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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*. On August 7, 2014 the United States and Equatorial Guinea signed an Open Skies air services agreement that entered into force upon signature and is available at *www.state.gov/e/eb/rls/othr/ata/e/ek/220533.htm*. On November 21, 2014, the United States and Mexico reached agreement, *ad referendum*, on a new civil aviation agreement to enter into force on January 1, 2016. The text of the initialed agreement is available at *www.state.gov/e/eb/rls/othr/ata/m/mx/234716.htm*. A November 21, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/11/234335.htm*, explains the significance of the new agreement:

> The new agreement, when brought into force, will benefit U.S. and Mexican passenger and cargo airlines, airports, travelers, and businesses by allowing significantly increased market access for passenger and cargo airlines to fly between any city in Mexico and any city in the United States. Cargo airlines, for the first time, will have expanded opportunities to provide service to new destinations that were not available under the current agreement.

2. Addressing Aviation Impacts on Climate Change

On January 8, 2014, the fourteenth meeting of the U.S.-EU Joint Committee took place in Washington, D.C. The European delegation updated the U.S. side on ratification of the U.S.-EU Air Transport Agreement. The Record of Meeting of the 14th Joint Committee meeting is available at www.state.gov/e/eb/rls/othr/ata/e/eu/227943.htm and includes several paragraphs, excerpted below, regarding the EU's Emissions Trading Scheme ("ETS"), discussed in *Digest 2013* at 306-07, *Digest 2012* at 352-56, and *Digest 2011* at 358-59.

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5. The U.S. delegation noted its pleasure with progress at ICAO's General Assembly in autumn 2013 regarding support for a comprehensive plan to reduce greenhouse gas emissions from international aviation, including developing a proposal for a global market-based measure (MBM), but expressed concerns about the pending European Commission proposal to apply its Emissions Trading Scheme (ETS) to EU airspace. The U.S. noted serious concerns that the proposal would interfere with efforts to make progress on the global MBM at ICAO. The U.S. delegation highlighted the previously unprecedented negative vote at ICAO on the notion of a separate "airspace approach" as clearly demonstrating the lack of international support for such a move, and questioned why the EU would continue to move forward when such action could lead to missing a great opportunity to get other nations on board with the overarching approach to mitigate CO2 emissions from aviation, including the global MBM proposal. The U.S. delegation also noted that several nations have already contacted the U.S. asking to reactivate the "coalition of the unwilling" and have indicated their intentions not to comply with any airspace ETS regulations enacted by the EU. The U.S. delegation recognized that the decision to enact a system within the EU is entirely an EU choice, but emphasized that if a system is enacted with which no one else complies, it will be very difficult for the U.S. to comply, and work towards development on the global measure will be undermined. Finally, the U.S. delegation noted with concern recent remarks by senior EU officials implying U.S. support for an "airspace approach" to the EU ETS. The U.S. clarified it does not support the European Commission's proposal to move forward with applying the airspace ETS to aviation given the results of the Assembly.

6. The EU delegation thanked the U.S. for this information and said that such issues are precisely what the Joint Committee is intended to discuss. Noting strong European support for the global MBM work at ICAO, the EU delegation added that there will always be parties that do not wish to comply with any proposed measures to reduce emissions, and that we need to work together on goals, modalities and processes, even if such work is not done publicly. On the regional airspace approach, the EU delegation underlined that this was a proposal from the European Commission and that the legislative process was still underway and therefore the final shape of the legislation had not yet been decided by the European Parliament and the Council. A decision is expected in April at the latest as that is when the current "stop-the-clock" legislation expires. The next step in this process will be for the European Parliament to hold a vote on 30 January 2014 regarding the details of the position (mandate) it will defend in negotiations with the Council ("trilogue"). The EU delegation noted that under international law states have the ability to regulate their own airspace, and despite the ICAO vote it is difficult to tell EU member states that they cannot now do so. Non-compliance will not be tolerated, and carriers can re-route around EU airspace if they feel that strongly. Finally, delaying until 2020 to take any action with regard to aviation emissions is unacceptable to the EU, which is why it intends to continue with a regional measure as long as no action is taken at the global level. According to the proposal, the

EU's approach would be reviewed and if necessary adjusted in 2016 to take into account the progress at ICAO on a global MBM.

7. Regarding work on a global MBM at ICAO, the U.S. delegation again noted satisfaction with work thus far by ICAO to develop a global MBM by 2016. ICAO has moved very quickly to establish a Task Force within ICAO's Committee on Aviation Environmental Protection (CAEP) to launch some of the key technical work items. The U.S. delegation supports formation of an advisory group that would include stakeholder representation to oversee the global MBM work. Building on work that the industry has already done can also make it easier to achieve a global MBM. The EU delegation agreed that the participation and commitment of industry is an important element, and also noted that DG CLIMA has made resources available to move things forward. Once a policy is determined, resources would then be moved towards implementation efforts. The EU delegation said that CAEP is the most suitable body to address the technical issues on the global MBM and cited the good EU-U.S. cooperation in that venue. The big challenge, the EU delegation said, will be buy-in from other countries, and industry could be helpful here as well. The EU delegation looked forward to the 23-24 January, 2014 meeting in Montreal aimed at setting up a new CAEP global MBM Task Force, noting that the ambitious timetable will require swift and concrete progress in the work.

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3. International Civil Aviation Organization ("ICAO")

Response to Downing of Malaysia Airlines Flight MH17 in Ukraine

On July 21, 2014, the UN Security Council adopted resolution 2166, demanding that armed groups in Ukraine allow an ICAO investigation, as well as access by other international bodies and investigating authorities including the OSCE, in the aftermath of the downing of Malaysia Air flight MH17 on July 17, 2014. U.N. Doc. S/RES/2166. Ambassador Samantha Power, U.S. Permanent Representative to the UN, delivered an explanation of vote for the United States on the resolution, excerpted below and available at *http://usun.state.gov/briefing/statements/229559.htm*.

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Today's resolution calls for a full, thorough and independent investigation into the horrific downing of Malaysian Airlines Flight 17. When 298 civilians are killed, we agree that we must stop at nothing to determine who is responsible and bring them to justice.

As we take this step, we are joined by the Dutch and Australian ministers, whose countries suffered an immense and heart-wrenching loss on Thursday—one they are still grappling with, together with nine other countries from where the victims came. We extend our deepest condolences to those countries, the families of victims they represent, and all of the people who lost loved ones on that plane. Your presence here today, along with the dozens of other countries whose representatives will speak, gives even greater urgency to our calls for the dignified return of the victims and our pursuit of truth and justice.

As we reflect on the immeasurable loss suffered by these families around the world, we are not only outraged at the attack itself; we are horrified and enraged by what has happened since—by the clear intention of some to obstruct an investigation into how the passengers and crew died.

Even after adopting this resolution, it is worth asking: If there really is consensus that this crime merits an immediate and impartial investigation, why did we still feel the need to meet today in order to demand one?

We came together because not everyone has been supporting a real investigation into this crime. If they were, international experts would have had unimpeded access to the crime scene. And all of the wreckage would have been left where it had fallen.

That has not happened. …

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We condemn the actions of the separatists who control the site. Indeed, almost everyone has condemned this grotesque behavior.

But there is one party from which we have heard too little condemnation: and that is Russia.

Russia has been outspoken on other matters. Russian officials have publicly insinuated that Ukraine was behind the crash. On Friday, Russia blamed Ukrainian air traffic controllers for this attack rather than condemning the criminals who shot down the plane. Since then, Russia has begun to blame Ukraine for the attack itself, though the missile came from separatist territory that Russia knows full well Ukraine has not yet reclaimed.

But if Russia genuinely believed that Ukraine was involved in the shoot-down of Flight17, surely President Putin would have told the separatists—many of whose leaders are from Russia—to guard the evidence at all costs, to maintain a forensically-pure, hermetically-sealed crime scene.

We welcome Russia's support for today's resolution. But no resolution would have been necessary had Russia used its leverage with the separatists on Thursday, getting them to lay down their arms and leave the site to international experts. …

It turns out that only this morning—coincidentally, the very morning this Security Council was meeting to discuss the investigation—did President Putin finally issue a public call to ensure the security of international experts. However—and this is critically important—President Putin still did not direct his call to the separatists who have threatened those experts, and over whom he has enormous influence.

President Poroshenko, by contrast, has consistently done everything within his power since the crash to allow capable investigators full and unfettered access to the crime scene. He has been willing to involve ICAO, the Netherlands, and other international players—hailing their independence.

Russia's muteness over the dark days between Thursday and today sent a message to the illegal armed groups it supports: We have your backs. This is the message Russia has sent by providing separatists with heavy weapons, by never publicly calling on them to lay down those weapons, and by massing thousands of troops at the Ukrainian border.

Today, we have taken a step toward combating impunity. The resolution passed provides clear directions to safeguard and uncover the facts—however inconvenient those facts may prove to be.

We have adopted a resolution today. But we are not naïve: if Russia is not part of the solution, it will continue to be part of the problem. For the past six months, Russia has seized Ukrainian territory and ignored the repeated requests of the international community to de-escalate—all in an effort to preserve influence in Ukraine, a country that has long made clear its desire to maintain constructive ties with Moscow.

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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

As discussed in *Digest 2013* at 307-13, a final award ("the *Apotex I & II* award") was issued in the arbitration initiated by Apotex, Inc., which dismissed all claims and included a determination that the tribunal lacked jurisdiction without a qualified "investment" or "investor." As discussed below, the effect of the *Apotex I & II* award was considered by another NAFTA Chapter 11 tribunal in separate arbitral proceedings initiated by Apotex Holdings Inc. and Apotex Inc.

b. Apotex Holdings Inc. and Apotex Inc. v. United States of America

On August 25, 2014, the arbitral tribunal constituted to consider claims brought against the United States by Canadian pharmaceutical firms, Apotex Holdings Inc. and Apotex Inc., issued its award. The tribunal rejected all claims, which related to an "Import Alert" issued in 2009 by the U.S. Food and Drug Administration ("FDA"). For background on the arbitration, see *Digest 2013* at 314-16 and *Digest 2012* at 356-60. The tribunal's award is summarized in an August 27, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/230995.htm*. The award and other documents in the arbitral proceedings are available at *www.state.gov/s/l/c50826.htm*. Excerpts below from the award (with footnotes omitted) reflect the conclusions that Apotex was barred from relitigating the issue of whether it had "investments" in the United States for purposes of NAFTA Chapter 11 due to the *Apotex I & II* award's determination on that issue and that the Import Alert did not violate U.S. obligations under NAFTA Chapter 11. The tribunal also ordered Apotex to pay all U.S. legal costs in the arbitration and 75 percent of the costs of the arbitration.

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7.41. It is self-evident that the "Operative Order" in Paragraph 358 of the Apotex I & II Award (pages 118-119) does not, read strictly in isolation by itself, address the Claimants' specific claims in this arbitration. That operative part merely records, in Paragraph 358(a), that Apotex Inc. "does not qualify as an 'investor', who has made an 'investment' in the U.S., for the purposes of NAFTA Articles 1116 and 1139, and accordingly both the Sertraline and Pravastatin Claims are hereby dismissed in their entirety, on the basis that the Tribunal lacks jurisdiction in relation thereto." The Claimants in this arbitration make no similar claims regarding Sertraline and Pravastatin.

7.42. However, in this Tribunal's view, that operative part as a "*dispositif*" can and should be read with the relevant "*motifs*" or reasons for that operative part, as decided above. Hence, the Tribunal concludes, for the purpose of *res judicata*, that Paragraph 358(a) of the operative part is to be applied together with the reasons applicable to that paragraph, namely the relevant passages in Paragraphs 177 to 246 of the Apotex I & II Award (pages 55 to 78). …It is nonetheless useful briefly to summarise the tribunal's approach in these parts of the Apotex I & II Award.

7.43. First, the tribunal addresses the issue whether activities surrounding ANDAs [or Abbreviated New Drug Applications] qualify as 'investments' under NAFTA Article 1139, as there submitted by Apotex Inc. and there disputed by the Respondent…. For several reasons, the tribunal rejects Apotex Inc.'s submissions….

7.44. Second, the tribunal addresses the issue whether ANDAs qualify as 'intangible property' under NAFTA Article 1139(g) in Paragraphs 196ff. For several reasons, the tribunal rejects Apotex Inc.'s submissions…. In Paragraphs 206 and 208, the tribunal equates Apotex Inc. to "a mere exporter of goods into the United States" and decides that " … property is not an 'investment' if, as here, it merely supports cross-border sales." In Paragraph 217, the tribunal states (inter alia): "… The ANDA was thus a requirement in order to conduct an export business. If there had been no ANDA process, the underlying business could not be said to be an 'investment' in the U.S. The fact that an ANDA was required does not change the nature of the business." The tribunal concludes, in Paragraph 225: "Thus, neither Apotex's ANDAs, nor its activities in Canada, nor the costs incurred there in meeting the requirements of the U.S. regulatory regime for exporting its goods, are 'investments' in the United States."

7.45. Third, the tribunal addresses the issue whether Apotex Inc.'s commitment of capital and resources towards ANDAs could constitute an 'investment' under NAFTA Article 1139(h) in Paragraphs 226ff. …. In Paragraph 233, the tribunal decides that NAFTA Article 1139(h) " … excludes simple cross-border trade interests. Something more permanent is necessary"; and, in Paragraph 235, that "each of the specific activities and expenses relied upon by Apotex [i.e. Apotex Inc.] simply supported and facilitated its Canadian-based manufacturing and export operations."

7.46. In Paragraphs 241-246, the tribunal concludes overall that Apotex Inc. had made no "investment" in the territory of the USA within the meaning of NAFTA Article 1139; that, as a necessary consequence, Apotex Inc. does not qualify as an "investor" under NAFTA Article 1116; and that, accordingly, the tribunal has no jurisdiction over the claims there made by Apotex Inc. as the claimant.

7.47. Lastly, in the first part of the operative part, in Paragraph 358(a), the Tribunal unanimously orders and awards: "[Lines 1-2] Apotex does not qualify as an 'investor', who has made an 'investment' in the U.S., for the purposes of NAFTA Articles 1116 and 1139, [Lines 2-4] and accordingly both the Sertraline and Pravastatin Claims are hereby dismissed in their entirety, on the basis that the Tribunal lacks jurisdiction in relation thereto."

7.48. This Tribunal accepts that there are several factors in the Apotex I & II Award which qualify the application of its passages for the purpose of *res judicata* in this arbitration.

7.49. The specific claims pleaded by Apotex-Canada in the Apotex I & II arbitration, as recited and decided in the Apotex I & II Award, are different from the specific claims made by the Claimants in this arbitration. The former claims related to "tentatively approved" ANDAs. This is not the specific case pleaded by the Claimants in this arbitration where the ANDAs were "finally approved" and where no claim as to "tentatively approved" ANDAs is advanced by the Claimants. Hence, the operative part, read by itself and in strict isolation from the preceding reasons, could not form the basis of *res judicata* in this arbitration.

7.50. However, as decided above, it is necessary to read the first two lines of Paragraph 358(a) of the operative part in the Apotex I & II Award with the tribunal's earlier relevant reasons for this part of the paragraph. It is clear from those reasons that the parties put distinctively in issue ANDAs generally, not limited to tentatively approved ANDAs but also including finally approved ANDAs; that the tribunal actually decided that issue; and that, as that tribunal saw it, that decision, amongst others, was necessary to resolve the parties' dispute before it. In the Tribunal's view, it is not required for the application of the *res judicata* doctrine that there should be a single reason necessary for the tribunal's decision: there can be two or more reasons of equal relevance for the application of the doctrine, particularly when the parties advance more than one argument in support of their respective cases (as the parties clearly did in the Apotex I & II arbitration).

7.51. Nevertheless, several reasons in the Apotex I & II Award are inapplicable to this arbitration for the purpose of *res judicata*, being expressly limited to tentatively approved ANDAs. Accordingly, the Tribunal here takes no account of these reasons in applying *res judicata* in this case. On the other hand, other passages clearly do refer to or necessarily include finally approved ANDAs. It is therefore not possible to conclude that the tribunal's reasons are limited to tentatively approved ANDAs.

7.52. Whilst addressing whether ANDAs were "property" under NAFTA Article 1139(g), the tribunal did not independently address ANDAs as "interests" under NAFTA Article 1139(h). In Paragraph 229 of the Apotex I and II Award, as noted above, the tribunal records Apotex Inc.'s confirmation that its submissions under NAFTA Article 1139(h) "were to be treated as part of its submissions under NAFTA Article 1139(g), and not as independent grounds." It is not entirely clear what these "submissions" were as part of Apotex Inc.'s submissions under Article 1139(g); but it is any event clear that both parties made submissions regarding Article 1139(h) and that the tribunal did address and decide upon ANDAs as investments under Article 1139(h).61

7.53. Lastly, it is necessary to record that this is not a case which raises any issue of bad faith or abuse of process by the Claimants. …

7.54. For the reasons set out below, as regards the claims made by Apotex Inc. in this arbitration, the Tribunal decides that the Apotex I & II Award, applying the doctrine of *res judicata*, precludes Apotex Inc. from contending that its finally approved ANDAs, within the meaning of NAFTA Article 1139(g), are “property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.”

7.55. In the Tribunal’s view, the operative part (first two lines) and its relevant reasons in the Apotex I & II Award apply equally to all ANDAs, whether tentatively approved or finally approved. …

7.56. As regards Apotex Inc., the Tribunal comes to the same conclusion in regard to NAFTA Article 1139(h). …

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7.60. In regard to Apotex-Holdings, the Tribunal decides that same result must follow, albeit for additional reasons. Given that Apotex Inc.’s ANDAs are not “investments” under NAFTA Article 1139, it follows that Apotex-Holdings cannot make any claim in respect of its indirect interest in such ANDAs because Apotex-Holdings is not, for that purpose, an investor with a relevant “investment” under NAFTA Article 1139.

(7) Conclusion

7.61. Accordingly, for these reasons, the Tribunal (by a majority) decides this second issue in favour of the Respondent and against Apotex Inc. and Apotex-Holdings. Thus, the Tribunal (by a majority) upholds the Respondent’s jurisdictional objections to the claims made by the Claimants in regard to the ANDAs under NAFTA Articles 1101(1), 1116 and 1139. (This decision does not apply, of course, to the other claims made by Apotex-Holdings for itself and for Apotex-US which are considered in the Parts which follow).

