballistic Missile Defense – or ALTBMD – command and control capability.

Cooperation With the Russian Federation

At the same time as we are developing this missile defense cooperation with NATO, we also seek to work cooperatively with Russia. We remain convinced that missile defense cooperation between the United States and Russia (and between NATO and Russia) is in the national security interests of all countries involved. For that reason, missile defense cooperation with Russia remains a Presidential priority for this Administration.

In Chicago, the NATO Allies made a very clear statement of our intent regarding strategic stability and Russia's strategic deterrent. NATO declared in the Chicago Summit Declaration that "…the NATO missile defense in Europe will not undermine strategic stability. NATO missile defense is not directed against Russia and will not undermine Russia's strategic deterrence capabilities." Through transparency and cooperation with the United States and NATO, Russia would see firsthand that this system is designed for ballistic missile threats from outside the Euro-Atlantic area, and that NATO missile defense systems can neither negate nor undermine Russia's strategic deterrent capabilities.

While we seek to develop ways to cooperate with Russia on missile defense, it is important to remember that in keeping with its collective security obligations, NATO alone bears responsibility for defending the Alliance from ballistic missile threats. This is why the United States and NATO cannot agree to Russia's proposals for "sectoral" or "joint" missile defense architectures. Just as Russia must ensure the defense of Russian territory, NATO must ensure the

defense of NATO territory. NATO cannot and will not outsource its Article 5 commitments. As ballistic missile threats continue to evolve, we cannot place limits or constraints on our ability to defend ourselves, our allies, and our partners. This includes any limitations on the operating areas of our BMD-capable multi-mission Aegis ships.

Cooperation With Poland

We can't talk about BMD cooperation without talking about our cooperation right here with the Republic of Poland.

We also now have an enduring Aviation Detachment deployed in Lask, which supports the joint training of U.S. and Polish Air Forces. And I also have to mention our vibrant and longstanding cooperation with Poland on other efforts to combat the threat of WMD and their missile delivery systems. For example, former President Bush chose Warsaw as the site of his May 2003 public call to create a common global effort to stop WMD- and missile-related shipments to and from states of proliferation concern. Poland and the United States then worked closely to heed that call by establishing the Proliferation Security Initiative. Over the following decade, 100 other nations from every part of the world joined our two countries in the PSI to improve our common efforts to take action against WMD shipments. Next month, Acting Under Secretary Gottemoeller will have the great pleasure of leading the U.S. delegation to the PSI Tenth Anniversary meeting in Warsaw not only to mark the occasion, but to continue efforts to meet the call that President Obama made in the 2009 Prague speech to ensure the PSI is a durable international effort.

I commend my Polish colleagues for their leadership within NATO and domestically on defense modernization which will lead to new and valuable skill sets for NATO. As everyone knows, Poland is leading by example. Where many NATO countries are reducing their defense modernization, Poland is focusing on it – and the "it" that I follow most closely is the Polish efforts to upgrade its Integrated Air and Missile Defense System. This has been a topic of considerable discussion with my Polish counterparts. I expect it will be a topic of continued discussion. It is clear to me that the Government of Poland intends to embark upon a substantial effort that will provide for a greater national expertise which can contribute to NATO air and missile defense capabilities.

And Poland is not only working on defense modernization – it is also a participant in the U.S. Strategic Command's NIMBLE TITAN multinational missile defense wargame. Polish military, Ministry of Defense and Ministry of Foreign Affairs officials are working closely with over 20 countries and NATO to collaboratively think through how regional and global coalitions might be able to innovate with equipment, tactics, techniques and procedures to provide the best and most agile defense. In a world where the threats and the technology to defend are constantly evolving, it is our responsibility to think through the problems to reach the best and most efficient solutions.

* * * *

H. NEW START TREATY

On February 19, 2013, the Bilateral Consultative Commission established under the New START treaty issued a decision on the number of launches of ICBMs and SLBMs conducted in 2012 on which an exchange of telemetric information will be carried out in 2013. That decision appears below and is available at *www.state.gov/t/avc/rls/204959.htm*. Also available on the State Department's website, at *www.state.gov/documents/organization/208183.pdf*, is a joint presentation delivered by the United States and Russia for the P5 on the verification regime under the New START Treaty.

---

* * * *

In accordance with paragraph 2 of Part Seven of the Protocol to the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms of April 8, 2010, the Delegation of the United States of America to the Bilateral Consultative Commission and the Delegation of the Russian Federation to the Bilateral Consultative Commission decided that the Parties would exchange, in 2013, telemetric information on one launch of an ICBM or SLBM conducted by each Party during the period from January 1, 2012, to December 31, 2012.

