DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW

2014

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Introduction

I am delighted to introduce the annual edition of the *Digest of United States Practice in International Law* for 2014. This volume provides a historical record of developments during calendar year 2014. The State Department publishes the official version of the *Digest* exclusively on-line to make U.S. views on international law more quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

The United States made presentations before three UN human rights-based committees in Geneva in 2014 regarding its human rights record. In March, the United States presented its periodic report concerning the International Covenant on Civil and Political Rights ("ICCPR"). In August, the United States made its presentation to the Committee on the Elimination of Racial Discrimination ("CERD"). And the presentation to the UN Committee Against Torture ("CAT") took place in November. These presentations provided an opportunity for the United States to review and reflect on our record and demonstrate our commitment to protecting human rights.

The United States negotiated and concluded several significant treaties, other international agreements, and arrangements in 2014. For example, negotiations with France resulted in an agreement regarding compensation for victims who were deported by rail from France to Nazi labor and death camps during the Holocaust. The Governments of Afghanistan and the United States signed the Security and Defense Cooperation Agreement. In the realm of trade and investment, the United States continued to pursue the Trans-Pacific Partnership ("TPP") and Transatlantic Trade and Investment Partnership ("TTIP") agreements, while participating in negotiations of an Environmental Goods Agreement and a new Trade in Services Agreement. The permanent five members of the UN Security Council and Germany, coordinated by the European Union, extended negotiations with Iran under the Joint Plan of Action ("JPOA") toward a final deal constraining Iran's nuclear program. A Protocol to the Treaty on a Nuclear-Weapon-Free Zone In Central Asia was signed, the agreement for peaceful nuclear cooperation with the Republic of Korea was extended, and two agreements for peaceful nuclear cooperation entered into force, including the agreement between the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") and the agreement between the United States and Vietnam. Also in 2014, the United States signed a maritime boundary treaty with Micronesia and several bilateral maritime law enforcement agreements. And the U.S. Senate gave its advice and consent to ratification of four fisheries conventions and agreements in 2014.

The U.S. government also participated in litigation and arbitration involving issues related to foreign policy and international law in 2014. The United States government filed briefs in several cases before the U.S. Supreme Court, including: *Zivotofsky v. Kerry*, regarding a law directing the Executive Branch to list "Israel" as the place of birth in passports and other official documents for certain individuals born in Jerusalem, contrary to U.S. foreign policy relating to the status of Jerusalem; *OBB v. Sachs*, involving claims against Austria's state-owned railway and the interpretation of the Foreign Sovereign Immunity Act's commercial activity exception; *NML v. Argentina* regarding the scope of discovery into foreign sovereign assets; *Kerry v. Din*, involving the denial of a visa to the spouse of a U.S. citizen on terrorism related grounds; and

two cases involving claims against military contractors, *Kellogg Brown & Root Servs., Inc., ("KBR") v. Harris* and *KBR v. Metzgar*. The United States also participated in a wide range of litigation matters at other levels, including cases challenging U.S. policy and practice regarding passports, citizenship, and visas; cases brought by law of war detainees and former detainees; and cases concerning foreign sovereign and official immunity. The U.S. Supreme Court also issued a number of important decisions relating to international law or foreign policy, including: *Bond v. United States*, relating to implementation of the Chemical Weapons Convention; *Lozano v. Alvarez*, regarding interpretation of the Hague Abduction Convention; *BG Group v. Argentina*, relating to jurisdictional prerequisites for arbitration pursuant to an investment treaty; and *Daimler v. Bauman*, regarding jurisdiction over foreign entities in U.S. courts. In arbitral proceedings, the Iran U.S. Claims Tribunal issued its final award in Case A/15(IV), and a NAFTA arbitral tribunal, constituted to consider claims brought against the United States by Canadian pharmaceutical firms, Apotex Holdings Inc. and Apotex Inc., issued its award, rejecting all claims.