7.62. Whilst this conclusion disposes of the Claimants’ claims under the doctrine of *res judicata*, it should not be assumed that the Tribunal (by a majority) would have reached any different decision on the Claimants’ other submissions under NAFTA Article 1139. Notwithstanding a well-researched argument by Counsel for the Claimants as regards the correct interpretation of Article 1139 (to which the Tribunal here pays tribute), the Tribunal remains attracted to the succinct submissions of the Respondent and Mexico to the effect that the definition of an “investment” under both Article 1139(g) and 1139(h) must be read with Article NAFTA 1101(1), collectively requiring such investment to be “in the territory” of the host State. Although Apotex Inc.’s ANDAs were originally submitted and approved in the USA, this Tribunal (by a majority) considers that such ANDAs cannot meet that particular requirement, particularly when Apotex Inc. has never had any presence, activity or other investment in the territory of the USA, including the non-payment of any relevant US taxes. (This is not inconsistent with the approach taken in the Apotex I & II Award.)

* * * *

8.22. For the purposes of the Claimants’ national treatment and most-favoured-nation claims, the Claimants and their expert witnesses proposed a number of comparators were said to be in like circumstances to the Claimants and their investments. The Claimants based their cases under NAFTA Articles 1102 and 1103 on the treatment accorded to five comparators. Each of these five maintained generic drug manufacturing facilities in the USA; three were domestic-based in the USA (on which the Claimants relied for Article 1102) and two were foreign-based (on which the Claimants relied for Article 1103). These two foreign-based comparators had manufacturing facilities from which finished form drugs for human consumption were exported to the USA subject to the Act.

* * * *

(9) The Tribunal's Analysis as to NAFTA Article 1102

8.40. For the reasons set out below, the Tribunal decides that none of the three domestic comparators proposed by the Claimants is "in like circumstances" to the Claimants or their investments for the purposes of NAFTA Article 1102.

8.41. The Respondent's defence to the Claimants' case under Article 1102 (on the merits) is that the three domestic comparators proposed by the Claimants were not in like circumstances to the Claimants and their investments. As already summarized above, this defence is based on the different legal and regulatory regimes applicable to domestic and foreign facilities, including the fact that drug products manufactured by domestic comparators could not be subject to import alerts or detentions (without physical examination) under the Act unless they were exported and re-imported into the USA.

8.42. The Parties did not take issue with the concept expressed by the *Pope & Talbot* tribunal, that "'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations." In addition, the Parties accepted, as the *Archer Daniels* tribunal put it, that "all 'circumstances' in which the treatment was accorded are to be taken into account in order to identify the appropriate comparator." These obviously include the legal and regulatory regime that governs parties that are being compared for the purposes of NAFTA Article 1102.

8.43. It is common ground that all of the three domestic comparators proposed by the Claimants were in the same sector as the Claimants, sold like drug products to those sold by Apotex Inc., and were direct competitors in the US market. In these circumstances, in the Tribunal's view, the question of whether the Claimants and their investments were subject to the same legal regime or regulatory requirements (to those to which the identified US-comparators were subject) becomes an important potential differentiator.

8.44. As a Canadian drug manufacturer, Apotex Inc. is primarily regulated and controlled by Health Canada and not the FDA. …

8.45. Unsurprisingly, the relevant law and practice recognise and provide for differences between domestic and foreign facilities as regards the inspection by the FDA of such facilities, and the tools available to the FDA for the enforcement of the cGMP standard.

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8.51. In the Tribunal's view, the decisive difference in the legal and regulatory regime that governs foreign products manufactured outside the USA and those that are manufactured at USA-based facilities is that Section 801(a) does not apply to domestic products that are manufactured in the USA, regardless of whether the manufacturing facilities are US-owned or foreign-owned (unless the products are exported and then re-imported into the USA). Import Alert 66-40 operates in conjunction with Section 801(a) of the Act, which authorises FDA district offices to detain at the US border, without physical examination, foreign drug products that "appear" to be adulterated because they were not manufactured in conformity with current good manufacturing practice.

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8.53. To the Tribunal's mind, the differences in the FDA's ability to deny access to the US market as between foreign and domestically manufactured drugs are substantial; and that these constitute a material distinction between the legal and regulatory regimes applicable to foreign and domestic manufacturing facilities. These differences go to "like circumstances", rather than to "treatment" and the Import Alert of 28 August 2009 itself.

8.54. The observations of the *Grand River* tribunal concerning "like circumstances" for the purposes of NAFTA Articles 1102 and 1103 are here helpful and apposite. The *Grand River* tribunal confirmed that the appropriate comparators under NAFTA Article 1102 (and Article 1103) are those that are subject to like legal requirements. …

8.55. The *Pope & Talbot* tribunal formulated a test, in the context of its analysis of "like circumstances", that: "[d]ifferences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."

8.56. The Tribunal considers that Section 801(a) of the Act (with the guidance as to import alerts thereunder) passes this test. Both protect the public health of US residents and patients, do not distinguish between companies or facilities on the basis of nationality and are consistent with the investment objectives of NAFTA's Chapter Eleven. Indeed, as the Claimants acknowledge, the FDA is not the primary regulator outside of the territory of the USA; and the FDA does not have the resources to examine every drug product made abroad that is offered for import into the USA.

8.57. In this arbitration, the only measure challenged by the Claimants is the Import Alert of 28 August 2009, namely the FDA's decision to place Apotex Inc.'s Etobicoke and Signet facilities on Import Alert 66-40. When, as here, the only domestic comparators proposed by the Claimants could never have been subject to any similar measure, the Tribunal considers it to be impermissible to contend that such comparators are in "like circumstances" to the Claimants and their investments.

8.58. Accordingly, the Tribunal decides that there is no basis to accept the Claimants' case that placing the Import Alert on Apotex Inc.'s Etobicoke and Signet facilities constituted a breach by the Respondent of NAFTA Article 1102's national treatment standard. The Tribunal therefore dismisses all claims made under NAFTA Article 1102 in this arbitration by Apotex-Holdings (for itself and for Apotex-US).

(10) Foreign Comparators and the Tribunal's Analysis as to NAFTA Article 1103

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8.61. In short, the Tribunal decides that both Teva and Sandoz are *prima facie* appropriate comparators for the purposes of NAFTA Article 1103. In the Tribunal's view, the US legal and regulatory regime, as to import alerts and detention (without physical examination) to which these foreign manufacturers, their foreign-based facilities and their foreign products were exposed, was materially the same regime to which the Claimants (Apotex Inc.) were subject in Canada as regards the Etobicoke and Signet facilities and their products.

8.62. As regards "treatment", the Tribunal has already decided that both Teva and Sandoz were treated more favourably than the Claimants (Apotex Inc.) as regards Import Alert 66-40: see the Tribunal's conclusions stated for each of these comparators in Part III Above.

8.63. Accordingly, the remaining questions under NAFTA Article 1103 are whether either Teva or Sandoz or their respective foreign facilities were indeed "in like circumstances" to the Claimants (Apotex Inc.) and the Etobicoke and Signet facilities within the meaning of NAFTA Article 1103 and, if so, whether the Respondent breached its obligations under NAFTA Article 1103.

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8.71. As summarised in Part III above, the Tribunal concludes that the evidence adduced in this arbitration proves that the FDA's different treatment of Teva was materially influenced by the FDA's genuine concerns over shortages of essential drugs manufactured at Teva's Jerusalem facility intended for shipment and sale in the USA. …

8.72. The evidence in regard to Sandoz is less straightforward, for reasons already described by the Tribunal in Part III. …

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8.75. The Tribunal also rejects any suggestion that the FDA especially targeted or sought to discriminate against the Claimants, based on the public speeches of its senior officers described in Part III. In the Tribunal's view, there was a change of policy in early 2009 under the Respondent's new political administration intended to resume stricter and swifter enforcement practices by the FDA, not limited to the Claimants. Under NAFTA Article 1103, there is no general bar to such a change in policy in regulatory practice made in good faith and in a non-arbitrary manner (as this was). …

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8.77. For all these reasons, the Tribunal determines that the Respondent has proven that Teva and Sandoz (with their respective foreign-based facilities and foreign products) were not in like circumstances to the Claimants and the Etobicoke and Signet facilities and their products, within the meaning of NAFTA Article 1103. The Tribunal therefore rejects all claims against the Respondent under NAFTA Article 1103 by Apotex-Holdings (for itself and for Apotex-US).

(11) Conclusion

8.78. Accordingly, the Tribunal dismisses, on the merits, all claims made by Apotex Holdings (for itself and for Apotex-US) under both NAFTA Articles 1102 and 1103. It follows that, if the Tribunal had accepted jurisdiction over the claims made by Apotex Inc. in this arbitration, the Tribunal would also have dismissed all its claims, on the merits, under both NAFTA Articles 1102 and 1103.

* * * *

9.15. The Tribunal initially considers whether the specific procedural rights invoked by the Claimants are part of any evolving "customary international law minimum standard of treatment of aliens" that a NAFTA Party must accord to the investments of another Party's investors as required by NAFTA Article 1105(1).

9.16. The Parties agree that the prohibition on denial of justice has acquired the status of customary international law and is among the protections embraced within the required minimum standard of treatment of aliens. However, the claim here is not framed as being for denial of justice under international law. Instead, it is that customary international law requires a State to accord to aliens several specific types of procedural protections in connection with that State's regulatory action affecting imports of drug products manufactured in aliens' facilities located in a foreign country. The Claimants maintain that customary international law, forming part of NAFTA Article 1105(1), guarantees such aliens the right to "effective means" of redress "different from, and less demanding than, denial of justice under customary international law."

* * * *

9.25. Thus, the Tribunal concludes that the specific elements of Section 181 of the Second Restatement are not free-standing rules of customary international law that constitute part of the international law minimum standard of treatment of aliens. As already noted above, the Claimants contend that they do not need to adduce evidence of state practice and *opinio juris* to show the existence of a rule of customary international law, because Section 181 offered a sufficient statement of settled customary principles. However, Section 181 involves factors for assessing "fairness," not rules of customary international law. It does not therefore assist the Claimants' case; and indeed, for a text dating from almost 50 years ago, it might be thought by many to be surprising if it did. Thus, it is next necessary for the Tribunal to consider whether there is support in state practice and *opinio juris* for ascribing greater legal weight to any of the elements invoked by the Claimants.

9.26. The Claimants cite scholarly commentaries contending, generally at a high level of abstraction, that customary international law requires due process. The Claimants also cite the administrative procedure laws adopted by certain countries, the practice of European multi-national institutions and the domestic and treaty practice of the USA, in support of their proposition that States provide protections for due process.

9.27. However, the issues before the Tribunal are not whether the abstract notion of due process has acquired sufficient status in customary international law, but whether the specific procedural protections claimed by the Claimants in this case are required by customary international law, particularly whether those protections are part of the customary international law minimum standard of treatment of aliens required by NAFTA Article 1105(1). In the Tribunal's view, the state practice available to the Tribunal in the specific context presented here, namely the regulation of imported drug products, weighs heavily against the assertion that the claimed protections are required by customary international law.

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9.37. The Tribunal also recalls in this regard the decisions by NAFTA and other international tribunals emphasising the need for international tribunals to recognize the special roles and responsibilities of regulatory bodies charged with protecting public health and other important public interests. ….

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9.40. For all these reasons, the Tribunal concludes that the Claimants have not established the existence of the specific procedural rights required by customary international law in the context of the FDA's regulatory decision here challenged, namely the Import Alert. As the Party bearing the legal burden of establishing its case, this determination would suffice to dismiss the Claimants' case under NAFTA Article 1105(1).

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9.58. The Tribunal has carefully weighed the Parties' conflicting assessments of the administrative remedies available to the Claimants in regard to the Import Alert. It finds that the evidence sufficiently establishes that remedies were available to the Claimants (particularly Apotex Inc. and Apotex-US) to challenge a legally or factually unwarranted regulatory decision by the FDA. The evidence does not establish that there were any "exceptional circumstances" justifying a decision by the Claimants not to pursue those remedies. The evidence shows that the Claimants were (and remain) a sophisticated international corporate organisation that makes vigorous use of legal proceedings (with specialist legal and other advisers) as part of its business model. Yet, the Claimants made no effort to utilise any of the FDA's administrative procedures to contest the FDA's findings of cGMP deficiencies, as they could have done had they believed that those findings involved factual or legal error. The Tribunal concludes from the evidence that, at the time, the Claimants held no such belief.

9.59. In this connection, the Tribunal notes that the evidential record indicates that the Claimants were at the time well aware of shortcomings in their manufacturing facilities and processes at the Signet and Etobicoke facilities. The Tribunal also notes that the Claimants' Request states that: "Apotex-Canada [Apotex Inc.] rejected FDA's suggestion that its facilities were not compliant with cGMP." Likewise, certain of the Claimants' written witness statements prepared for purposes of this arbitration maintain that the FDA's action was not justified. However, no contemporaneous evidence to this effect was identified to the Tribunal.

9.60. To the contrary, there is substantial evidence indicating that at the time of the Import Alert, the Claimants recognised material deficiencies at both the Signet and Etobicoke facilities. …

9.61. This record cannot be reconciled with the proposition that the Claimants in fact rejected the FDA's findings of cGMP violations at the time. It is only consistent with the conclusion that the Claimants did not pursue administrative relief because they decided that doing so would be unavailing because there was a sufficient factual and legal basis for the FDA's action, and not because the available remedies were ineffectual.

9.62. Finally, the Claimants did not contest the FDA's actions in the US courts. They submit that they could not do so, citing the position taken by the FDA in domestic litigation that imposing an import alert is not a final agency action subject to judicial review. The Respondent submits that the Claimants could have brought suit against the FDA for unreasonable delay (in lifting the Import Alert), pointing out that the Claimants had previously filed such a suit against the FDA in another setting. Further, the Respondent submits that the Claimants could have brought suit to challenge the Import Alert itself, observing that while the FDA believes that decisions to impose an Import Alert are not judicially reviewable, US courts are not bound to this view and that some US courts have rejected the FDA's position in analogous settings.

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9.64. In light of all the evidence, the Tribunal cannot conclude, as the Claimants assert, that it would have been futile for the Claimants to seek relief in the US courts to contest the FDA's actions if the FDA had indeed been acting improperly and that the Claimants were justified in not pursuing any such legal remedy.

9.65. Given the overall record, including the Claimants' decisions not to pursue either administrative or judicial remedies to contest the FDA's allegedly improper action in imposing the Import Alert, the Tribunal decides that the Claimants have failed to establish that the Respondent's conduct rose to the threshold of severity and gravity required to establish a violation of NAFTA Article 1105, even assuming that such protection extends beyond an investment to the treatment of an investor.

* * * *

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

a. Detroit International Bridge Company v. Canada

On February 14, 2014, 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, *Detroit International Bridge Co. v. Canada*. Detroit International Bridge Company ("DIBC"), a U.S. company, filed a claim against Canada related to the Ambassador Bridge, crossing the Detroit River between Detroit and Windsor, Canada. DIBC asserts that certain decisions made by Canada with respect to the Ambassador Bridge violate NAFTA Article 1102 (national treatment), Article 1103 (most favored nation treatment), and Article 1105 (minimum standard of treatment). For background on litigation in U.S. courts of DIBC's claims relating to the Ambassador Bridge, including excerpts of the U.S. brief, see *Digest 2013* at 104-10. Excerpts follow (with footnotes omitted) from the U.S. Article 1128 submission, which is available in full at www.state.gov/s/l/c61900.htm.

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Articles 1116(1) and 1117(1) (Arbitrable Disputes)

2. In creating Chapter Eleven's investor-State dispute settlement mechanism, the NAFTA Parties have specified the treaty obligations the breach of which may be submitted to arbitration. NAFTA Articles 1116(1) and 1117(1) provide a Party's consent to arbitrate only claims based on a breach of either Section A of Chapter Eleven, Article 1503(2) or, under certain circumstances, Article 1502(3)(a). Articles 1116(1) and 1117(1) do not provide consent to arbitrate disputes based on alleged breaches of obligations found in other articles or chapters of the NAFTA or alleged breaches of other treaties or other international obligations.

Articles 1116(2) and 1117(2) (Limitations Period)

3. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Article 1116(2) and Article 1117(2). 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).

Article 1121(1)(b) (Waiver Requirement)

4. One of the preconditions to the NAFTA Parties' consent to arbitrate claims under Chapter Eleven is the waiver required by Article 1121. That provision is entitled "Conditions Precedent to Submission of a Claim to Arbitration" …The NAFTA Parties thus conditioned their consent to arbitration on a claimant's waiver (under Article 1121) of its right to avail itself of other forums with respect to a measure alleged to constitute a NAFTA breach. Without an effective waiver, therefore, there is no consent of the Party/Respondent necessary for a tribunal to assume jurisdiction over the dispute.

5. Compliance with Article 1121 requires that the claimant not only provide a written waiver, but that it act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the measure alleged to constitute a NAFTA breach in another forum. As the Tribunal in *Commerce Group v. El Salvador* explained in relation to the similar waiver provision contained in the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"), "[a] waiver must be more than just words; it must accomplish its intended effect." Thus, if a claimant continues proceedings with respect to the same measure in another forum despite meeting the formal requirement of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.

6. Article 1121(1)(b) requires a waiver of a claimant's "right to initiate or continue . . . any proceedings *with respect to* the measure of the disputing Party that is alleged to be a breach referred to in Article 1116[.]" As the United States has previously argued, the phrase "with respect to" in Article 1121(b) should be interpreted broadly. This construction of the phrase is consistent with the purpose of the waiver provision: to avoid the need for a Respondent to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)." As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are "separate and distinct" and the measures can be "teased apart."

7. Article 1121(1)(b) includes an exception to the waiver requirement for "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party." The United States agrees with Canada and Mexico that the NAFTA Parties intended this exception to be limited to proceedings before an administrative tribunal or court constituted under the law of the disputing Party. This reading is consistent with the NAFTA's negotiating history. The purpose of this exception is to allow a claimant to initiate or continue certain proceedings to preserve its rights during the pendency of the arbitration, in a manner consistent with the broader purposes of the waiver requirement, set forth in paragraph 6 above. It would not be consistent with this purpose to allow a claimant in a NAFTA proceeding to bring a claim for extraordinary relief in one NAFTA Party "under the law of" a different NAFTA Party. The exception in Article 1121(1)(b) thus does not permit a claimant to initiate or continue "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages," with respect to

the measure before an administrative tribunal or court constituted under the law of any other NAFTA Party, or of a non-Party.