* * * *

I. TREATY ON CONVENTIONAL ARMED FORCES IN EUROPE AND TREATY ON OPEN SKIES

On June 20, 2013, Greg Delawie, Deputy Assistant Secretary of State in the Bureau of Arms Control, Verification and Compliance, delivered remarks on enhancing security cooperation in Europe in which he discussed both the Treaty on Conventional Armed Forces in Europe and the Treaty on Open Skies. Mr. Delawie's remarks are available at *www.state.gov/t/avc/rls/2013/211055.htm* and are excerpted below.

---

* * * *

…[L]et's consider how the existing three-pillared conventional arms control regime contributes to our European security architecture. The Open Skies Treaty, the Vienna Document's CSBMs, and the Treaty on Conventional Armed Forces in Europe, provide a foundation for stability in our strategic relationships. Each regime is important and contributes to security and stability in a

unique way and, when working in harmony, they result in greater confidence for all of Europe. Unfortunately, they are not currently working in harmony.

First, I want to touch on the Open Skies Treaty, which provides a historic level of openness and transparency regarding military forces and activities. In the more than ten years since the Treaty's entry into force, States Parties have flown nearly 1,000 observation flights, enhancing confidence and providing significant insight into the security situation in Europe. These flights also provide valuable opportunities for our governments—in most cases, our military personnel—to regularly and effectively work together.

One of the challenges we face for the continued success of the Treaty is the future availability of resources. The Treaty will only be as good as the States Parties make it, and we cannot ensure its effectiveness with old aircraft and sensors. For its part, the United States has committed to transition from the use of film-based cameras to digital sensors. We urge all parties to redouble their efforts to modernize the Treaty to allow for the use of these new sensors and ensure sufficient assets for future operations.

We will need to continue to think creatively in order to advance European security in the current fiscal environment bearing in mind the reality of budgetary constraints in the United States and across Europe. For example, the Open Skies Consultative Commission began discussing the possibility of sharing aircraft, sensors, and media processing, and considered the idea of a working group to focus on this topic. It seems clear to us that the potential to share Open Skies assets among States Parties is underutilized and we would like to see the OSCC reengage on this important topic.

We cannot address the importance of modernizing the Open Skies Treaty without also addressing the procedural impasse in its Consultative Commission. Unfortunately, specific national political interests have introduced a significant roadblock to the functioning of the OSCC by preventing timely and effective decision-making. It is not in the interest of any State Party, nor is it in the interest of improving European security, for the work of the OSCC to be held hostage in this way. We should all insist on a higher standard for the Treaty. No State Party should make procedural demands that compromise its international legal commitments and obligations when any correction to the underlying dispute or issue is outside the mandate and control of the Treaty's mechanisms. The United States will work with our Treaty partners to find a long-term solution that will allow the OSCC to get back to business. This situation must be resolved in order to prevent negative effects in other European security fora.

I now turn to the Vienna Document, which also plays a vital role in European security. It provides insights into military activities and equipment holdings for confidence and security building purposes. This set of politically binding measures has contributed immeasurably to Europe-wide military transparency and reassurance. In addition, the Vienna Document can serve as a useful template for other regions where nations look to build confidence regarding the military intentions of their neighbors.

To ensure the continued relevance of the Vienna Document, both to Europe and to other regions, we need to modernize it with two goals in mind: strengthen existing provisions and ensure the Document remains relevant to current security challenges. Looking at existing provisions, we believe there are ways to enhance key components of the Vienna Document –

such as enhancing inspection opportunities – so as not to impose unreasonable expenses on participating States. In the face of today's security challenges, changes such as lowering thresholds for notification of military activities would bring the document into line with today's smaller military forces. We call on all our OSCE partners to engage seriously on efforts to take these vital steps to modernize and recalibrate the Vienna Document for the 21st Century.

We also have the Treaty on Conventional Armed Forces in Europe, with its system of equipment limits, information exchange, and verification. Since its entry into force, more than 72,000 pieces of Cold War military equipment – tanks, armored combat vehicles, artillery, combat aircraft, and attack helicopters – have been eliminated. Under CFE, thousands of inspections have taken place at military sites all over Europe, dramatically increasing confidence and military transparency on the continent by providing a means to verify the information provided in data exchanges. It is important to recognize that CFE and the Vienna Document are complementary, not interchangeable. Each was designed with a specific purpose and makes a separate and distinct contribution to overall stability in Europe.