This year's *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives. The United States provided the impetus for and strongly supported several notable resolutions adopted by the UN Security Council in 2014, including: resolution 2178 on foreign terrorist fighters ("FTFs"); resolution 2166, demanding that armed groups in Ukraine allow international investigation of the downing of Malaysia Air flight MH17; and resolutions 2139, 2165, and 2191 on access for humanitarian assistance to Syria. The United States provided comments and information to the International Law Commission ("ILC") on several topics, including expulsion of aliens, identification of customary international law, the effects of armed conflict on treaties, and U.S. practice relating to the provisional application of treaties. The United States responded to the High Commissioner for Human Rights on the right to privacy and other human rights in the digital age. The United States informed the UN Security Council of an operation to capture Abu Khatallah in Libya, as well as its operations against ISIL in Iraq and Syria and against the Khorasan Group in Syria. The United States filed formal objections with the UN Secretariat to the Palestinians' efforts to accede to certain treaties. And the United States welcomed the re-election of Judge Donoghue to the International Court of Justice.

The Executive Branch issued policies, programs, orders, and studies with international legal implications in 2014. For example, the Department of State issued new policy guidance regarding citizenship of children born abroad through the use of assisted reproductive technology ("ART") and established an in-country refugee/parole program in El Salvador, Guatemala, and Honduras to provide an alternative to unaccompanied children migrating to the United States unlawfully. The United States announced a new policy on anti-personnel landmines, committing not to produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention. The President issued new executive orders authorizing sanctions in response to Russia's intervention in Ukraine. And the United States resumed operations of its embassy in the Central African Republic and announced the beginning of the process of re-establishing diplomatic relations with Cuba. The United States also issued sixteen detailed studies of countries' maritime claims and maritime boundaries in its *Limits in the Seas* series, covering archipelagic claims around the world as well as China's claims in the South China Sea.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2014 volume, attorneys whose voluntary contributions to the *Digest* were particularly significant include Henry Azar, Kevin Baumert, David Bigge, Jay Bischoff,

Jamie Briggs, David Buchholz, Michael Coffee, Laura Conn, David DeBartolo, Peter Gutherie, Tom Heinemann, Julie Herr, David Huitema, Kimberly Jackson, Joseph Khawam, Theodore Kill, Emily Kimball, Jeffrey Kovar, Mike Mattler, Michael Meier, Holly Moore, Beth O'Connor, Judy Osborn, Sabeena Rajpal, David Salie, Tim Schnabel, Neha Sheth, Gabriel Swiney, Jesse Tampio, Wynne Teel, Alec Ugol, Amanda Wall, and Jeremy Weinberg. Sean Elliott at the Foreign Claims Settlement Commission also provided valuable input. I express very special thanks to Joan Sherer, the Department's Senior Law Librarian, and to Jerry Drake, our bureau's records manager, assisted by Anthony Stampone, for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

Mary E. McLeod
Acting Legal Adviser
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Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2014 is published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the timely release of this year's *Digest*.

The 2014 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through May 2015) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2015 where they relate to the discussion of developments in 2014.

Updates on most other 2014 developments, such as the release of annual reports and sanctions-related designations of individuals or entities under U.S. executive orders are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

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

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

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential

Documents. The Federal Digital System, available at *www.gpo.gov/fdsys*, is GPO's online site for U.S. government materials.

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

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

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

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

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

U.S. Court of Appeals for the Second Circuit:
http://www.ca2.uscourts.gov/decisions.html;

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

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

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

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

U.S. Court of Appeals for the Seventh Circuit:
http://media.ca7.uscourts.gov/opinion.html;

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

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

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

U.S. Court of Appeals for the Eleventh Circuit:
http://www.ca11.uscourts.gov/published-opinions;

U.S. Court of Appeals for the Federal Circuit:
http://www.cafc.uscourts.gov/opinions-orders/0/all.

The official U.S. Supreme Court website is maintained at *www.supremecourtus.gov* . The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at *www.justice.gov/osg*.
Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records ("PACER") service.