* * * *

b. Mesa Power Group LLC v. Canada

On July 25, 2014, 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, *Mesa Power Group LLC v. Canada*. Mesa Power Group submitted claims under NAFTA Chapter 11 concerning various government measures related to the regulation and production of renewable energy in Ontario, including alleged violations of Article 1102 (national treatment), Article 1103 (most favored nation treatment), Article 1105 (minimum standard of treatment), and Article 1106 (prohibition on performance requirements). The U.S. submission is excerpted below (with footnotes omitted) and is available in full at *www.state.gov/s/l/c63963.htm*.

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2. NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration," provides in part that "[a] disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement . . . ." NAFTA Article 1122, entitled "Consent to Arbitration," further provides in part that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." No Chapter Eleven claim may be submitted unless these procedures have been satisfied.

3. NAFTA Article 1120, entitled "Submission of a Claim to Arbitration," contains one such procedure. Article 1120(1) sta

tes that a disputing investor may submit a claim to arbitration "provided that six months have elapsed since the events giving rise to a claim." Together with the notice requirement in Article 1119, the "cooling-off" requirement in Article 1120(1) affords a
NAFTA Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and consider amicable settlement or other courses of action prior to arbitration. As such, any claim for which a claimant has not waited six months from the events giving rise to the claim is not submitted in accordance with Article 1120(1), and thus does not satisfy the requirements of consent contained in Articles 1121 and 1122.

4. NAFTA Article 1116(1) further provides that an investor may submit a claim to arbitration that a Party "has breached" certain obligations, and that the investor "has incurred loss or damage by reason of, or arising out of, that breach." Thus, there can be no claim under Article 1116(1) until an investor has suffered harm from an alleged breach. Consistent with Articles 1116(1) and 1120(1), therefore, a disputing investor may submit a claim to arbitration under Chapter Eleven only for a breach that already has occurred and for which damage or loss has already been incurred, provided that six months has elapsed from the events giving rise to the

claim. No claim based solely on speculation as to future breaches or future loss may be submitted.

Article 1105 (Minimum Standard of Treatment)

5. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation reaffirming 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 further clarified 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)." In accordance with NAFTA Article 1131(2), "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

6. The Commission's interpretation thus 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. 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. 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. …[A] claimant submitting a claim under an agreement such as NAFTA, in which fair and equitable treatment is defined by the customary international minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

7. The principle of "good faith," moreover, 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."

8. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector. Regulatory action violates "fair and equitable treatment" under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or constitutes manifest arbitrariness falling below international standards.

9. 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. 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."

10. All three NAFTA Parties jointly issued a binding interpretation on the scope of the fair and equitable treatment obligation under Article 1105(1). The United States' views on the relationship between the Interpretation and Articles 1105(1) and 1103 are set out in the … U.S. non-disputing Party submission in the NAFTA Chapter Eleven arbitration *Chemtura Corporation v. Government of Canada*.

Article 1102 (National Treatment)

11. NAFTA's national treatment provision, Article 1102, is designed to prohibit discrimination on the basis of nationality. Consistent with this purpose, only the disputing Party's "own investors" or "investments of its own investors" may qualify as comparators under Article 1102.

12. Article 1102 paragraphs (1) and (2) are not intended to prohibit all differential treatment among investors or investments. Rather, they are intended only to ensure that Parties do not treat domestically owned entities that are "in like circumstances" with foreign-owned entities more favorably based on their nationality of ownership. If the challenged measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments that are in like circumstances on the basis of nationality, there can be no violation of Article 1102.

13. The phrase "in like circumstances" ensures that comparisons are made with respect to investors or investments on the basis of relevant characteristics. This is a fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the legal and regulatory frameworks which apply to or govern the conduct of investors or investments (including any relevant policy objectives), among other possible relevant characteristics.

14. 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 national investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor *in like circumstances*. This is an important distinction intended by the Parties. Thus, a NAFTA Party may adopt measures that draw distinctions among entities without necessarily violating Article 1102.

15. Nothing in the text of Article 1102 suggests a shifting burden of proof. The burden to prove a violation of Article 1102 thus rests with the claimant to prove each element of its claim.

Article 1108 (Reservations and Exceptions)

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16. The term "procurement" is not defined in the NAFTA. The ordinary meaning of the term on its face, however, encompasses any and all forms of procurement by a NAFTA Party. This reading is confirmed by the French and Spanish versions of the NAFTA, which each use the generic term for "purchases" in those languages.

17. The term "procurement" is found in several other NAFTA chapters, including Chapter Ten. The United States agrees with Canada that, whereas in Chapter Eleven the term is used as a broad "carve-out," in Chapter Ten the term is used as a "carve-in." Chapter Ten

describes the kinds of procurement that are and are not covered by the obligations in Chapter Ten.

Article 1131 (Governing Law)

18. NAFTA Article 1131, entitled "Governing Law," provides in part that a tribunal established under Chapter Eleven "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Thus, a tribunal constituted under Chapter Eleven must apply the NAFTA as the rule of decision, not the provisions of other treaties.

* * * *

c. KBR, Inc. v. United Mexican States

On July 30, 2014, 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 Mexico by KBR, a U.S. company, regarding an arbitration award issued in December 2009. KBR alleges that Mexico violated NAFTA Article 1102 (national treatment), Article 1103 (most-favored-nation treatment), Article 1105 (minimum standard of treatment), Article 1110 (expropriation and compensation), and Article 1503 (state enterprises). Excerpts follow (with footnotes omitted) from the U.S. Article 1128 submission, which is also available at *www.state.gov/s/l/c63962.htm*.

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2. One of the preconditions to the NAFTA Parties' consent to arbitrate claims under Chapter Eleven is the waiver required by Article 1121, which is entitled "Conditions Precedent to Submission of a Claim to Arbitration." As a condition precedent to submission of a claim to arbitration, a claimant must submit an effective waiver together with its Notice of Arbitration. Without an effective waiver, there is no consent of the NAFTA Party necessary for a tribunal to assume jurisdiction over the dispute.

3. As the tribunal in *Railroad Development Corporation v. Republic of Guatemala* explained in relation to the similar waiver provision contained in the Dominican Republic-Central America-United States Free Trade Agreement, although a tribunal may determine whether a waiver complies with the requirements of Article 1121, a tribunal itself cannot remedy an ineffective waiver. Accordingly, a claim can be submitted, and the arbitration can properly commence, only as of the date that a claimant submits an effective waiver.

4. Further U.S. views on the interpretation of Article 1121 are reflected in paragraphs 4 to 7 of the … non-disputing Party submission of February 14, 2014 in the NAFTA Chapter Eleven case *Detroit International Bridge Company v. Government of Canada*.

* * * *

3. Non-Disputing Party Submissions under other Trade Agreements

a. Renco Group v. Peru

On September 10, 2014, the United States made a non-disputing party submission, pursuant to Article 10.20.2 of the United States-Peru Trade Promotion Agreement ("U.S.-Peru TPA" or "Agreement"), in the arbitration proceedings initiated by the Renco Group, Inc. ("Renco"), a New York corporation that purchased mining operations in La Oroya, Peru. Renco's claims against the Republic of Peru concern government measures and contracts related to interests in the mining operations in La Oroya, which Renco owned through its wholly-owned affiliate, Doe Run Peru S.R. LTDA. Renco alleges that Peru violated several provisions of the U.S.-Peru TPA, including Article 10.3 (national treatment), Article 10.5 (the minimum standard of treatment), and Article 10.7 (expropriation). Excerpts follow (with footnotes omitted) from the September 10, 2014 submission of the United States, which is also available at *www.state.gov/s/l/c64390.htm*.

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2. In August 2002, an arbitral tribunal constituted under NAFTA Chapter Eleven concluded that it lacked authority to rule on the United States' preliminary objection that, even accepting all of the claimant's allegations of fact, the claims should be dismissed for "lack of legal merit." [citing *Methanex Corp. v. United States*.] The tribunal ultimately dismissed all of claimant's claims for lack of jurisdiction, but only after three more years of pleading on jurisdiction and merits and millions of dollars of additional expense.

3. In all of its subsequent investment agreements concluded to date, the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner.

4. The U.S.-Peru TPA contains such mechanisms in Articles 10.20.4 and 10.20.5, which provide:

> 4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.
>
> (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).
>
> (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent

> with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
>
> (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
>
> (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph
>
> 5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

5. Paragraphs 4 and 5 establish complementary mechanisms for a respondent State to seek to efficiently and cost-effectively dispose of claims that cannot prevail as a matter of law, potentially together with any preliminary objections to the tribunal's competence.

6. Paragraph 4 authorizes a respondent to make "any objection" that, "as a matter of law," a claim submitted is not one for which the tribunal may issue an award in favor of the claimant. Paragraph 4 clarifies that its provisions operate "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question." Paragraph 4 thus provides a further ground for dismissal, in addition to "other objections," such as preliminary objections to the tribunal's competence. Consistent with the "without prejudice" clause, a tribunal retains the authority to hear preliminary objections to competence asserted under the applicable arbitration rules.

7. Subparagraph (a) requires that a respondent submit any such objection "as soon as possible after the tribunal is constituted," and generally no later than the date for the submission of the counter-memorial. This contrasts with the expedited procedures contained in paragraph 5, which authorize a respondent, "within 45 days after the tribunal is constituted," to make an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.

8. Subparagraph (b) states that a tribunal "shall" hear and decide as a preliminary question any objection made under paragraph 4. This mandatory requirement complements the tribunal's discretion, under the applicable arbitration rules, to decide an objection to competence as a preliminary matter.

9. Subparagraph (c) states that, for any objection under paragraph 4, a tribunal "shall assume to be true" the factual allegations supporting a claimant's claims. The tribunal "may also consider any relevant facts not in dispute." This evidentiary standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit. Subparagraph (c) does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider.

10. Subparagraph (d) states that the respondent "does not waive any objection as to competence . . . merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5." Subparagraph (d) confirms that a respondent is not required to request a preliminary decision on an objection to competence when invoking the procedures under paragraph 4 (or paragraph 5). That is, the applicable arbitration rules permit, but do not require, a respondent to seek a preliminary decision on any objections to competence, and paragraph 4 does not alter those rules.

11. In sum, paragraph 4 was intended to supplement, not limit, the tribunal's authority under the available arbitration rules to decide preliminary objections, such as competence objections, separately from the merits. Thus, if a respondent makes a preliminary objection under paragraph 4, the tribunal also retains the authority under the applicable arbitration rules to hear any preliminary objections to competence. Indeed, reasons of economy and efficiency will often weigh in favor of competence objections being decided preliminarily and at the same time as objections made under paragraph 4. This is consistent with the Agreement's text, context, and object and purpose.

12. Paragraph 5 provides an expedited procedure for deciding all preliminary objections, whether permitted by paragraph 4 or the applicable arbitral rules. If the respondent makes a request within 45 days of the date of the tribunal's constitution, "the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence." Paragraph 5 thus modifies the applicable arbitration rules by requiring a tribunal to decide on an expedited basis any paragraph 4 objection as well as any objection to competence, provided that the respondent makes the request within 45 days of the date of the tribunal's constitution.

* * * *

b. Al Tamimi v. Oman

On September 22, 2014, the United States made a non-disputing party submission pursuant to Article 10.19.2 of the U.S.-Oman Free Trade Agreement ("U.S.-Oman FTA") in arbitral proceedings initiated by Adel A. Hamadi Al Tamimi against Oman in 2011. The Claimant alleges that Oman's enforcement of certain environmental regulations that resulted in, among other things, the arrest of the Claimant and the cancellation of certain leases, violated Articles 10.3 (national treatment), 10.5 (minimum standard of treatment), and 10.6 (expropriation) of the U.S.-Oman FTA. The U.S. submission, excerpted below (with footnotes omitted) and available at *www.state.gov/s/l/c64632.htm*, addresses two questions of treaty interpretation raised by the arbitral tribunal in a procedural order dated May 26, 2014: (1) the burden to establish the content of customary international law; and (2) the meaning of the "Governing Law" clause in Article 10.21.

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3. The Tribunal posed the following question:

Footnote 1 of Chapter 10, requires that Article 10.5, the Minimum Standard of Treatment clause be interpreted in accordance with Annex 10-A. Under Annex 10-A, does a claimant bear the burden of proving the existence of an applicable rule of customary international law that is claimed to be breached by respondent?

4. The minimum standard of treatment referenced in Article 10.5 of the U.S.-Oman FTA is an umbrella concept incorporating a set of rules that, over time, has crystallized into customary international law in specific contexts. Article 10.5 thus reflects a standard that develops from State practice and *opinio juris,* as expressly stated in Annex 10-A, 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.

5. The burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law that is not otherwise incorporated expressly in the text of Article 10.5. "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." [quoting *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of Nov. 20).]

6. Tribunals applying Article 1105 of NAFTA Chapter Eleven have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill Inc. v. Mexico*, for example, acknowledged

> that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.

The tribunals in *ADF v. United States*, *Glamis Gold v. United States*, and *Methanex v. United States* likewise placed on the claimant the burden of establishing the content of customary international law.

7. A tribunal determining whether a claimant has established the existence of a rule of customary international law must look to the elements set forth in Annex 10-A; namely, the "general and consistent practice of States that they follow out of a sense of legal obligation." These are also the criteria recognized by the International Court of Justice as necessary to establish a rule of customary international law.

8. Arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 10.5 and Annex 10-A. Nor can these decisions serve as precedent for a tribunal determining the content of customary international law.

9. State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States. The principle of proportionality, like good faith, "is not in itself a source of obligation where none would otherwise exist." [quoting *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, ¶ 94 (Judgment of Dec. 20).]

10. 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. 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. The Tribunal posed the following question:

Article 10.15(1)(a)(i) of the FTA permits the Tribunal to determine whether there has been a breach of any obligation set forth in Section A of that Chapter. Article 10.21, Governing Law, requires the Tribunal to "...decide the issues in dispute in accordance with this Agreement and applicable rules of international law." What is the relationship between the Tribunal's subject-matter jurisdiction and the Governing Law clause?

12. Article 10.21 requires the Tribunal to apply international law both in interpreting the provisions of Chapter Ten, Section A, and as a rule of decision for claims of breach of Chapter Ten, Section A. Article 10.21 does not give the Tribunal jurisdiction to hear claims of breach of any obligations other than the obligations listed in Chapter Ten, Section A. In particular, Article 10.21 does not expand the obligations listed in Article 10.5 beyond any protections recognized as a part of the minimum standard of treatment under customary international law.

*   *   *   *

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement proceedings are available at https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/dispute-settlement. The following discussion of a selection of WTO dispute settlement proceedings involving the United States in 2014 is drawn largely from Chapter II "The World Trade Organization" of the 2014 Annual Report of the President of the United States on the Trade Agreements Program ("2014 Annual Report"), available at https://ustr.gov/sites/default/files/2015%20AR%20Compiled%20FINAL_0.pdf. 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 — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (DS431)

On March 26, 2014, the panel established to consider complaints brought by the United States, the European Union, and Japan regarding export restraints imposed by China on rare earths, tungsten, and molybdenum (inputs in the manufacture of various electronics and other products) issued its report. As summarized in the 2014 Annual Report at 65,

> The panel found that the export quotas and export duties that China maintains on various forms of rare earths, tungsten, and molybdenum constitute a breach of WTO rules and that China failed to justify those measures as legitimate conservation measures or environmental protection measures, respectively. The panel also found that China's imposition of prior export performance and minimum capital requirements is inconsistent with WTO rules.

On August 7, 2014, these panel findings were affirmed by the Appellate Body. And on August 29, 2014, the DSB adopted the panel and Appellate Body reports. The parties agreed that China would have until May 2, 2015 to comply with the recommendations and rulings of the DSB.

(2) China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (DS427)

As discussed in *Digest 2011* at 372-73 and *Digest 2013* at 319, the panel established to consider anti-dumping and countervailing duty measures imposed by China on imports of chicken broiler products from the United States issued its report on August 2, 2013, upholding most of the U.S. claims. In 2014, Chinese authorities initiated a new investigation in response to the panel report and released redeterminations that maintained recalculated duties on U.S. broiler products. As stated in the 2014 Annual Report at 67, "The United States is evaluating China's redeterminations closely to assess its implications for China's compliance in this dispute."

(3) India — Measures Concerning the Importation of Certain Agricultural Products from the United States (DS430)

On October 14, 2014, a panel issued its report on claims by the United States regarding import prohibitions by India on various agricultural products from the United States, purportedly to prevent avian influenza. As described in the 2014 Annual Report at 74:

> …the panel found in favor of the United States. Specifically, the Panel found that India's restrictions breach its WTO obligations because they are: are not based on international standards or a risk assessment that takes into account available scientific evidence; arbitrarily discriminate against U.S. products because India blocks imports while not similarly blocking domestic products; constitute a disguised restriction on international trade; are more trade restrictive than necessary since India could reasonably adopt international standards for the control of avian influenza instead of imposing an import ban; fail to recognize the concept of disease free areas and are not adapted to the characteristics of the areas from which products originate and to which they are destined; and were not properly notified in a manner that would allow the United States and

> other WTO Members to comment on India's restrictions before they went into effect.

b. *Disputes brought against the United States*

(1) Subsidies on Upland Cotton (Brazil) (DS267)

As discussed in *Digest 2010* at 483-84, in 2010, the United States and Brazil agreed on a Memorandum of Understanding ("MOU") and a Framework Agreement to prevent Brazil from imposing countermeasures against the United States for its subsidies and export credit guarantees for cotton. In 2014, the 2010 MOU and Framework Agreement expired. Brazil and the United States negotiated a final solution to the cotton dispute in the form of a new MOU, signed October 1, 2014 with a notification to the DSB on October 16, 2014. As described in the 2014 Annual Report at 83,

> The 2014 MOU includes provisions on payment to and use of funds by the Brazilian Cotton Institute ("IBA"), which operates the technical assistance and capacity building fund established in 2010; operation of the GSM-102 export credit guarantee program; and limitations on matters on which Brazil may bring new WTO disputes. The 2014 Memorandum also provided the basis for termination of the WTO dispute *United States – Subsidies on Upland Cotton*.