The U.S. Government believes that the security provided by the CFE Treaty is too important to ignore. CFE has been an important pillar for European security as a whole and remains important to the United States. But we are at a difficult crossroads. Russia ceased implementation of its CFE obligations in December 2007 and, in late 2011, the United States, along with 23 other countries, ceased carrying out certain obligations under the CFE Treaty with regard to Russia. We continue to implement the Treaty in full with respect to all the other CFE states, even as we explore how to modernize the conventional regime.

Future of Conventional Arms Control

Conventional arms control has contributed substantially to stability and security in Europe. We believe it has a role to play in building trust and confidence for the future as well. NATO's 2012 Chicago Summit communique confirmed the importance all Allies attach to conventional arms control:

"Allies are determined to preserve, strengthen and modernize the conventional arms control regime in Europe, based on key principles and commitments, and continue to explore ideas to this end."

All of us, together, have made a serious investment in building the current security architecture in Europe. We must adapt and improve our efforts to meet our current and future security needs, and do it in a way that is efficient and effective for all countries involved, while also preserving key OSCE principles and commitments. We have been devoting a lot of time and energy to this task. We're asking fundamental questions: What are the security concerns in Europe today that a conventional arms control agreement should address? And, taking into account the lessons learned from the implementation of existing agreements, what kinds of arms control measures could best address those security concerns and uphold core principles of European security?

We should all be proud that the CFE Treaty resolved successfully the basic problem posed by the destabilizing surplus of conventional arms on the continent. Today, quantities of conventional armaments across much of the continent are far below the negotiated ceilings, and are likely to decrease further.

While the NATO-Warsaw Pact confrontation of 1989 no longer exists, it is clear that conventional arms control, done right, still has scope to significantly improve security on the continent by helping to address today's concerns. We must adapt and improve upon the investment we have already made in order to meet our current and future security needs, and do it in a way that is efficient and effective for all countries involved, while continuing to preserve key principles and commitments.

The United States wants to enhance the partnership between NATO and Russia as a key component of this European security cooperation. One of the major practical achievements of the NATO-Russia Council has been our collaboration on Afghanistan. It is important to build on that success and expand our practical cooperation on security issues, in particular by building additional military transparency. We share many common goals and face mutual concerns, including creating the conditions to achieve long-term prosperity for all our people. When we do not agree on issues, our relationship should accommodate frank discussion of disagreements in a spirit of mutual respect.

In the bilateral context, we see significant opportunities for the United States and Russia to expand our partnership in ways that advance our mutual security interest and the interest of the international community. As President Obama mentioned yesterday in Berlin, we hope to continue to work together to safeguard and reduce nuclear arsenals and stem global proliferation.

Our two nations now are extending traditional transparency and confidence-building measures to reduce the mutual danger we face from cyber threats. President Obama and President Putin earlier this week announced a range of steps designed to increase transparency and reduce the possibility that a misunderstood cyber incident could create instability or a crisis in our bilateral relationship.

We can build on the new United States-Russia bilateral framework on threat reduction, also announced this week, that reinforces our longstanding partnership on nonproliferation.

Missile defense transparency and cooperation is another area we should pursue, and the United States continues to seek a path forward with Russia that would advance the security interests of us all. We look forward to implementing all these initiatives, and will continue to seek other steps to enhance transparency and confidence, strengthening security in the Euro-Atlantic area boosting the potential of our societies to prosper.

* * * *

J. ARMS TRADE TREATY

In 2013, the United States continued to support the conclusion of the UN Arms Trade Treaty. For background on progress on the treaty in 2012, see *Digest 2012* at 674-79.

Secretary Kerry issued a press statement in advance of the Final UN Conference on the Arms Trade Treaty, convened in New York March 18-28, with the aim of reaching consensus on the treaty. His statement, excerpted below, is available at *www.state.gov/secretary/remarks/2013/03/206323.htm*.

---

* * * *

The United States looks forward to working with our international partners at the upcoming conference from March 18-28 to reach consensus on an Arms Trade Treaty that advances global security and respects national sovereignty and the legitimate arms trade. We supported and actively participated in negotiations on an Arms Trade Treaty held at the United Nations in July 2012. Those negotiations made considerable progress, but ended before a treaty could be concluded. Accordingly, the United States supported a UN General Assembly resolution December 24, 2012 to convene the conference this month to build on those efforts.

The United States is steadfast in its commitment to achieve a strong and effective Arms Trade Treaty that helps address the adverse effects of the international arms trade on global peace and stability. An effective treaty that recognizes that each nation must tailor and enforce its own national export and import control mechanisms can generate the participation of a broad majority of states, help stem the illicit flow of conventional arms across international borders, and have important humanitarian benefits.