In accordance with the 2014 MOU, Brazil and the United States jointly notified the WTO of the termination of the dispute on October 16, 2014.

(2) Certain Country of Origin Labeling Requirements (Canada) (DS384) and Mexico (DS386)

As discussed in *Digest 2013* at 321, the parties to disputes challenging U.S. country of origin labeling ("COOL") requirements requested a compliance panel to determine whether new U.S. rules modifying labeling provisions adequately comply with recommendations by the DSB. The compliance panel issued its report in October 2014, finding that the amended labeling provisions are noncompliant. The United States appealed the compliance panel's determinations.

(3) Measures Affecting the Production and Sale of Clove Cigarettes (Indonesia) (DS406)

As discussed in *Digest 2013* at 321, Indonesia disputed that the United States had complied with the DSB recommendations and rulings concerning U.S. measures affecting the sale of clove cigarettes, and the parties were engaged in WTO arbitration with respect to this matter. In 2014, the parties reached a mutually agreed solution in the dispute. As a result, the arbitration proceeding was terminated.

(4) Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436)

A panel was established in 2012 to consider claims concerning U.S. countervailing measures on certain hot-rolled carbon steel flat products from India. As described in the 2014 Annual Report at 95, the panel issued its report on July 14, 2014 and the Appellate Body issued its report on December 8, 2014.

> …The Panel rejected India's claims against the U.S. statutes and regulations concerning facts available and benchmarks under Articles 12.7 and 14(d) of the SCM Agreement, respectively, but found that the U.S. statute governing cumulation was inconsistent with Article 15 of the SCM Agreement because it required the cumulation of both dumped and subsidized imports in the context of CVD investigations. Consequently, the Panel also found that the ITC's injury determination breached U.S. obligations under Article 15.
>
> The Panel rejected India's challenges under Article 1.1(a)(1) of the SCM Agreement to Commerce's "public body" findings in two instances, as well as most of India's claims with respect to Commerce's application of facts available under Article 12.7 in the determination at issue. The Panel also rejected most of India's claims against Commerce's specificity determinations under Article 2.1, and its calculation of certain benchmarks used in the proceedings under Article 14(d). The Panel found that Commerce's determination that certain low-interest loans constituted "direct transfers" of funds was consistent with Article 1.1(a)(1), but that Commerce's determination that a captive mining program constituted a financial contribution was not consistent with Article 1.1(a). Finally, the Panel found that Commerce did not act inconsistently with Articles 11, 13, 21 and 22 of the SCM Agreement when it analyzed new subsidy allegations in the context of review proceedings.
>
> On August 8, 2014, India appealed the Panel's findings; on August 13, 2014, the United States also appealed certain of the Panel's findings. The Appellate Body released its report on December 8, 2014.
>
> The Appellate Body upheld the Panel's findings regarding the U.S. benchmarks regulation, but found that … Commerce's application of these regulations was inconsistent with Article 14(d). The Appellate Body also upheld the Panel's findings regarding cumulation, finding that the application of the U.S. statute in the injury determination at issue was inconsistent with Article 15 of the SCM Agreement, and that the U.S. statute was inconsistent with that provision, although on different grounds than those found by the Panel. The Appellate Body rejected India's interpretation of "public body" under Article 1.1(a)(1), but reversed the Panel's finding that Commerce acted consistently in making the public body determination at issue on appeal. Regarding specificity, the Appellate Body rejected each of India's appeals under Article 2.1(c), as it did with respect to India's challenge to the Panel's finding under Article 1.1(a)(1)(i)

> relating to "direct transfers of funds". The Appellate Body also reversed the Panel's finding that Commerce had acted inconsistently with Article 1.1(a)(1)(iii) in finding that captive mining program constituted a provision of goods. Finally, the Appellate Body upheld the Panel's rejection of India's claims under Articles 11, 13 and 21 regarding new subsidy allegations. The Appellate Body reversed the Panel's findings under Article 22 of the SCM Agreement, but was unable to complete the analysis.

(5) Countervailing Duty Measures on Certain Products from China (DS437)

In June 2014, a panel issued its report regarding China's challenges to certain U.S. countervailing duty determinations in which the U.S. Department of Commerce considered Chinese state-owned enterprises to be public bodies under the SCM Agreement. China challenged additional aspects of these countervailing duty determinations. The Panel found Commerce's determinations that state-owned enterprises were public bodies to be inconsistent with the SCM Agreement, but found in favor of the United States regarding other challenged aspects of the countervailing duty determinations. China and the United States each appealed aspects of the panel's findings. As described in the 2014 Annual Report at 96, the Appellate Body issued its report before the end of 2014:

> On December 18, 2014, the Appellate Body circulated its report. On benchmarks, the Appellate Body reversed the Panel and found that Commerce's determination to use out-of-country benchmarks in four CVD investigations was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. On specificity, the Appellate Body rejected one of China's claims with respect to the order of analysis in de facto specificity determinations. However, the Appellate Body reversed the Panel's findings that Commerce did not act inconsistently with Article 2.1 when it failed to identify the "jurisdiction of the granting authority" and "subsidy programme" before finding the subsidy specific. On facts available, the Appellate Body accepted China's claim that the Panel's findings regarding facts available are inconsistent with Article 11 of the DSU, and reversed the Panel's finding that Commerce's application of facts available was not inconsistent with Article 12.7 of the SCM Agreement. Lastly, the Appellate Body rejected the U.S. appeal of the Panel's finding that China's panel request failed to meet the requirement of Article 6.2 of the DSU to present an adequate summary of the legal basis its claim sufficient to present the problem clearly.

(6) Countervailing and Anti-Dumping Measures on Certain Products from China (DS449)

China raised claims regarding certain U.S. antidumping and countervailing duty proceedings in 2012, claiming that Public Law 112-99 was inconsistent with obligations under the GATT 1994, and that the United States breached WTO rules because U.S.

authorities did not investigate and avoid an alleged overlap between countervailing duties (CVD) and antidumping (AD) duties. The panel report, issued on March 27, 2014, rejected China's claims concerning P.L. 112-99, but upheld China's claim regarding the alleged overlap in AD and CVD duties. Both China and the United States appealed the panel's report. The Appellate Body issued its report on July 7, 2014, as described in the 2014 Annual Report at 97:

> The Appellate Body found that the panel erred in its legal interpretation of Article X:2 of the GATT, and reversed the Panel's findings with respect to P.L. 112-99. The Appellate Body was unable to complete the analysis to determine the consistency of P.L. 112-99 with Article X:2 due to the lack of undisputed facts on the record.. The Appellate Body found that China's panel request complied with Article 6.2 of the DSU.
>
> On July 22, 2014, the DSB adopted its recommendations and rulings in the dispute. On August 21, 2014, the United States stated its intention to comply with the DSB's findings.

2. Environmental Goods Agreement

On July 8, 2014 the United States and 13 other WTO members began negotiations toward an Environmental Goods Agreement ("EGA"). President Obama's Climate Action Plan (discussed in *Digest 2013* at 389) calls for global free trade in environmental goods, which are subject to tariffs as high as 35 percent in some countries. Environmental goods include, for example, solar panels, gas and wind turbines, and other items related to renewable and clean energy generation; soot removers, carbon dioxide scrubbers, and other items related to controlling air pollution; disinfection and desalination equipment and other items related to water treatment; recycling and composting systems and other technologies to manage solid and hazardous waste; and air and water quality monitors and other equipment related to environmental monitoring. Further information on the EGA is available at *https://ustr.gov/trade-agreements/other-initiatives/environmental-goods-agreement#*. At the launch of the EGA negotiations, the participants released a joint statement, which follows and is available at *https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/Joint-Statement-Regarding-Launch-of-Environmental-Goods-Agreement-Negotiations*.

* * * *

Earlier this year, the representatives of Australia; Canada; China; Costa Rica; the European Union; Hong Kong, China; Japan; Korea; New Zealand; Norway; Singapore; Switzerland; Chinese Taipei; and the United States, committed to begin preparations for negotiations to liberalise trade in environmental goods, building on the APEC List of Environmental Goods.

The global challenges we face, including environmental protection and climate change, require urgent action. Today, we are pleased to announce the launch of negotiations on the Environmental Goods Agreement (EGA), through which we aim to achieve our shared goal of global free trade in environmental goods. We will now engage in intensive negotiations, meeting regularly in Geneva, to discuss the substance of the agreement, including product coverage. We are committed to work towards the timely and successful conclusion of the agreement.

In this process we are committed to work together and with other WTO Members similarly committed to liberalization that are interested in joining our ambitious efforts. We are convinced that this WTO initiative will strengthen the rules-based multilateral trading system, support its mission to liberalise trade, provide important impetus to the DDA[Doha Development Agenda] negotiations and benefit all WTO Members, including by involving all major traders and applying the principle of Most Favoured Nation, once a critical mass of Members agree to participate.

* * * *

D. TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Trade Agreements

a. Trans-Pacific Partnership

Negotiations by the Trans-Pacific Partnership ("TPP") countries on the text of a free trade agreement progressed in 2014, with meetings at various levels throughout the year. See *Digest 2013* at 322-23 and *www.ustr.gov/tpp* regarding previous negotiations. The trade ministers of the TPP countries met twice in Singapore, on February 22-25, 2014 and May 19-20, 2014, in Australia on October 25-27, 2014, and in China on November 8, 2014; their joint statements on their progress after each meeting are available at *www.ustr.gov/tpp*. TPP Leaders met in Beijing, China on November 10, 2014, issuing the TPP Leaders' Joint Statement that appears below and is also available at *www.ustr.gov/tpp*. TPP negotiators convened for the last meeting of 2014 in Washington, D.C. in December.

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* * * *

We, the Leaders of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam, welcome the significant progress in recent months, as reported to us by our Ministers, that sets the stage to bring these landmark Trans-Pacific Partnership (TPP) negotiations to conclusion. We are encouraged that Ministers and negotiators have narrowed the remaining gaps on the legal text of the agreement and that they are intensively engaging to complete ambitious and balanced packages to open our markets to one another, in accordance with the instructions we gave them in Bali a year ago. With the end coming into focus, we have instructed our Ministers and negotiators to make concluding this agreement a top priority so that our businesses, workers, farmers, and consumers can start to reap the real and substantial benefits of the TPP agreement as soon as possible.

As we mobilize our teams to conclude the negotiations, we remain committed to ensuring that the final agreement reflects our common vision of an ambitious, comprehensive, high-standard, and balanced agreement that enhances the competitiveness of our economies, promotes innovation and entrepreneurship, spurs economic growth and prosperity, and supports job creation in our countries. We are dedicated to ensuring that the benefits of the agreement serve to promote development that is sustainable, broad based and inclusive, and that the agreement takes into account the diversity of our levels of development. The gains that TPP will bring to each of our countries can expand even further should the open approach we are developing extend more broadly throughout the region. We remain committed to a TPP structure that can include other regional partners that are prepared to adopt its high standards.

Our fundamental direction to our Ministers throughout this process has been to negotiate an outcome that will generate the greatest possible benefit for each of our countries. In order to achieve that, our governments have worked to reflect the input we each have received from our stakeholders in the negotiation. Continued engagement will be critical as our Ministers work to resolve the remaining issues in the negotiation.

* * * *

b. *Trans-Atlantic Trade and Investment Partnership*

The Fourth Round of Transatlantic Trade and Investment Partnership (“T-TIP”) negotiations was held in Brussels, Belgium, March 10-14, 2014 and the Fifth Round was held in Arlington, Virginia, May 19-23, 2014. Updates on the progress made at each round are available at *www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts*. For background on the earlier rounds, see *Digest 2013* at 323-28. Leaders of the United States and the European Union, and the United Kingdom, Germany, France, Italy and Spain also reaffirmed their commitment to negotiating the T-TIP agreement at a meeting on the margins of the G-20 Summit in Brisbane, Australia on November 16, 2014. See *https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/November/Statement-on-the-Transatlantic-Trade-and-Investment-Partnership*. U.S. Trade Representative Michael Froman met with European Union Trade Commissioner Cecilia Malmström in Brussels, Belgium on November 21, 2014 and in Washington, D.C. on December 8, 2014 to discuss T-TIP negotiations. For further information on T-TIP, see *www.ustr.gov/ttip*.

c. *Trade in Services Agreement*

In 2013, negotiations began for a new Trade in Services Agreement ("TiSA") that would provide trade rules for the service sectors, including telecommunications and technology, distribution and delivery services, and new sectors such as services provided over the Internet. Twenty-three economies participated in TiSA negotiations in 2014. On June 18, 2014, Ambassador Froman addressed the Coalition of Services Industries in Washington, D.C. on TiSA. His remarks are excerpted below and available at *https://ustr.gov/TiSA*, the Office of the U.S. Trade Representative's webpage for TiSA.

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* * * *

Here in the United States the concept of a level playing field is deeply established, but in other countries we often see a patchwork of discriminatory laws and regulations that curb competition.

One is that restrictions on the flow of data across borders or requirements that companies duplicate their IT infrastructure in a country in order to serve that market makes it harder for companies of all sizes, based in all countries, to compete, and for buyers of all types to connect.

These policies are particularly hard on the increasing number of U.S. small and medium-sized enterprises that now can offer their services online on a global basis.

Small businesses in areas like software development or online retailing get locked out if government rules require them to establish a physical presence in every country.

* * * *

A second challenge is posed by the role of state-owned enterprises—or "national champions".

SOEs that benefit from direct and indirect subsidies as well as differences in regulatory treatment may enjoy an advantage that distorts the level playing field. Whether its financial services, telecommunications or delivery services, SOE's are increasingly playing a significant role. This is an issue we're taking head-on in TPP, along with other obstacles to the free flow of services, such as regulatory coherence, transparency and good governance.

And a third reason we aren't living up to our potential is that services trade policy is still new—and in fact, we are only now starting to understand the potential of services trade.

It wasn't that long ago that services trade was called "invisible trade" by economists.

We have come a long way in the past 20 years since the first international agreement on trade in services (GATS), but still services have a rather low profile. But the world is changing and we can't afford to wait any longer. And this brings me back to TiSA.

The Trade in Services Agreement is designed to address all of these challenges.

By focusing exclusively on services, we are raising awareness that services are of vital importance, not only as a source of exports but as a driver of competitiveness throughout the economy.

By pursuing ambitious outcomes for market access, we are working to establish a level playing field as the global norm.

And by pursuing common rules of the road in areas like telecommunications, E-Commerce, and regulatory transparency, we are working to minimize policy conflicts and smooth the flow of trade.

In other words, through TiSA we are working to establish state-of-the-art trade rules that promote fair and open competition across a broad spectrum of service sectors.

So let me give you an update on where negotiations currently stand.

TiSA was launched just over a year ago and in that time we have made significant progress.

We are currently engaged with fifty WTO members that represent nearly two-thirds of global trade in services and a combined services market exceeding $30 trillion.

That's more than half the world GDP.

These participants span the globe—big to small, lower-income to very wealthy. Together they have committed to a vision of the world as it could be in 2020 and 2030: open markets, new opportunities for businesses and for consumers, advances in technological, receding poverty.

The 7th round of negotiations begins next week and the basic framework of the agreement is in place, initial market access offers have been exchanged, and sector-specific work in areas like telecommunications and financial services is in full swing. And we are pleased with the level of progress and the 'can do' spirit of the group.

But we still have a lot of work before us.

We have taken very seriously the calls from business to address new issues in TiSA.

For example, we have tabled an ambitious proposal to address restrictions on cross-border data flows and the troubling trend toward localization requirements.

These issues are difficult, and reaching a consensus will not be easy.

But that is exactly why we need the help of coalitions like "Team TiSA," which brings together a broad business coalition to help support our efforts.

We need to be making the case to the American public, to businesses, to foreign countries, and to members of Congress that service exports provide an unmatched and untapped opportunity.

An opportunity that TiSA can help us realize.

At USTR, TiSA is a critical component of our overall agenda to unlock opportunity for more Americans, an agenda that also includes negotiations like the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (T-TIP).

TiSA is particularly interesting in that it enables us to build a bridge across both the Atlantic and the Pacific—to start working right now on a global basis.

* * * *

d. Trade Facilitation Agreement

On November 27, 2014, the members of the WTO adopted a Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization to insert the new Trade Facilitation Agreement (TFA), the negotiation of which concluded in December

2013 at the Bali Ministerial Conference, into Annex 1A of the WTO Agreement. The TFA will enter into force when two-thirds of the WTO's 161 members notify the WTO that they have completed their domestic ratification processes.* Further information on the TFA is available at *https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-doha-negotiations/trade-facilitation* and *https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm*.

2. Trade Legislation and Trade Preferences

a. *Generalized System of Preferences*

(1) Russia

On May 7, 2014, President Obama provided notice to the U.S. Congress of his intent to withdraw the designation of Russia as a beneficiary developing country under the Generalized System of Preferences ("GSP"). Daily Comp. Pres. Docs. 2014 DCPD No. 00339, pp. 1-2 (May 7, 2014). In his message to Congress, President Obama explained the basis for the determination to withdraw Russia's designation:

> Having considered the factors set forth in sections 501 and 502(c) of the 1974 Act, I have determined that it is appropriate to withdraw Russia's designation as a beneficiary developing country under the GSP program because Russia is sufficiently advanced in economic development and improved in trade competitiveness that continued preferential treatment under the GSP is not warranted. I intend to issue a proclamation withdrawing Russia's designation consistent with section 502(f)(2) of the 1974 Act.

Russia's designation as a beneficiary developing country under the GSP program was subsequently terminated on October 3, 2014. Daily Comp. Pres. Docs. 2014 DCPD No. 00744, pp. 1-2 (Oct. 3, 2014).

(2) Bangladesh

As discussed in *Digest 2013* at 331-34, President Obama suspended GSP trade benefits for Bangladesh in June 2013 due to concerns about workers' safety and workers' rights in that country. At the time of the suspension, the Administration provided the Government of Bangladesh with an action plan toward possible reinstatement of GSP trade benefits. In 2014, an interagency review by the U.S. government determined that some progress had been made, but Bangladesh needed to do more to address workers' rights before it would qualify for reinstatement of GSP benefits. See July 2, 2014 USTR

* Editor's note: The United States accepted the Protocol on January 23, 2015.

press release, available at *https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/GSP-Action-Plan-Review-Finds-Need-to-Improve-Worker-Rights-Safety-in-Bangladesh*.

(3) Lapse of GSP

As discussed in *Digest 2013* at 334, legal authorization of the GSP program expired and was not reauthorized in 2014. For more information, see USTR's GSP webpage, *https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp*.

b. AGOA

On June 26, 2014, President Obama issued Proclamation 9145 to take certain actions under the African Growth and Opportunity Act ("AGOA"). The Proclamation conveys the President's determination to designate Madagascar as a beneficiary sub-Saharan African country for purposes of section 506A of the Trade Act of 1974. Daily Comp. Pres. Docs. 2014 DCPD No. 00496, p. 1 (June 26, 2014). The Proclamation also includes the determination that the Kingdom of Swaziland is not making continual progress in meeting the requirements described in section 506A(a)(1) of the 1974 Act and that its designation as a beneficiary sub-Saharan African country be terminated effective January 1, 2015. *Id*.

On December 15, 2014, the U.S. Trade Representative determined that Guinea and Madagascar have each adopted effective visa systems and related procedures, and progressed toward implementing customs procedures required by AGOA such that imports from Guinea and Madagascar qualify for the textile and apparel benefits provided for under AGOA. 79 Fed. Reg. 74,156 (Dec. 15, 2014).

On December 23, 2014, President Obama issued Proclamation 9223 to take certain actions under AGOA. 79 Fed. Reg. 78,679 (Dec. 30, 2014). The Proclamation includes the designation of Guinea Bissau as a beneficiary sub-Saharan African country pursuant to section 506A(a)(1) of the 1974 Act, and the termination of the designations of South Sudan and The Gambia as beneficiary sub-Saharan African countries.

3. Trade-related Arbitration and Litigation

a. Actions Arising from the Softwood Lumber Agreement

As discussed in *Digest 2013* at 335, the United States and Canada submitted a joint request for arbitration to resolve the parties' dispute 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 2006 Softwood Lumber Agreement ("SLA") or should continue based on the parties' decision to extend the SLA. 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. The award is available at *www.international.gc.ca/controls-controles/assets/pdfs/softwood/lc-05.pdf*.

b. U.S. Court Challenge to Country-of-Origin Labeling

On July 29, 2014, the U.S. Court of Appeals for the D.C. Circuit issued its en banc decision in a case challenging the U.S. Department of Agriculture regulation mandating disclosure of country-of-origin information of meat products. *American Meat Institute et al. v. U.S. Department of Agriculture*, 760 F.3d. 18 (D.C. Cir. 2014). As discussed in section C.1.b.(2), *supra*, country-of-origin labelling measures are also the subject of a WTO dispute resolution proceeding. The lower court had rejected the challenge, brought on First Amendment and statutory grounds. A panel of the D.C. Circuit affirmed but recommended review by the en banc court. The U.S. brief on appeal before the en banc court, available at *www.state.gov/s/l/c8183.htm*, argues that:

> The panel … properly concluded that this Court should join the First and Second Circuits in declining to impose searching First Amendment review on the "literally thousands" of regulations requiring "routine disclosure" of information in the commercial context…

Excerpts follow from the majority opinion of the en banc Court of Appeals, which affirmed the lower court and upheld the country-of-origin labeling regulation under the First Amendment.

* * * *

Reviewing a regulation of the Secretary of Agriculture that mandates disclosure of country-of-origin information about meat products, a panel of this court rejected the plaintiffs' statutory and First Amendment challenges. The panel found the plaintiffs unlikely to succeed on the merits and affirmed the district court's denial of a preliminary injunction. On the First Amendment claim, the panel read *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), to apply to disclosure mandates aimed at addressing problems other than deception (which the mandate at issue in *Zauderer* had been designed to remedy). Noting that prior opinions of the court might be read to bar such an application of *Zauderer*, the panel proposed that the case be reheard *en banc*. … We now hold that *Zauderer* in fact does reach beyond problems of deception, sufficiently to encompass the disclosure mandates at issue here.

Congress has required country-of-origin labels on a variety of foods, including some meat products, …

The Secretary, whom we refer to interchangeably with his delegate the Agricultural Marketing Service ("AMS"), first promulgated rules in 2009. Mandatory Country of Origin Labeling, 74 Fed. Reg. 2658 (Jan. 15, 2009) ("2009 rule"). …

After the 2009 rule's adoption, Canada and Mexico filed a complaint with the Dispute Settlement Body of the World Trade Organization. In due course the WTO's Appellate Body found the rule to be in violation of the WTO Agreement on Technical Barriers to Trade. See Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R (June 29, 2012). The gravamen of the WTO's decision appears to have been an objection to the relative imprecision of the information required by the 2009 rule. See *id*. ¶ 343. In a different section of its opinion, the Appellate Body seemed to agree with the United States that country-of-origin labeling in general can serve a legitimate objective in informing consumers. *Id*. ¶ 453. A WTO arbitrator gave the United States a deadline to bring its requirements into compliance with the ruling.

The Secretary responded with a rule requiring more precise information—revealing the location of each production step. Mandatory Country of Origin Labeling, 78 Fed. Reg. 31,367 (May 24, 2013) ("2013 rule"). For example, meat derived from an animal born in Canada and raised and slaughtered in the United States, which formerly could have been labeled "Product of the United States and Canada," would now have to be labeled "Born in Canada, Raised and Slaughtered in the United States." In a matter of great concern to plaintiffs because of its cost implications, the 2013 rule also eliminated the flexibility allowed in labeling commingled animals. *Id*. at 31,367/3.

The plaintiffs, a group of trade associations representing livestock producers, feedlot operators, and meat packers, whom we'll collectively call American Meat Institute ("AMI"), challenged the 2013 rule in district court as a violation of both the statute and the First Amendment. This led to the decisions summarized at the outset of this opinion.

AMI argues that the 2013 rule violates its First Amendment right to freedom of speech by requiring it to disclose country-of-origin information to retailers, who will ultimately provide the information to consumers. See 7 U.S.C. § 1638a(e). The question before us, framed in the order granting en banc review, is whether the test set forth in *Zauderer*, 471 U.S. at 651, applies to government interests beyond consumer deception. Instead, AMI says, we should apply the general test for commercial speech restrictions formulated in *Central Hudson*, 447 U.S. 557, 566 (1980). Given the scope of the court's order, we assume the correctness of the panel's rejection of plaintiffs' statutory claims.

The starting point common to both parties is that *Zauderer* applies to government mandates requiring disclosure of "purely factual and uncontroversial information" appropriate to prevent deception in the regulated party's commercial speech. The key question for us is whether the principles articulated in *Zauderer* apply more broadly to factual and uncontroversial disclosures required to serve other government interests. AMI also argues that even if *Zauderer* extends beyond correction of deception, the government has no interest in country-of-origin labeling substantial enough to sustain the challenged rules.

Zauderer itself does not give a clear answer. Some of its language suggests possible confinement to correcting deception. …

The language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception. After recounting the elements of *Central*

Hudson, *Zauderer* rejected that test as unnecessary in light of the "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650. Later in the opinion, the Court observed that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id*. at 652 n.14. After noting that the disclosure took the form of "purely factual and uncontroversial information about the terms under which [the] services will be available," the Court characterized the speaker's interest as "minimal": "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." *Id*. at 651 (citation omitted). All told, *Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of such information as "minimal" seems inherently applicable beyond the problem of deception, as other circuits have found. See, *e.g.*, *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (Torruella, J.); *id*. at 316 (Boudin, C.J. & Dyk, J.); *id*. at 297-98 (per curiam) (explaining that the opinion of Chief Judge Boudin and Judge Dyk is controlling on the First Amendment issue); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-15 (2d Cir. 2001).

To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.1 See, *e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 370-71 (D.C. Cir. 2014); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.18 (D.C. Cir. 2013); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1214 (D.C. Cir. 2012).

In applying *Zauderer*, we first must assess the adequacy of the interest motivating the country-of-origin labeling scheme. AMI argues that, even assuming *Zauderer* applies here, the government has utterly failed to show an adequate interest in making country-of-origin information available to consumers. AMI disparages the government's interest as simply being that of satisfying consumers' "idle curiosity." Counsel for AMI acknowledged during oral argument that her theory would as a logical matter doom the statute, "if the only justification that Congress has offered is the justification that it offered here . . . ." Oral Argument Tr. 18, *American Meat Institute v. USDA*, No. 13-5281 (D.C. Cir. May 19, 2014) (en banc).

Beyond the interest in correcting misleading or confusing commercial speech, *Zauderer* gives little indication of what type of interest might suffice. In particular, the Supreme Court has not made clear whether *Zauderer* would permit government reliance on interests that do not qualify as substantial under *Central Hudson*'s standard, a standard that itself seems elusive. … But here we think several aspects of the government's interest in country-of-origin labeling for food combine to make the interest substantial: the context and long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak. Because the interest motivating the 2013 rule is a substantial one, we need not decide whether a lesser interest could suffice under *Zauderer*.

Country-of-origin information has an historical pedigree that lifts it well above "idle curiosity." … Congress has been imposing similar mandates since 1890, giving such rules a run just short of 125 years. See Tariff Act of 1890, ch. 1244, § 6, 26 Stat. 567, 613; *United States v. Ury*, 106 F.2d 28, 29 (2d Cir. 1939); see also Tariff Act of 1930, ch. 497, § 304, 46 Stat. 590, 687 (current version at 19 U.S.C. § 1304); Wool Products Labeling Act of 1939, as amended by

Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, §§ 304-05, 98 Stat. 1585, 1604 (current version at 15 U.S.C. § 68b(a)(2)(D)); Fur Products Labeling Act, ch. 298, § 4, 65 Stat. 175, 177-78 (1951) (current version at 15 U.S.C. § 69b(2)(F)); Textile Fiber Products Identification Act, Pub. L. No. 85-897, § 4, 72 Stat. 1717, 1719 (1958) (current version at 15 U.S.C § 70b(b)(4)-(5)); American Automobile Labeling Act, Pub. L. No. 102-388, § 210, 106 Stat. 1556 (1992) (current version at 49 U.S.C. § 32304).

… The Congress that extended country-of-origin mandates to food did so against a historical backdrop that has made the value of this particular product information to consumers a matter of common sense.

Supporting members of Congress identified the statute's purpose as enabling customers to make informed choices based on characteristics of the products they wished to purchase, including United States supervision of the entire production process for health and hygiene. …. Some expressed a belief that with information about meat's national origin, many would choose American meat on the basis of a belief that it would in truth be better. See, *e.g.*, 148 Cong. Rec. 5492 (2002) (statement of Rep. Hooley); *id*. (statement of Rep. Thune); *id*. (statement of Rep. Wu). Even though the production steps abroad for food imported into the United States are to a degree subject to U.S. government monitoring, see Brief for United Mexican States as Amicus Curiae at 4-6, it seems reasonable for Congress to anticipate that many consumers may prefer food that had been continuously under a particular government's direct scrutiny.

Some legislators also expressed the belief that people would have a special concern about the geographical origins of what they eat. This is manifest in anecdotes appearing in the legislative record, such as the collapse of the cantaloupe market when some imported cantaloupes proved to be contaminated and consumers were unable to determine whether the melons on the shelves had come from that country. See 148 Cong. Rec. 5492 (2002) (statement of Rep. Thurman). Of course the anecdote more broadly suggests the utility of these disclosures in the event of any disease outbreak known to have a specific country of origin, foreign or domestic.

The record is further bolstered by surveys AMS reviewed, such as one indicating that 71-73 percent of consumers would be willing to pay for country-of-origin information about their food. Mandatory Country of Origin Labeling, …But such studies, combined with the many favorable comments the agency received during all of its rulemakings, reinforce the historical basis for treating such information as valuable. 2013 rule, 78 Fed. Reg. at 31,376/1-2.

In light of the legislators' arguments, read in the context of country-of-origin labeling's long history, we need not consider to what extent a mandate reviewed under *Zauderer* can rest on "other suppositions," as opposed to "the precise interests put forward by the State."…

* * * *

In any event, the agency has sufficiently invoked the interests served by the statute, both during the rulemaking, 2013 rule, 78 Fed. Reg. at 31,377/2 ("This rule . . . is the result of statutory obligations to implement the [country-oforigin] provisions of the 2002 and 2008 Farm Bills."); *id*. at 31,370/1, and in litigation, Federal Appellees' Br. 25, 26, *American Meat Institute v. USDA*, No. 13-5281 (D.C. Cir. 2014), and has certainly not disclaimed those interests, see Oral Argument Tr. 51-52, *American Meat Institute v. USDA*, No. 13-5281 (D.C. Cir. May 19, 2014) (en banc).

Finally, agency statements (from prior rulemakings) claiming that country-of-origin labeling serves no food safety interest are not inconsistent with any of the government's litigation positions here. Simply because the agency believes it has other, superior means to protect food safety doesn't delegitimize a congressional decision to empower consumers to take possible country-specific differences in safety practices into account. Nor does such an agency belief undercut the economy-wide benefits of confining the market impact of a disease outbreak.

Having determined that the interest served by the disclosure mandate is adequate, what remains is to assess the relationship between the government's identified means and its chosen ends. Under *Central Hudson*, we would determine whether "the regulatory technique [is] in proportion to [the] interest," an inquiry comprised of assessing whether the chosen means "directly advance[s] the state interest involved" and whether it is narrowly tailored to serve that end. *Central Hudson*, 447 U.S. at 564; Fox, 492 U.S. at 480. *Zauderer*'s method of evaluating fit differs in wording, though perhaps not significantly in substance, at least on these facts.

When the Supreme Court has analyzed *Central Hudson*'s "directly advance" requirement, it has commonly required evidence of a measure's effectiveness. See *Edenfield*, 507 U.S. at 770-71. But as the Court recognized in *Zauderer*, such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest. 471 U.S. at 650; … Of course to match *Zauderer* logically, the disclosure mandated must relate to the good or service offered by the regulated party, a link that in *Zauderer* itself was inherent in the facts, as the disclosure mandate necessarily related to such goods or services. See *Zauderer*, 471 U.S. at 651 (acknowledging that the disclosure mandate involved "purely factual and uncontroversial information about the terms under which [the] services will be available"). For purposes of this case, we need not decide on the precise scope or character of that relationship.

The self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality. In this long-lived group have been not only country-of-origin labels but also many other routine disclosure mandates about product attributes …

…To the extent that the government's interest is in assuring that consumers receive particular information (as it plainly is when mandating disclosures that correct deception), the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose "purely factual and uncontroversial information" about attributes of the product or service being offered. In other words, this particular method of achieving a government interest will almost always demonstrate a reasonable means-ends relationship, absent a showing that the disclosure is "unduly burdensome" in a way that "chill[s] protected commercial speech," *id*. at 651.

Thus, to the extent that the pre-conditions to application of *Zauderer* warrant inferences that the mandate will "directly advance" the government's interest and show a "reasonable fit" between means and ends, one could think of *Zauderer* largely as "an application of *Central Hudson*, where several of *Central Hudson*'s elements have already been established." AMI Supplemental Br. at 9.

In this case, the criteria triggering the application of *Zauderer* are either unchallenged or substantially unchallenged. The decision requires the disclosures to be of "purely factual and uncontroversial information" about the good or service being offered. *Zauderer*, 471 U.S. at 651.

AMI does not contest that country-of-origin labeling qualifies as factual, and the facts conveyed are directly informative of intrinsic characteristics of the product AMI is selling.

…And AMI does not disagree with the truth of the facts required to be disclosed, so there is no claim that they are controversial in that sense.

* * * *

Finally, though it may be obvious, we note that *Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally protected speech, …Nor can it sustain mandates that "chill[] protected commercial speech." *Zauderer*, 471 U.S. at 651. AMI has made no claim of either of these consequences.

Accordingly we answer affirmatively the general question of whether "government interests in addition to correcting deception," *American Meat Inst. v. USDA*, 746 F.3d 1065, 1073 n.1 (D.C. Cir. 2014), can be invoked to sustain a disclosure mandate under *Zauderer*, and specifically find the interests invoked here to be sufficient. We reinstate the judgment and leave untouched the opinion of the panel with respect to the remaining issues on appeal.

* * * *

E. TAXATION

1. Transmittal of Tax Treaties to the Senate for Advice and Consent

On May 7, 2014, President Obama submitted to the U.S. Senate for its advice and consent to ratification the Protocol Amending the Convention between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and its Protocol, signed at Madrid on February 22, 1990, and a related Memorandum of Understanding signed on January 14, 2013, at Madrid, together with correcting notes dated July 23, 2013, and January 31, 2014 (the "proposed protocol"). Daily Comp. Pres. Docs. 2014 DCPD No. 00338, pp. 1-2 (May 7, 2014). In his message to the Senate transmitting the porposed protocol, President Obama explained its purpose:

> The proposed protocol was negotiated to bring United States-Spain tax treaty relations into closer conformity with U.S. tax treaty policy. The proposed protocol exempts from source-country withholding cross-border payments of certain direct dividends, interest, royalties, and capital gains, and updates the provisions of the existing convention with respect to preventing abuse by third-country investors and the exchanges of information between revenue authorities. The proposed protocol also updates the mutual agreement procedure by requiring binding arbitration of certain cases that the competent authorities of the United States and Spain have been unable to resolve after a reasonable period of time.

On May 20, the President transmitted, for the advice and consent of the Senate to its ratification, the Convention between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed on February 13, 2013, at Warsaw. Daily Comp. Pres. Docs. 2014 DCPD No. 00383 p. 1 (May 20, 2014). As explained in the President's message to Congress:

> The proposed Convention replaces the existing Convention, signed in 1974, and was negotiated to bring United States-Poland tax treaty relations into closer conformity with current U.S. tax treaty policies. For example, the proposed Convention contains provisions designed to address "treaty shopping," which is the inappropriate use of a tax treaty by residents of a third country, that the existing Convention does not. Concluding the proposed Convention with Poland has been a top priority for the tax treaty program at the Department of the Treasury.