The United States could only be party to an Arms Trade Treaty that addresses international transfers of conventional arms solely and does not impose any new requirements on the U.S. domestic trade in firearms or on U.S. exporters. We will not support any treaty that would be inconsistent with U.S. law and the rights of American citizens under our Constitution, including the Second Amendment.

While the international arms trade affects every country, over one hundred states today do not have a system for control of international conventional arms transfers. We support a treaty that will bring all countries closer to existing international best practices, which we already observe, while preserving national decisions to transfer conventional arms responsibly. The international conventional arms trade is, and will continue to be, a legitimate commercial activity. But responsible nations should have in place control systems that will help reduce the risk that a transfer of conventional arms will be used to carry out the world's worst crimes, including those involving terrorism, and serious human rights violations.

I wish the conference well and hope that we can reach consensus on a treaty that improves global security, advances our humanitarian goals, and enhances U.S. national security by encouraging all nations to establish meaningful systems and standards for regulating international arms transfers and ensuring respect for international law.

* * * *

Remarks by Assistant Secretary Countryman at the plenary session of the conference on March 25, 2013 are available at *www.state.gov/t/isn/rls/rm/2013/206668.htm*. Mr. Countryman also held an on-the-record conference call with the media on March 28, 2013, which is available at *www.state.gov/t/isn/rls/rm/2013/206806.htm*. Although the conference did not reach consensus, the UN General Assembly adopted the text of the Arms Trade Treaty that was produced by the conference on April 2, 2013. Secretary Kerry issued a press statement that same day, welcoming the adoption of the Arms Trade Treaty. The press statement is excerpted below and available at *www.state.gov/secretary/remarks/2013/04/206982.htm*.

---

* * * *

The United States is pleased that the United Nations General Assembly has approved a strong, effective and implementable Arms Trade Treaty that can strengthen global security while protecting the sovereign right of states to conduct legitimate arms trade.

The Treaty adopted today will establish a common international standard for the national regulation of the international trade in conventional arms and require all states to develop and implement the kind of systems that the United States already has in place. It will help reduce the risk that international transfers of conventional arms will be used to carry out the world's worst crimes, including terrorism, genocide, crimes against humanity, and war crimes. At the same time, the treaty preserves the principle that the international conventional arms trade is, and will continue to be, a legitimate commercial activity that allows nations to acquire the arms they need for their own security.

By its own terms, this treaty applies only to international trade, and reaffirms the sovereign right of any State to regulate arms within its territory. As the United States has required from the outset of these negotiations, nothing in this treaty could ever infringe on the rights of American citizens under our domestic law or the Constitution, including the Second Amendment.

* * * *

Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the UN, also delivered a statement at the UN General Assembly Meeting on the Arms Trade Treaty on April 2, 2013. Her statement, available at *http://usun.state.gov/briefing/statements/207006.htm*, is excerpted below.

---

* * * *

Mr. President, the United States is proud to have been able to co-sponsor and vote in favor of adopting the Arms Trade Treaty. The treaty is strong, balanced, effective, and implementable, and we believe it can command wide support. We join others in congratulating Ambassador Peter Woolcott for his tireless efforts in guiding the negotiation.

The treaty is the product of a long, intensive negotiation, and I know that no nation, including my own, got everything it may have sought in the final text. The result, however, is an instrument that succeeds in raising the bar on common standards for regulating international trade in conventional arms while helping to ensure that legitimate trade in such arms will not be unduly hindered.

The negotiations remained true to the original mandate for them from UN General Assembly Resolution 64/48, which called for negotiating a treaty with the highest possible common international standards for the transfer of conventional arms and for the negotiations to be conducted in an open and transparent manner, on the basis of consensus. The consensus rule remains important for the United States; the United Nations is most effective when it is able to take decisions by consensus.

Mr. President, as the United States has urged from the outset, this Treaty sets a floor—not a ceiling—for responsible national policies and practices for the regulation of international trade in conventional arms. We look forward to all countries having effective national control systems and procedures to manage international conventional arms transfers, as the United States does already.

We believe that our negotiations have resulted in a treaty that provides a clear standard, in Article 6, for when a transfer of conventional arms is absolutely prohibited. This article both reflects existing international law and, in paragraph three, would extend it by establishing a specific prohibition on the transfer of conventional arms when a state party knows that the transfer will be used in the commission of genocide, crimes against humanity, or the enumerated war and other crimes. Article 7 requires a state party to conduct a national assessment of the risk that a proposed export could be used to commit or facilitate serious violations of international humanitarian law or international human rights law, as well as acts of terrorism or transnational organized crime. Taken together, these articles provide a robust and complementary framework that will promote responsible transfer of decisions by states parties.