2. FATCA

The United States also continued in 2014 to engage with jurisdictions around the world to improve international tax compliance and implement the Foreign Account Tax Compliance Act ("FATCA"). For background on FATCA, see *Digest 2012* at 413 and *Digest 2013* at 358. In April 2014, the U.S. Treasury Department and IRS announced that, in anticipation of withholding under FATCA taking effect on July 1, 2014, the Treasury Department would treat jurisdictions that have reached "agreements in substance" with the United States regarding FATCA as if they had agreements in effect until the end of 2014. See IRS Announcement 2014-17, available at *www.irs.gov/pub/irs-irbs/irb14-18.pdf* and April 2, 2014 Treasury Department press release, available at *www.treasury.gov/press-center/press-releases/Pages/jl2343.aspx*. By the end of 2014, the United States had signed agreements to implement FATCA with 53 jurisdictions. On December 1, 2014, the IRS announced an extension of time, beyond the end of 2014, for jurisdictions that have reached agreement in substance, but have yet to sign an agreement, to be treated as if they had an agreement in effect. See IRS Announcement 2014-38, available at *www.irs.gov/pub/irs-drop/a-14-38.pdf*. The December 1, 2014 announcement also identifies additional jurisdictions that will be treated, as of November 30, 2014, as if they had an agreement in effect based on the Treasury's determination that they reached "agreements in substance" with the United States. The list of FATCA agreements and joint statements, with links to the texts of the agreements, as well as lists of jurisdictions that have reached "agreements in substance," are available at *www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx*.

3. Litigation

a. Validus: *Challenge to U.S. Tax on Extraterritorial Reinsurance Activity*

In 2014, the United States government challenged the decision of a federal district court holding that Validus Reinsurance, Ltd. ("Validus") was not liable for excise taxes imposed by Internal Revenue Code ("I.R.C.") § 4371 (26 U.S.C.) on premiums that Validus paid to foreign reinsurers under retrocession agreements—agreements for reinsurance from another foreign insurer to protect against risks in reinsuring policies that insured risks in the United States. *Validus Reins., Ltd. v. United States*, No. 14-5081 (D.C. Cir. 2014). The district court based its decision on the plain language of the statute and did not reach arguments presented by Validus regarding the extraterritorial reach of the statute. In its opening brief on appeal, the United States explained not only why the lower court erred in interpreting the statute, but also why the alternative arguments regarding limits on extraterritorial application of the excise tax lack merit. The brief is excerpted below (with footnotes omitted) and available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

In general, there is a presumption that a federal statute has no application outside of the territorial jurisdiction of the United States unless Congress has explicitly so provided. See *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (superseded by statute). "This principle," however, "represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." *Morrison*, 561 U.S. at 255; see also *Arabian Am. Oil*, 499 U.S. at 248; *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949). Under this canon, "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, "'[the court] must presume it is primarily concerned with domestic conditions.'" *Morrison*, 531 U.S. at 255 (quoting *Arabian Am. Oil*, 499 U.S. at 248) (internal quotations omitted).

This presumption does not apply here, because Congress "'clearly expressed'" (*Morrison*, 561 U.S. at 255) its intent that I.R.C. §§ 4371-74 should have extraterritorial effect. Indeed, the entire statutory scheme would be a nullity in the absence of an extraterritorial effect. That § 4371 was intended to apply extraterritorially is readily apparent from the terms of the statute. Section 4371 provides that the tax is imposed on "each policy of insurance . . . or policy of reinsurance issued by any foreign insurer or reinsurer." I.R.C. § 4371. The definition of a "foreign insurer or reinsurer" in I.R.C. § 4372(a), in turn, makes clear that the statute is intended to reach foreign entities doing business outside the United States, providing that a foreign insurer or reinsurer includes:

> an insurer or reinsurer who is a nonresident alien individual, or a foreign partnership, or a foreign corporation. The term includes a nonresident alien individual, foreign partnership, or foreign corporation which shall become bound by an obligation of the nature of an indemnity bond.

I.R.C. § 4372(a).

The statute further clearly establishes that, in imposing an excise tax on foreign reinsurers, Congress intended to tax only those foreign companies that were operating extraterritorially and, as such, not subject to the U.S. income tax. In this regard, I.R.C. § 4373 excludes from the excise tax imposed by I.R.C. § 4371 any amount which is effectively connected to the conduct of a trade or business within the United States. Thus, because the excise tax imposed by § 4371 applies only to foreign insurers doing business outside of the United States, it would be utterly meaningless absent an extraterritorial effect.

To the extent there is any ambiguity as to Congress's intent, the ambiguity does not involve whether I.R.C. § 4371 has extraterritorial application, but only whether the statute applies to retrocessions—a question that (as explained above) should be resolved on the side of imposing the tax on retrocessions. In short, the presumption against extraterritorial application of a statute simply has no relevance in interpreting a statutory provision that, by its plain terms, only applies to extraterritorial transactions by foreign insurance and reinsurance companies.

2. Application of I.R.C. § 4371(3) to Validus's retrocession contracts is consistent with due process

Congress's imposition of the excise tax in § 4371 on retrocession contracts that ultimately reinsure risks within the United States, like those at issue here, is well within its authority. Where Congress manifests a clear intent to give a statute extraterritorial effect, such extraterritorial effect must be given effect, subject only to the requirement under the Due Process Clause of the Fifth Amendment that there be a sufficient connection between the extraterritorial events that are the subject of the statute and the United States. See *United States v. Bennett*, 232 U.S. 299, 304-05 (1914); *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990). As the Supreme Court explained in *Bennett*, for an extraterritorial imposition of federal tax to be unconstitutional it must be "so in conflict with obvious principles of justice, and so inconsistent with every conception of representative and free government, as to cause the exertion of power to come within the limitations of the due process clause of the 5th amendment." *Bennett*, 232 U.S. at 304-05 (holding due process was not violated by taxation of a yacht owned by a U.S. citizen but kept outside the United States).

In evaluating whether or not extraterritorial application of a statute satisfies due process requirements, courts inquire into whether there is a sufficient nexus between the extraterritorial person or entity to whom the statute is applied and the United States, so that application of the statute would not be arbitrary and unfair. See *Davis*, 905 F.2d at 249 & n.2 (finding sufficient nexus for applying Maritime Drug Enforcement Act extraterritorially to seize drug smuggling boats, because the boats were engaged in a transaction intended to result in criminal acts within the United States). Although no bright-line test has developed for evaluating whether extraterritorial application of a tax has the necessary connection to the United States, case law addressing similar due-process inquiries in the context of whether a state can impose tax outside its territory or on persons who are not citizens of the state provides relevant guidance and makes clear that only some link or minimum connection is required. See *Quill Corp. v. N.D.*, 504 U.S. 298, 306 (1992) ("Due Process Clause "'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'") (quoting *Miller Bros. Co. v. Md.*, 347 U.S. 340, 344-345 (1954)); *Meadwestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008) (same); *Gordon v. Holder*, 721 F.3d 638, 647 (D.C. Cir. 2013).

Factors considered in determining whether such a link or minimum connection exists include the volume of the contacts, whether the taxed entity (usually a seller of goods or services) purposefully directed itself at activities or business within the taxing jurisdiction, and whether the taxed entity received benefits from its contact with the state. See *Quill*, 504 U.S. at 307-08 (required contact existed even though contact was only made by mail, but the volume was large). As the Court explained in *Quill*, as long as a "foreign corporation purposefully avails itself of the benefits of an economic market in the forum State," the "requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Id*. Other cases similarly have focused on whether the taxed entity availed itself of a benefit of doing business in the forum state, either because of its beneficial laws or regulations or its economic market. See, *e.g.*, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

Applying these standards, it follows that there is a sufficient nexus to satisfy due process here. The retrocession contracts are plainly connected to the United States in that the obligation of the retrocessionaires to indemnify Validus arises only upon the occurrence of specified events in the United States. Because it is the practice of insurance companies to obtain reinsurance to allow them to insure more than their own reserves can cover (see *Hartford Fire*, 509 US. at 773 (reinsurance "allow[s] the primary insurer to sell more insurance than its own financial capacity might otherwise permit")), whether Validus and its retrocessionaires have maintained the reserves necessary to meet their reinsurance obligations could have a significant impact on the ability of U.S. insureds to collect on policy claims. Thus, each reinsurer is linked in an unbroken chain to the United States and can significantly affect the interests of U.S. citizens.

Moreover, Validus and its retrocessionaires "purposely direct[ed] [their] activities" towards the United States when they elected to buy and sell reinsurance for U.S. risks. *Quill*, 504 U.S. at 308. By participating in the reinsurance of U.S. risks, Validus and its retrocessionaires have a significant impact, not only on any potential insureds who may make claims based on a particular transaction, but also on the U.S. insurance market generally, by impacting competition for insurance and reinsurance coverage. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 682 (9th Cir. 2004) (discussing *Hartford Fire*, 509 U.S. 764, and the Court's recognition that availability of foreign reinsurance impacts the market for primary insurance in the U.S.); H.R. Rep. No. 77-2333 (explaining the tax is necessary to eliminate unfair advantage for foreign insurers over U.S. insurers who pay income tax).

* * * *

b. Challenge to U.S. Tax on Non-Citizen Workers in U.S. Territory

In June 2014, the United States filed its brief in the U.S. Court of Appeals for the Ninth Circuit in *Fang Lin Ai; Does 1-1000, and Concorde Garment Manufacturing Corp. v. United States of America*, No. 13-17491. Plaintiffs in the lower court challenged the application of the Federal Insurance Contributions Act ("FICA") (26 U.S.C., or Internal Revenue Code (I.R.C.) §§ 3101 – 3128) to a corporation ("Concorde") and its temporary foreign workers in the Commonwealth of the Northern Marianna Islands ("CNMI"). FICA funds the Social Security and Medicare programs by taxing both employers and employees on wages with respect to employment performed within the United States, irrespective of the citizenship of either the employee or employer. The CNMI is subject to a 1975 Covenant, approved by its people and the U.S. Congress, establishing it as a self-governing commonwealth and unincorporated territory of the United States. In 2013, the district court granted summary judgment for the United States and plaintiffs appealed to the Ninth Circuit. The U.S. brief on appeal, arguing that FICA properly applies to plaintiffs, is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*.

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The District Court correctly concluded that FICA taxes are imposed on both employers and employees on wages from employment in the CNMI, irrespective of the citizenship of the employees and employers. Employment under I.R.C. § 3121(b)(A)(i) is defined as service performed by an employee for an employer, irrespective of the citizenship of either, if the employment is "within the United States."

The FICA statutes define "the United States," when used in a geographical sense, to include Guam (I.R.C. § 3121(e)), and the Internal Revenue Code undisputedly applies employee and employer FICA taxes to wages for employment in Guam, irrespective of citizenship, absent a specific and applicable statutory exemption to "employment" pursuant to I.R.C. § 3121(b). See I.R.C. §§ 3121(b)(1)-(21). The terms of the Covenant apply federal laws that apply in Guam (including the laws imposing taxes to support Social Security) to the CNMI. Consequently, as the District Court held, wages from employment in the CNMI are subject to FICA taxes without regard to the citizenship of the employees or employers because that employment is deemed to be within the United States. The Federal Circuit, in *Zhang v. United States*, 640 F.3d 1358 (2011), reached the same conclusion.

Concorde argues that even if FICA taxes generally apply in the CNMI without regard to citizenship, FICA taxes do not apply to the wages they paid foreign workers (specifically, Chinese workers) in the CNMI. Concorde argues that applying FICA taxes in the CNMI as they apply in Guam means that the wages it pays should be exempted from FICA because their foreign workers are "similarly situated" to Filipino contract workers in Guam, who are admitted to Guam under § 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C.) (H-2 status). Those workers from the Philippines are expressly exempted from the payment of FICA taxes by I.R.C. § 3121(b)(18). An express and specific statutory exemption that does not apply by its terms cannot, however, be extended to groups not covered by its terms, even if it has been shown that the workers were similar (which is not the case).

Alternatively, taxpayers fall back on a claim that Covenant § 606(b) requires payment of employer, but not employee, FICA taxes. That claim relies on § 606(b)'s reference to "excise" and self-employment taxes that support the Social Security system; taxpayers assert that employee FICA taxes do not fall within this description. Taxpayers' argument is incorrect: FICA taxes are an excise tax on wages from employment. Taxpayers' argument ignores that fact that the employee portion of FICA (like the employer portion) is an employment tax under Subtitle C of the Internal Revenue Code that is imposed on wages—albeit, in the case of employees, the tax is imposed on income from wages, I.R.C. § 3101. In that regard, taxpayers also ignore the several contemporary authorities that treat the employer and employee portions of FICA indistinguishably as employment taxes and excise taxes. Moreover, as the District Court (and the Federal Circuit in *Zhang*) reasoned, any ambiguity in the coverage of § 606(b) was answered by reference to legislative history and the Section by Section Analysis of the Covenant. Nothing can be found in those sources to suggest an intent to distinguish between employee and employer FICA taxes, which are consistently applied together.

Finally, taxpayers assert that having to discern the applicability of the FICA tax provisions by reading Code and Covenant provisions together results in unconstitutional vagueness, which relieves them of the obligation to comply with those laws. In this regard, taxpayers do not assert that any particular provision is vague, but that the difficulties of synthesizing the Code and the Covenant lead to unconstitutional vagueness. The complexity of a statutory scheme is not generally grounds for striking it down on constitutional grounds, and taxpayers point to no authorities that support that position. And, where an economic regulatory scheme is at issue, the statutory rule must be so vague and indefinite as to be no rule at all (see, *e.g.*, *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000)), which, again, is not the situation here. The District Court correctly rejected this argument, which falls of its own weight in light of taxpayers' longstanding practice of paying FICA taxes and their acknowledgement that a possible argument against payment only came to them in recent years.

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F. COMMUNICATIONS

1. Transfer of Internet Domain Name Functions from U.S. Administration to Multistakeholder Community

On March 14, 2014, the U.S. Department of Commerce's National Telecommunications and Information Administration ("NTIA") announced its intention to transition key Internet domain name functions to the global multistakeholder community. NTIA asked the Internet Corporation for Assigned Names and Numbers ("ICANN") to initiate a multistakeholder process that would develop a proposal for the transition that had broad community support, would bolster the multistakeholder model of Internet governance, maintain the security, stability, and resiliency of the Internet's domain name system, satisfy the needs and expectations of global customers and partners of the services that would be addressed by the transition plan, and maintain the openness of the Internet. NTIA also made clear that it would not accept a government-led or an inter-governmental organization solution. The NTIA press release on the announcement is excerpted below and available at *www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions*.

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…. As the first step, NTIA is asking the Internet Corporation for Assigned Names and Numbers (ICANN) to convene global stakeholders to develop a proposal to transition the current role played by NTIA in the coordination of the Internet's domain name system (DNS).

NTIA's responsibility includes the procedural role of administering changes to the authoritative root zone file—the database containing the lists of names and addresses of all top-level domains—as well as serving as the historic steward of the DNS. NTIA currently contracts with ICANN to carry out the Internet Assigned Numbers Authority (IANA) functions and has a Cooperative Agreement with Verisign under which it performs related root zone management functions. Transitioning NTIA out of its role marks the final phase of the privatization of the DNS as outlined by the U.S. Government in 1997.

"The timing is right to start the transition process," said Assistant Secretary of Commerce for Communications and Information Lawrence E. Strickling. "We look forward to ICANN convening stakeholders across the global Internet community to craft an appropriate transition plan."

ICANN is uniquely positioned, as both the current IANA functions contractor and the global coordinator for the DNS, as the appropriate party to convene the multistakeholder process to develop the transition plan. NTIA has informed ICANN that it expects that in the development of the proposal, ICANN will work collaboratively with the directly affected parties, including the Internet Engineering Task Force (IETF), the Internet Architecture Board (IAB), the Internet Society (ISOC), the Regional Internet Registries (RIRs), top level domain name operators, VeriSign, and other interested global stakeholders.

NTIA has communicated to ICANN that the transition proposal must have broad community support and address the following four principles:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services; and,
- Maintain the openness of the Internet.

Consistent with the clear policy expressed in bipartisan resolutions of the U.S. Senate and House of Representatives (S.Con.Res.50 and H.Con.Res.127), which affirmed the United States support for the multistakeholder model of Internet governance, NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.

From the inception of ICANN, the U.S. Government and Internet stakeholders envisioned that the U.S. role in the IANA functions would be temporary. The Commerce Department's June 10, 1998 Statement of Policy stated that the U.S. Government "is committed to a transition that will allow the private sector to take leadership for DNS management." ICANN as an organization has matured and taken steps in recent years to improve its accountability and transparency and its technical competence. At the same time, international support continues to grow for the multistakeholder model of Internet governance as evidenced by the continued success of the Internet Governance Forum and the resilient stewardship of the various Internet institutions.

While stakeholders work through the ICANN-convened process to develop a transition proposal, NTIA's current role will remain unchanged. The current IANA functions contract expires September 30, 2015.

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2. Internet Governance

The United States participated in the Global Multistakeholder Meeting on the Future of Internet Governance ("NETmundial") in São Paulo, Brazil, April 23- 24, 2014. The meeting concluded with issuance of a non-binding statement, which the United States supported, titled the NETmundial Multistakeholder Statement, available at *http://netmundial.br/netmundial-multistakeholder-statement/*. Ambassador Daniel A. Sepulveda, Deputy Assistant Secretary of State and U.S. Coordinator for International Communications and Information Policy, Bureau of Economic and Business Affairs, addressed the significance of the NETmundial meeting and the resulting Multistakeholder Statement in remarks on May 21, 2014 at a telecommunications and media forum in Miami, Florida. Ambassador Sepulveda's remarks are excerpted below and available at *www.state.gov/e/eb/rls/rm/2014/226278.htm*.

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We think that NETmundial … took us a long way …. It recognized that the Internet is a global resource which should be managed in the public interest and committed all but a few of its global participants … to a future for Internet governance rooted in common principles and endorsed the multistakeholder process for addressing future challenges.

We know that over the next year, in other forums, the opponents of the decentralized system of multistakeholder Internet governance will challenge the NETmundial commitment and try to replace it with centralized multilateral control. In fact, they have already tried to downplay the significance of NETmundial at the recent annual meeting of the ITU and the 17th Session of the UN Commission on Science and Technology for Development.

It is our responsibility as governments, the private sector, civil society, and academia to ensure that the multistakeholder alliance strengthens and grows, particularly in the Americas, and build upon the progress made in Brazil.

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The final product of the Brazil meeting, the Multistakeholder Statement of Sao Paulo, established some agreement for a way forward. It:

1. reaffirmed the multistakeholder model of Internet governance as the first principle of Internet governance;
2. endorsed the transition of the U.S. Government's stewardship role of IANA functions to the global multistakeholder community, consistent with our stated principles;
3. emphasized the importance of strengthening and expanding upon the mandate of the Internet Governance Forum; and

4. underscored the importance of human rights in the implementation of a free and open Internet.

These four outcomes constitute a big win …. But our work is not yet complete.

We will engage the debate in more difficult venues later this year, including at the ITU where only governments are authorized to make decisions and where the opponents of NETmundial, already trying to downplay it significance, will try to regain lost ground.

The ITU is an important international institution to the proper functioning of international telecommunications, particularly for radio spectrum allocations, satellite management, and the wireless space. But it is often seen as a place that authoritarian governments can push their agenda for intergovernmental control of the Internet. These countries fear the freedom and loss of power that the Internet facilitates by enabling freedom of expression and access to information. As a result, these authoritarian countries manipulate the legitimate concerns of other countries when it comes to cybersecurity and the digital divide to win favor for increasing the mandate of the UN or ITU over the Internet, where they believe traditional notions of state sovereignty will allow them to control how and whether their people access and use the Internet..

The United States has and will continue to oppose any proposal towards that objective, but importantly, so should the nations of the global South that embrace democracy, economic and social development, innovation, free expression, and open and competitive markets. We must also take steps to make Internet-related discussions at the ITU transparent and open to all stakeholders, consistent with the principles we agreed to at NETmundial.

I am responsible for leading the U.S. delegations to ITU events all over the world and believe that mobilizing our friends to join us in common cause, in defense of the multistakeholder system of Internet governance is of vital importance for the future of the Internet. I believe that the best way we can do that is by helping meet the real needs of the countries working to strengthen their Internet infrastructures and encouraging the multistakeholder Internet governance institutions themselves to evolve and become stronger and more inclusive.

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3. International Telecommunication Union Plenipotentiary Conference

As Ambassador Sepulveda mentioned in his remarks excerpted above, the United States participated in the 2014 International Telecommunication Union ("ITU") Plenipotentiary Conference in Busan, Korea. The Plenipotentiary Conference is held every four years for the purpose of holding elections, establishing ITU general policies and four-year strategic and financial plans, and considering amendments to the ITU Constitution and Convention. Outcomes of the ITU conference in Korea are described in a November 10, 2014 State Department media note, excerpted below and available at *www.state.gov/r/pa/prs/ps/2014/11/233914.htm*.

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The International Telecommunication Union (ITU) Plenipotentiary Conference, which concluded on November 7, is a three week, high-level policy conference held every four years. Ambassador Daniel Sepulveda, U.S. Coordinator for International Communications and Information Policy, led the U.S. delegation to a successful outcome that will greatly support the development of global telecommunications infrastructure and networks. The Plenipotentiary Conference sets the ITU general policies, adopts four-year strategic and financial plans, and elects the ITU senior management team, members of Council, and members of the Radio Regulations Board for the next four years.

The U.S. delegation achieved its four primary objectives, and all outcomes were agreed by consensus with other member states. The U.S. delegation was elected to another four year term on the ITU Council with more votes than we received four years ago, and Ms. Joanne Wilson was elected to the Radio Regulations Board (RRB). Member states improved the ITU's fiscal and strategic management and transparency policies and improved the ability of all stakeholders to view and participate in the work of the Union. The member states agreed to no changes to the ITU's legal instruments (the Constitution and Convention of the Union). Finally, member states decided not to expand the ITU's role in Internet governance or cybersecurity issues, accepting that many of those issues are outside of the mandate of the ITU. The leadership of the U.S. delegation was instrumental to each of these efforts.

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Internet and Cybersecurity Issues

The United States built a broad consensus that led to success on Internet and cybersecurity issues keeping the ITU's work focused on its current mandate. The United States worked with other members to mitigate and remove proposed language from resolutions that would have improperly expanded the scope of ITU work and curtail the robust, innovative, multistakeholder Internet we enjoy today, while providing clear guidance to the ITU on the efforts it can and should work on.

The U.S. also worked successfully with partners to eliminate proposed language that could have provided a mandate for the ITU in surveillance or privacy issues; inhibited the free flow of data; regulated Internet content and service companies; undermined the multistakeholder process; or called on the ITU to develop international regulations on these issues.

Finally, a compromise was reached on the Council Working Group on International Internet-related Public Policy (CWG-Internet), which will provide for physical consultation meetings, open to all stakeholders, to be held prior to each of the CWG-Internet meetings. These meetings will allow all Internet stakeholders to directly contribute to the work of the CWG-Internet.

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International Telecommunication Regulations

The U.S. delegation secured agreement that another World Conference on International Telecommunications (WCIT), the conference that revises the International Telecommunication Regulations (ITR's) should not be scheduled until an expert group reviews the existing treaty regulations from 2012 and assesses whether any update is necessary. This expert group will submit recommendations that will be forwarded to the next Plenipotentiary Conference in 2018 for it to decide on whether to schedule another WCIT treaty conference.

Radiocommunication Issues

The Plenipotentiary Conference successfully addressed six Radiocommunication related matters, all in a manner consistent with U.S. objectives.

The Plenipotentiary Conference decided that the World Radiocommunication Conference (WRC) would be the appropriate body to address the conditions under which the RRB would reconsider a previous decision. Additionally, all members of the RRB will sign a declaration committing to adhere to the relevant provisions of the ITU Constitution and avoid conflict of interests.

The Union reached consensus on the U.S. proposal that the WRC is the proper conference to examine and modify the procedures for registering frequencies used by satellite networks and not the Plenipotentiary Conference.

The Plenipotentiary Conference decided that the ITU could continue to express interest in taking on the role of the Supervisory Authority of the International Registration System for Space Assets and that Council would continue to monitor developments.

The Plenipotentiary Conference decided to bring the issue of extending the deadline for bringing into operation a Colombian satellite system (SATCOL) to the attention of the next WRC.

The Union achieved consensus on a new resolution on strengthening the role of ITU with regard to transparency and confidence-building measures in outer space activities and dealt with the ITU Radiocommunication Bureau's role in addressing harmful radio-frequency interference to satellite transmissions, particularly to international broadcast transmissions.

The United States supported adding the issue of global flight tracking to the WRC-15 agenda.

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G. OTHER ISSUES

1. Antitrust

The United States in 2014 filed several *amicus curiae* briefs in the U.S. Court of Appeals for the Seventh Circuit in a private damages case involving application of U.S. antitrust laws to an international price-fixing conspiracy among foreign manufacturers of liquid crystal display ("LCD") panels used in cellphones and sold throughout the world, *Motorola v. AU Optronics*, No. 14-8003 (7th Cir. 2014). The U.S. briefs are available at *http://www.justice.gov/atr/cases/f305400/305466.pdf* (April 24, 2014); *http://www.justice.gov/atr/cases/f306700/306783.pdf* (June 27, 2014); and *http://www.justice.gov/atr/cases/f308400/308451.pdf* (September 5, 2014). The April 24 brief urged the appellate panel to vacate its initial opinion affirming partial summary judgment for the defendants and to rehear the case. The June 27 supplemental brief was filed in response to a specific request by the court for the views of the United States "concerning the potential impact on U.S. foreign commercial relations, and on U.S. foreign relations more generally, of deciding the present appeal one way or another." The June 27 brief argued that the initial panel opinion was "broader than necessary to preserve the balance Congress struck in [the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA") and to avoid harm to U.S. foreign relations." On July 1, 2014, the appellate panel vacated its initial opinion and granted rehearing, permitting full briefing and argument. The September 5 brief noted among other things that the U.S. government for many years "has criminally prosecuted foreign companies for participating in international price-fixing cartels without causing conflict with foreign jurisdictions, but some jurisdictions have occasionally expressed concern about private plaintiffs seeking treble damages under U.S. antitrust law for injuries sustained outside the United States. This disparity may reflect the government's careful consideration of international comity and its prudence in bringing antitrust enforcement actions that may implicate another sovereign's interests" (citations omitted).

The Seventh Circuit's final opinion, issued November 26 and amended January 12, 2015, again affirmed the lower court ruling against Motorola on most of its price-fixing claims against the foreign manufacturers, holding that any effect on U.S. commerce in cellphones did not give rise to Motorola's damages claims. Among other things, the court's opinion emphasized "differences between a private damages suit and a government suit seeking criminal or injunctive remedies" and the "government's power to obtain relief through criminal and injunctive actions without ruffling our allies' feathers." Notably, "[i]f price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the [Foreign Trade Antitrust Improvements] Act would not block the Department of Justice from seeking criminal or injunctive remedies." *Motorola*, 775 F.3d 816 (7th Cir. 2015), cert. denied, No. 14-1122 (U.S. June 15, 2015). See also *United States v. Hsiung*, 758 F.3d 1074 (9th Cir. 2014), amended by 778 F.3d 738 (9th Cir. 2015), cert. denied, No. 14-1121 (U.S. June 15, 2015) (holding that FTAIA did not block criminal convictions of defendants for conspiring to fix LCD panel prices because conspiracy involved U.S. import commerce in LCD panels and, alternatively, it directly affected U.S. import commerce in LCD panel-containing laptop computers and desktop monitors).

2. Intellectual Property: Special 301 Report

The "Special 301" Report is an annual review of the global state of intellectual property rights ("IPR") protection and enforcement. The Office of the U.S. Trade Representative provides information about the Special 301 Report on its website at *https://ustr.gov/issue-areas/intellectual-property/Special-301*.

a. Ukraine

As discussed in *Digest 2013* at 336, USTR's 2013 Special 301 Report designated 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. As a result of this designation, USTR initiated a Section 301 investigation of the acts, policies, and practices of the Government of Ukraine with respect to intellectual property rights that formed the basis of its designation. The investigation, which included a public hearing, consideration of written submissions and testimony, and an extension of three months, and coincided with ongoing discussions between U.S. and Ukrainian officials, concluded on February 28, 2014. The Federal Register notice of the determination in the Section 301 investigation of Ukraine, 79 Fed. Reg. 14,326 (Mar. 13, 2014), concludes as follows:

> Based on the information obtained during the investigation, and consistent with the recommendation of the interagency Section 301 Committee, the Trade Representative has determined under Section 304(a)(1)(A) and (B) of the Trade Act that: (1) The acts, policies, and practices subject to investigation are unreasonable and burden or restrict U.S. commerce, and are thus actionable under Section 301(b) of the Trade Act; and (2) in light of the current political situation in Ukraine, no action under Section 301(b) is appropriate at this time.

b. 2014 Report

USTR issued the 2014 Special 301 Report in April 2014. The Report is available at *www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf*. The introduction to the 2014 Report highlights that, while Italy and the Philippines were both removed from the Watch List in 2014 after many years, 10 countries are on the Priority Watch List and 27 countries are on the Watch List in 2014, including several countries (Chile, China, India, Indonesia, Thailand, and Turkey) which have been listed every year since the Report's inception 25 years ago.
See *Digest 2007* at 605–7 for additional background on the watch lists. USTR's press release, available at *https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/April/USTR-Releases-Annual-Special-301-Report-on-Intellectual-Property-Rights*, also summarizes the Report and lists the 10 Priority Watch List and 27 Watch List countries as follows: Algeria, Argentina, Chile, China, India, Indonesia, Pakistan, Russia, Thailand, and Venezuela are on the Priority Watch List; Barbados, Belarus, Bolivia, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Finland, Greece, Guatemala, Jamaica, Kuwait, Lebanon, Mexico, Paraguay, Peru, Romania, Tajikistan, Trinidad and Tobago, Turkey, Turkmenistan, Uzbekistan, and Vietnam are on the Watch List.

3. International Financial System

On September 9, 2014, the United States voted against a G77 resolution with the aim of concluding a multilateral convention to establish a legal regulatory framework for sovereign debt restructuring processes. The U.S. explanation of vote was delivered by Terri Robl, U.S. Deputy Representative to the UN Economic and Social Council, and is available at *http://usun.state.gov/briefing/statements/231414.htm*. The U.S. explanation of vote is excerpted below.

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The United States remains committed to the stability of the international financial system and to the development of its partners around the world. Financing is a crucial tool for that growth and development. Access to functioning debt markets enables developing countries to make the infrastructure investments essential to diversify economies and expand productive capacity. In that context, the United States regrets that it was obliged to vote "no" on this resolution on both substantive and procedural grounds.

The United States cannot support the creation of a sovereign debt restructuring mechanism [("SDRM")], as is envisioned in this resolution. The establishment of a statutory mechanism for debt restructurings would create uncertainty in financial markets. If lenders face higher uncertainty regarding repayment, they may be less likely to provide financing and will likely charge higher risk premiums, potentially stifling financing to developing countries.

Experience from the debate on an SDRM in the early-2000s reflected these concerns and concluded that the creation of such a mechanism would have highly uncertain results. Issuers of external debt, working with market participants and members of the G-10, instead elected to pursue market-oriented approaches, including the increasingly common use of collective action clauses, paired with enhancing debt management capacity in borrowing countries. Working on this technically complex issue is ongoing in other fora, including the IMF, and in non-governmental bodies like the International Capital Markets Association. These efforts have already begun to bear fruit and are the more appropriate venues for this type of discussion, and better ways to address the issue.

The United States is also concerned about the procedures surrounding this resolution. The resolution clearly assumes a final outcome—the establishment of a binding convention or legal framework—precluding substantive debate on its merits.

Effective discussion is further inhibited by the attempt to force this resolution through in the waning hours of the General Assembly's 68th session and mandating an accelerated timeframe for developing any convention or legal framework.

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4. Committee on Foreign Investment in the United States

As discussed in Digest 2013 at 340-54 In 2012, and *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. *Ralls Corp. v. Committee on Foreign Investment in the United States*, No. 12-1513 (D. D.C. 2013). Ralls appealed after the district court dismissed its claims. On July 15, 2014, the U.S. Court of Appeals for the District of Columbia reversed and remanded to the district court, directing that Ralls's due process claim under the U.S. Constitution could proceed. *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d. 298 (D.C. Cir. 2014). The Court of Appeals also held that Ralls' claims concerning actions by CFIUS determinations were not rendered moot by the President's determination. Excerpts follow from the opinion of the court of appeals.

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… Ralls's due process claim does *not* challenge (1) the President's determination that its acquisition of the Project Companies threatens the national security or (2) the President's prohibition of the transaction in order to mitigate the national security threat. …[R]eviewing *these* determinations would require us to exercise judgment in the realm of foreign policy and national security. But Ralls does not request that we exercise such judgment. Instead, Ralls asks us to decide whether the Due Process Clause entitles it to have notice of, and access to, the evidence on which the President relied and an opportunity to rebut that evidence before he reaches his non-justiciable (and statutorily unreviewable) determinations. .… We think it clear, then, that Ralls's due process claim does not encroach on the prerogative of the political branches, does not require the exercise of non-judicial discretion and is susceptible to judicially manageable standards. To the contrary, and as the Supreme Court recognized long ago, interpreting the provisions of the Constitution is the role the Framers entrusted to the judiciary.

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We conclude that the Presidential Order deprived Ralls of its constitutionally protected property interests without due process of law. As the preceding discussion makes plain, due process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence. *See, e.g.*, *McElroy*, 360 U.S. at 496, 79 S.Ct. 1400; *NCRI*, 251 F.3d at 208–09; *Schweiker*, 652 F.2d at 165. Although the Presidential Order deprived Ralls of significant property interests—interests, according to the district court record, valued at $6 million—Ralls was not given any of these procedural protections at any point. Under our FTO precedent, this lack of process constitutes a clear constitutional violation, notwithstanding the Appellees' substantial interest in national security and despite our uncertainty that more process would have led to a different presidential decision. *See, e.g.*, *PMOI II*, 613 F.3d at 228; *NCRI*, 251 F.3d at 208–09. As the FTO cases make plain, a substantial interest in national security supports withholding only the *classified* information but does not excuse the failure to provide notice of, and access to, the unclassified information used to prohibit the transaction. *See NCRI*, 251 F.3d at 208–09. That Ralls had the opportunity to present evidence to CFIUS and to interact with it, then, is plainly not enough to satisfy due process because Ralls never had the opportunity to tailor its submission to the Appellees' concerns or rebut the factual premises underlying the President's action. *See Greene*, 360 U.S. at 496, 79 S.Ct. 1400; *NCRI*, 251 F.3d at 205; *Schweiker*, 716 F.2d at 32.

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In sum, we conclude that the Presidential Order deprived Ralls of constitutionally protected property interests without due process of law. We remand to the district court with instructions that Ralls be provided the requisite process set forth herein, which should include access to the unclassified evidence on which the President relied and an opportunity to respond thereto. …. Should disputes arise on remand—such as an executive privilege claim—the district court is well-positioned to resolve them. Finally, because the CFIUS Order claims were dismissed on a jurisdictional ground, and given the scant merits briefing, we leave it to the district court to address the merits of Ralls's remaining claims in the first instance.

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5. Corporate Responsibility Regimes

a. Voluntary Principles on Security and Human Rights

On March 26 and 27, 2014, the United States again participated in the annual plenary meeting of the Voluntary Principles on Security and Human Rights Initiative, held this year in Montreux, Switzerland. For background on the Initiative, see *Digest 2013* at 354-55, *Digest 2012* at 409-10, *Digest 2000* at 364-68, and *www.voluntaryprinciples.org*. The initiative is a collaborative effort by governments, major multinational extractive companies, and NGOs to provide guidance to companies on tangible steps that they can take to minimize the risk of human rights abuses in communities located near extraction sites. The Department of State issued a media note summarizing the outcomes of the meeting, available at *www.state.gov/r/pa/prs/ps/2014/04/224380.htm*, which included the following:

> During the meeting, the government of Ghana announced that it would join the VPs Initiative, becoming the first African government participant. Government participation in the VPs Initiative signals an important commitment to human rights and to supporting a positive business environment for extractive companies. The VPs Initiative also welcomed companies Repsol, PanAust, IAMGold, and NGO LITE-Africa as new members, as well as the Institute for Human Rights and Business, as an observer. Several companies also discussed challenges and best practices related to implementation and verification of their performance under the VPs. These discussions helped to demonstrate how companies work to adhere to their commitments in some of the toughest places in the world, spurring discussion about how participants can work collaboratively to support these efforts.