* * * *

On June 3, 2013, the United States welcomed the opening for signature of the Arms Trade Treaty with a press statement by Secretary Kerry. That statement, available at *www.state.gov/secretary/remarks/2013/06/208554.htm*, is excerpted below.

---

* * * *

The United States welcomes the opening of the Arms Trade Treaty for signature, and we look forward to signing it as soon as the process of conforming the official translations is completed satisfactorily.

The Treaty is an important contribution to efforts to stem the illicit trade in conventional weapons, which fuels conflict, empowers violent extremists, and contributes to violations of human rights. The Treaty will require the parties to implement strict controls, of the kind the United States already has in place, on the international transfer of conventional arms to prevent their diversion and misuse and create greater international cooperation against black market arms merchants. The ATT will not undermine the legitimate international trade in conventional weapons, interfere with national sovereignty, or infringe on the rights of American citizens, including our Second Amendment rights.

We commend the Presidents of the two UN negotiating conferences – Roberto Garcia Moritan of Argentina and Peter Woolcott of Australia –for their leadership in bringing this agreement to fruition. We also congratulate all the states that helped achieve an effective, implementable Treaty that will reduce the risk that international transfers of conventional arms will be used to carry out the world's worst crimes.

* * * *

On September 25, 2013, Secretary Kerry signed the Arms Trade Treaty on behalf of the United States. His remarks at the signing ceremony are excerpted below and available at *www.state.gov/secretary/remarks/2013/09/214717.htm*.

---

* * * *

On behalf of President Obama and the United States of America, I am very pleased to have signed this treaty here today. I signed it because President Obama knows that from decades of efforts that at any time that we work with – cooperatively to address the illicit trade in conventional weapons, we make the world a safer place. And this treaty is a significant step in that effort.

I want to be clear both about what this treaty is, but I also want to be clear about what it isn't. This is about keeping weapons out of the hands of terrorists and rogue actors. This is about reducing the risk of international transfers of conventional arms that will be used to carry out the world's worst crimes. This is about keeping Americans safe and keeping America strong. And this is about promoting international peace and global security. And this is about advancing important humanitarian goals.

I also want to be clear about what this treaty is not about. This treaty will not diminish anyone's freedom. In fact, the treaty recognizes the freedom of both individuals and states to obtain, possess, and use arms for legitimate purposes. Make no mistake, we would never think about supporting a treaty that is inconsistent with the rights of Americans, the rights of American citizens, to be able to exercise their guaranteed rights under our constitution. This treaty

reaffirms the sovereign right of each country to decide for itself, consistent with its own constitutional and legal requirements, how to deal with the conventional arms that are exclusively used within its borders.

What this treaty does is simple: It helps lift other countries up to the highest standards. It requires other countries to create and enforce the kind of strict national export controls that the United States already has in place. And I emphasize here we are talking about the kind of export controls that for decades have not diminished one iota our ability in the United States as Americans to exercise our rights under the constitution – not one iota of restriction in the last decades as we have applied our standards.

So here's the bottom line: This treaty strengthens our security, builds global security without undermining the legitimate international trade in conventional arms which allows each country to provide for its own defense. I want to congratulate everyone who has worked hard in order to help bring this agreement into fruition, including our international partners and the civil society organizations' commitment was absolutely vital to winning support for this treaty. The United States is proud to have worked with our international partners in order to achieve this important step towards a more peaceful – and a more peaceful world, but a world that also lives by international standards and rules.

And we believe this brings us closer to the possibilities of peace as well as a security, a higher level of a security, and the promotion and protection of human rights. That, frankly, is a trifecta for America, and that's why we're proud to sign this treaty today.

* * * *

Cross References

MNEPR, **Chapter 4.A.3.**
Arms Trade Treaty, **Chapter 4.A.4.**
Bond *case regarding the CWC*, **Chapter 4.B.1.**
Human Rights Council actions regarding Syria, **Chapter 6.A.4.b.**
Outer space, **Chapter 12.B.**
Iran sanctions, **Chapter 16.A.1.**
Syria sanctions, **Chapter 16.A.2.**
Nonproliferation sanctions, **Chapter 16.A.3.**
Export controls, **Chapter 16.C.**
Syria, **Chapter 16.B.1.**
Conventional weapons, **Chapter 18.B.**