The 2014 U.S. Annual Report for the VPs Initiative is available at *www.state.gov/j/drl/rls/vprpt/2014/239362.htm*. See also discussion in Chapter 6 regarding the complementary Guiding Principles on Business and Human Rights and the U.S. National Action Plan being developed to implement the Guiding Principles.

b. Extractive Industries Transparency Initiative ("EITI")

On March 19, 2014, the Extractive Industries Transparency Initiative ("EITI") Board accepted the United States as a candidate country. See *Digest 2013* at 357-58 regarding the U.S. application for candidacy and *Digest 2012* at 412 regarding previous U.S. commitment to the EITI. The letter from the EITI Board notifying U.S. Secretary of the Interior Sally Jewell of the designation of the United States as a candidate country is available at *www.doi.gov/eiti/upload/Letter-to-US-Candidature-March-2014.pdf*. As a candidate country, the United States has three years to fully implement the EITI transparency standard. The White House press release on acceptance of the United States as an EITI candidate country is available at *www.whitehouse.gov/the-press-office/2014/03/19/statement-nsc-spokesperson-caitlin-hayden-us-admittance-extractive-indus* and includes the following:

> Two years ago, at the launch of the Open Government Partnership, President Obama announced the U.S. commitment to implement EITI, an international standard aimed at increasing transparency and accountability in the payments that companies make and the revenues governments receive for their natural resources such as oil, gas, and mining.
>
> The United States is [the] first G-8 country to achieve candidate status and become an EITI implementing country, joining a group of 41 countries around the world that are working actively to improve the management of their oil, gas, and mining sectors.

As an EITI Candidate Country, the United States, through the Department of the Interior, will continue its work toward increasing revenue transparency and accountability in relevant industry sectors, ensuring that American taxpayers receive every dollar due for the extraction of the nation's natural resources, and making the U.S. government more open and more accountable to the American people.

c. Kimberley Process

In 2014, the United States continued its active participation in, and implementation of, the Kimberley Process Certification Scheme for the control of trade in conflict diamonds. For background and further information on the Kimberley Process, see the Bureau of Economic and Business Affairs webpage on the topic, *www.state.gov/e/eb/tfs/tfc/diamonds/index.htm* and *Digest 2002* at 728-29, *Digest 2003* at 704-09, *Digest 2004* at 653-54, and *Digest 2013* at 183. Significant developments in 2014 include the Administrative Decision on ensuring that diamonds from the Central African Republic are not introduced into the legitimate trade, available at *www.kimberleyprocess.com/en/2014-administrative-decision-car*, and the Administrative Decision on the participation of observers in the work of the Kimberley Process, available at *www.kimberleyprocess.com/en/administrative-decision-participation-observers-work-kp*. At the conclusion of the Twelfth Kimberley Process Plenary Meeting held in Guangzhou, China in November 2014, the Plenary issued a Communique summarizing the outcomes of the meeting, which is excerpted below and available at *www.kimberleyprocess.com/en/2014-final-plenary-comuniqu%C3%A9-guangzhou-eng*.

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34. The Plenary commended Côte d'Ivoire for its efforts to achieve KPCS implementation and congratulated the country on the lifting of the UN embargo on the export of rough diamonds by means of UN Security Council Resolution 2153 (2014). The Plenary took note of a presentation by Côte d'Ivoire on its implementation of the recommendations from the review mission report (30 September-4 October 2013) as well as its transition strategy and post-embargo Action Plan. The Plenary encouraged Côte d'Ivoire to further implement its Action Plan and accepted the country's invitation to host a review visit in early 2015, in line with the timing and obligations set out in UNSC Resolution 2153 (2014).

35. Furthermore, the Plenary took note of the diagnostic work undertaken by civil society in conjunction with the Government of Côte d'Ivoire to improve outcome in the artisanal mining sector in accordance with the Washington Declaration on integrating development of artisanal and small scale diamond mining with KP implementation.

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40. In light of the AD on the Central African Republic (CAR) [Temporary Suspension] as approved through written procedure on 23 May 2013 and the AD on ensuring that diamonds from CAR are not introduced into the legitimate trade as approved through written procedure on 11 July 2014, the Plenary took note of the progress made by CAR on implementation of its Work Plan and roadmap for addressing issues of non-compliance with KPCS minimum standards and strengthening the internal control system.

41. The Plenary encouraged CAR's KP authorities to continue implementing its Work Plan and share any relevant information and data directly with the appropriate KP working bodies. The Plenary also encouraged CAR to continue working closely together with the African Union (AU), relevant United Nations bodies—notably the Panel of Experts established pursuant to UNSC Resolution 2127 (2013), the international community and neighboring countries on KP compliance issues with a regional dimension. The Plenary invited the WGM to proceed with the planning of a Review Mission, in line with the AD on the Central African Republic (CAR) [Temporary Suspension] as approved through written procedure on 23 May 2013.

42. Furthermore, the Plenary invited the EU Joint Research Centre (JRC) and the US Geological Survey (USGS) to continue monitoring the situation in selected producing areas through analysis of satellite imagery.

43. The Plenary requested Participants to consider providing technical assistance to CAR and its neighboring countries, with a view to enhancing their capacity and strengthening their internal controls over diamond production and trade.

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45. The Plenary welcomed the suggestion made by KP working bodies to consider relevant recommendations from the Financial Action Task Force report related to risks associated with the supply chain of rough diamonds, but emphasized that the Kimberley Process already provides measures to mitigate against such "vulnerabilities" and risks. …

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6. 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 2014, the United States government continued to defend these rules in multiple legal challenges brought in U.S. courts.

As discussed in *Digest 2013* at 355-57, the United States filed its brief on appeal in a case challenging the SEC's rule implementing Section 1502 of Dodd-Frank under the Administrative Procedure Act ("APA"), the Exchange Act, and the First Amendment of the U.S. Constitution. The U.S. Court of Appeals for the D.C. Circuit decided the case on April 14, 2014. *National Association of Manufacturers et al v. SEC*, 748 F.3d 359 (D.C. Cir. 2014). The appeals court sustained the SEC's conflict minerals rule against challenges under the APA and the Exchange Act, but held that the requirement that some products be described as not "DRC conflict free" in reports filed with the SEC and posted on company websites violates the First Amendment.

The SEC issued an order on May 2, 2014 clarifying that companies are required to comply with most due diligence and reporting requirements related to conflict minerals from the DRC and adjacent countries under its rule implementing Section 1502. See May 26, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/05/226546.htm*. Excerpts follow from the May 26 State Department media note concerning the continued importance of due diligence for conflict minerals identified in Section 1502 of Dodd-Frank.

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The Department of State recognizes recent progress in the Democratic Republic of the Congo (DRC) and Republic of Rwanda towards developing legitimate supply chains for the conflict minerals (gold, tin, tungsten, and tantalum, and their ores) identified in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). However, exploitation of these minerals by armed groups continues to fuel conflict, pose a threat to peace and stability, and undermine efforts by the DRC authorities, the United States, and other international partners to end decades of strife in the African Great Lakes region.

On Friday, May 2, 2014 the Securities and Exchange Commission (SEC) issued an order clarifying that companies are required to comply with most due diligence and reporting requirements related to conflict minerals from the DRC and adjacent countries under its rule implementing Section 1502. The Department welcomes the SEC action as a key step towards ending the illicit exploitation of the DRC's minerals and establishing transparent, conflict-free production, processing, and export of these resources. The Department strongly encourages companies to continue conducting due diligence on their supply chains for these four minerals as required by law and the SEC guidance. Disclosure reports, pursuant to the SEC's April 29, 2014 guidance, generate increased public confidence in companies' due diligence efforts and significantly contribute to these important objectives.

Developing a legitimate mining industry is critical to building an economic foundation for a sustainable peace in the eastern DRC and the African Great Lakes region, which is an essential component of U.S. policy in the region. The importance of this goal within the region itself is reflected in the Peace, Security and Cooperation Framework Agreement for the DRC signed by regional governments. It is also reflected in the call by the member states of the International Conference of the Great Lakes Region (ICGLR) to combat the illegal exploitation of minerals and their use to undermine peace and security.

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The decision of the en banc Court of Appeals for the D.C. Circuit in *American Meat Institute*, discussed in section D.3.b., *supra*, led the D.C. Circuit to order en banc review of the First Amendment analysis in *National Association of Manufacturers*. The United States filed its supplemental brief on December 18, 2014 arguing that the conflict minerals disclosure requirement should be upheld in light of the D.C. Circuit's reasoning in *American Meat Institute*. Excerpts follow (with footnotes omitted) from the U.S. brief, which is available in full at www.state.gov/s/l/c8183.htm.

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II. In light of the en banc Court's decision in AMI, the conflict minerals disclosure should be upheld.

A. The disclosure should be upheld under *Zauderer*.

There is no dispute that the disclosure in this case relates to issuers' products. And although the panel suggested that the conflict minerals disclosure was not "factual and uncontroversial," it did not so hold. *Nat'l Ass'n of Mfrs*., 748 F.3d at 27. Thus, after *AMI*, whether *Zauderer* applies in this case is an open question. And, because the disclosure is "purely factual and uncontroversial" as discussed above, application of *Zauderer* is appropriate.

A conflict minerals report, if required, discloses the steps an issuer has taken to exercise due diligence on the source and chain of custody of minerals used in its products, as well as the results of that due diligence. The required description of products that "have not been found to be 'DRC conflict free'" is made in the context of those disclosures and merely measures the results of that due diligence against an objectively defined standard. It is therefore "factual and uncontroversial." And the disclosure otherwise survives *Zauderer* review.

1. The disclosure is factual.

The Conflict Minerals rule requires issuers to describe products that have not been found to be "DRC conflict free" as that term is defined in the rule and statute. Thus, contrary to appellants' argument (Response at 9), the disclosure is one of "literal fact" about whether an issuer has found its products to meet a defined standard. Appellants nonetheless argue that this case differs from AMI, in which the factual nature of the country-of-origin labelling at issue was undisputed, because the description required here "reflects a government viewpoint that the mineral trade bears responsibility for causing the DRC conflict." Response at 10.

But the factual information actually provided says nothing about the "cause" of the conflict in the DRC. Rather, it merely states whether a particular issuer's products have been found to meet the statutory standard. Moreover, appellants have never contested that trade in these minerals finances armed groups perpetrating violence in the DRC in some instances. Opening Br. at 1. Nor could they, as that connection is supported by longstanding international consensus. See, *e.g.*, U.S. Department of State, 2011 Human Rights Report for the DRC 15.

Appellants also argue (Response at 13-14) that the factual nature of the disclosure is undercut because the definition of "DRC conflict free" is "pregnant with political and ideological conclusions and connotations," such as "what it means to 'indirectly finance or benefit' a group" or which groups fall within the definition of "armed group." But it is issuers—not the government—that apply the statutory standard to determine whether their necessary minerals "finance or benefit" armed groups. Thus, the requirement does not compel issuers to disseminate a governmental determination on this point with which they disagree.

And while appellants argue that the statutory definition of an "armed group" is subjective, it is not. An "armed group" is a group that is specifically identified in an annual State Department report. Section 1502(e)(3). The disclosure is therefore similar to many other regulatory programs that require disclosure about products meeting governmentally determined standards. For example, a federal statute requires disclosure of the manufacture, processing, or use of products that have been found to be "toxic" as identified in a specific Senate Committee report. 42 U.S.C. 11023. And the Second Circuit has pointed to this requirement as an example of the "innumerable federal and state regulatory programs [that] require the disclosure of product and other commercial information" that should be reviewed under *Zauderer*. *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 116.

2. The disclosure is "uncontroversial."

There can be no real debate about the accuracy or veracity of the disclosure that certain products "have not been found to be 'DRC conflict free.'" The statutory definition of "DRC conflict free" encompasses products that "do not contain minerals that directly or indirectly finance or benefit armed groups" in the DRC or an adjoining country. 15 U.S.C. 78m(p)(1)(A)(ii) (emphasis added). Depending on the results of its due diligence, an issuer has either "found" that its products "do not contain" such minerals or it has not.

Appellants nonetheless assert that the disclosure is "highly misleading" because it "obscures" uncertainties about the origin of minerals. Response at 11. But this improperly divorces the disclosure from its context. See *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014) (citing *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988)). A required description of due diligence precedes any description of products. Thus, to the extent there are any "fundamental uncertainties" or "remote possibilities" involved (Response at 12), they are made clear in the disclosure itself. And the rule allows issuers to include any additional information they wish to provide to further clarify the level of certainty as to the origin of their minerals. JA767.

Nor is the disclosure tantamount to a statement of opinion in some other way. Unlike in *R.J. Reynolds*, the disclosure here does not seek to evoke an emotional response. 696 F.3d at 1216. And it does not convey a government message as to what consumers or investors should do with the information provided. *Id*. at 1216-17. Rather, just as the disclosures in *Nat'l Elec. Mfrs. Ass'n* (272 F.3d at 115) and *New York State Rest. Ass'n* (556 F.3d at 133) were designed to reduce mercury levels and obesity, respectively, by providing information in hopes that consumers would act on it, the disclosure here is designed to reduce funding to armed groups in the DRC by providing consumers and investors factual information with which to make their own decisions.

In appellants' view, the required statement "conveys moral responsibility for the Congo war" (Response at 9) because it "leaves consumers with the misleading impression that there is likely to be some substantial connection between the product and the DRC conflict" (Response at 12-13). But appellants fail to explain why this is the case, especially when the description is viewed in the context of the entire disclosure. Again, the precise nature of an issuer's known connection to the conflict is apparent from the entirety of the report. And a statement that, despite due diligence, an issuer has not been able to find that certain products meet the statutory definition of "DRC conflict free" does not inherently convey that those products are "ethically tainted" (Response at 9, 14). …

* * * *

… And Rule 13p-1 permits the disclosure of any additional information the issuer wishes to provide to dispel any perceived confusion about its connection to the conflict.

3. The disclosure survives Zauderer *review.*

The first step in applying *Zauderer* is to "assess the adequacy of the interest motivating the [statutory] scheme." *AMI*, 760 F.3d at 23. Because the governmental interest asserted in *AMI* was "substantial," the Court did not decide whether a lesser interest would suffice. So too here: appellants "do not contest that the government's interest in promoting peace and security in the DRC is substantial, even compelling." Opening Br. at 54.

"[W]hat remains," then, "is to assess the relationship between the government's identified means and its chosen ends." *AMI*, 760 F.3d at 25. And, by using a disclosure mandate to achieve the goal of informing consumers about a product, the government "will almost always demonstrate a reasonable means-ends relationship, absent a showing that the disclosure is 'unduly burdensome' in a way that 'chill[s] protected commercial speech." *Id*. (quoting *Zauderer*, 471 U.S. at 651).

Here, the conflict minerals disclosure is "reasonably crafted" (*id*. at 26) to provide information about an issuer's products without chilling protected speech. The rule is not a labelling requirement. Nor does it require that the challenged statement be made in the context of an issuer's advertising. And issuers are not, as the district court noted (JA916-17), ever required to separately or conspicuously publish a list of products that have not been found to be "DRC conflict free."

Rather, the challenged statement is required once a year in the body of a conflict minerals report filed with the Commission and posted on an issuer's website, at a location of its choosing. The disclosure is thus not "temporally, tangibly, or otherwise linked to other fully protected speech." *Beeman*, 315 P.3d at 86; *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989). Nor is there any risk that issuers' own message will be overwhelmed (Amicus Br. at 10; *AMI*, 760 F.3d at 27) because of limited time or space in advertising or on labels. Moreover, Rule 13p-1 allows issuers to include additional statements and does not in any way restrict their ability to engage in speech either contemporaneously with the disclosure or elsewhere. This fully satisfies the "fit" requirement (see *AMI*, 760 F.3d at 27; *Envtl. Def. Ctr.*, 344 F.3d at 850), and the disclosure therefore survives *Zauderer* review.

B. Even if *Zauderer* did not apply, *AMI* makes clear that the disclosure survives *Central Hudson* scrutiny.

The Court's decision in *AMI* also makes clear that the conflict minerals disclosure meets the higher *Central Hudson* standard requiring that the disclosure be "narrowly tailored." 760 F.3d at 25. The panel stated that the Commission did not present sufficient evidence that a "less restrictive measure would fail." *Nat'l Ass'n of Mfrs*., 748 F.3d at 372-73 (quoting *Central Hudson*). But *AMI* reiterated that under *Central Hudson* the government is not required to show that its regulation is the least restrictive means to accomplish its purpose. Rather, all that must be shown is "a 'reasonable fit' or a 'reasonable proportion' between means and ends." *AMI*, 760 F.3d at 26 (internal citations omitted). Indeed, in *Fox*, the Supreme Court specifically disavowed any requirement for the government to show that a less restrictive measure would be less effective. 492 U.S. at 477-81.

Moreover, while the panel expressed concern that there was a lack of evidence that a government-compiled list of products that fail to meet the definition of DRC conflict free placed on the Commission's website would be less effective, the record supports the proposition that posting the disclosure on issuers' websites is more effective. JA 617-18. Indeed, one of the appellants requested that the disclosures be made "exclusively" on issuers' websites because that would be "the most appropriate location for conflict minerals disclosure." JA 275-76. Thus, the disclosure meets this requirement of *Central Hudson* review, as well as the others. See Br. 61-66.

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Cross References

Responsible business conduct, **Chapter 6.F.**
Internet freedom, **Chapter 6.K.2.**
ILC's work on topic of most-favored-nation clauses, **Chapter 7.D.3.**
Free trade in the EU, **Chapter 9.B.3.b.**
South China Sea and East China Sea, **Chapter 12.A.3.**
Freedom of navigation and overflight, **Chapter 12.A.6.**
Treaty on Transparency in Investor-State Arbitrations, **Chapter 15.A.2.**
BG Group PLC v. Argentina *(challenge to award in BIT arbitration)*, **Chapter 15.C.1.a.**
Jurisdiction over foreign entities in U.S. courts, **Chapter 15.C.2.**
International comity, **Chapter 15.C.3.**
Sanctions, **Chapter 16.A.**
Applicability of international law in cyberspace, **Chapter 18.A.3.b.**