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

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

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

CarrieLyn D. Guymon

CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. *Hizam*: Proof of Citizenship Issued Erroneously

As discussed in *Digest 2013* at 6-14, the United States appealed a district court judgment ordering the State Department to reissue a Consular Report of Birth Abroad ("CRBA") that was issued in error. *Hizam v. Clinton*, No. 12-3810 (2d. Cir.). On March 12, 2014, the U.S. Court of Appeals for the Second Circuit issued its decision on appeal, reversing the district court.[*] *Hizam v. Kerry*, 747 F.3d 102 (2d Cir. 2014). Excerpts follow (with footnotes omitted) from the opinion of the Court of Appeals for the Second Circuit.

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* * * *

There is no dispute that the consular officer issued the CRBA and passport to Hizam in error. Citizenship of a person born abroad is determined by law in effect at the time of birth. *Drozd v. Immigration and Naturalization Serv.*, 155 F.3d 81, 86 (2d Cir.1998). At the time of Hizam's birth, the child of a United States citizen born outside of the United States was eligible for citizenship if the parent was present in the United States for at least 10 years at the time of the child's birth. 8 U.S.C. § 1401(g) (Supp. III 1980). However, the law had changed by the time Hizam's father sought a CRBA on Hizam's behalf. The amended law required the parent to be present in the United States for just five years. 8 U.S.C. § 1401(g). It appears that the consular officer erroneously applied the five-year rule in granting Hizam a CRBA.

[*] Editor's note: On December 5, 2014, the Court of Appeals issued an order granting the parties' joint motion seeking remand of this matter to the district court for presentation and entry of a stipulation and order of settlement and dismissal.

* * * *

There are "two sources of citizenship, and two only—birth and naturalization." *United States v. Wong Kim Ark,* 169 U.S. 649, 702, 18 S.Ct. 456, 42 L.Ed. 890 (1898). A person born outside of the United States becomes a citizen at birth only if the circumstances of birth satisfy the statutory requirements in effect at the time of application. *See Rogers v. Bellei,* 401 U.S. 815, 830, 91 S.Ct. 1060, 28 L.Ed.2d 499 (1971); *Drozd v. INS,* 155 F.3d 81, 86 (2d Cir.1998). At the time of Hizam's application, persons born outside of the United States to a citizen parent and a non-citizen parent acquired United States citizenship at birth only if, at that time, the citizen parent had been physically present in the United States or its outlying possessions for at least ten years. 8 U.S.C. § 1401(g) (1982), *amended by* Pub L. 99–653 (1986). At the time of Hizam's birth, his father had only been present in the United States for seven years. The parties agree Hizam did not meet the statutory requirements for citizenship at the time of his birth.

When the State Department issues a CRBA it does not grant citizenship—it simply certifies that a person was a citizen at birth. Issuing or revoking a CRBA does not change the underlying circumstances of an individual's birth and does not affect an individual's citizenship status. *See* 8 U.S.C. § 1504(a) (Cancellation of a CRBA "shall affect only the document and not the citizenship status of the person in whose name the document was issued."). Revoking Hizam's CRBA did not change his citizenship status. Instead, it withdrew the proof of a status which he did not possess. *See United States v. Ginsberg,* 243 U.S. 472, 474–75, 37 S.Ct. 422, 61 L.Ed. 853 (1917) ("[E]very certificate of citizenship must be treated as granted upon condition that the government may challenge it ... and demand its cancelation unless issued in accordance with [statutory] requirements.").

I. *Section 1503(a).*

Hizam sought relief pursuant to 8 U.S.C. § 1503(a), which provides, in relevant part, as follows:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States.

8 U.S.C. § 1503(a). While Hizam's complaint sought "a declaration of U.S. nationality ... to remedy a denial of rights and privileges by the Department of State," the district court ultimately determined Hizam was seeking a "declaratory judgment finding that the State Department exceeded its authority when it cancelled his CRBA and an order compelling its return." *Hizam,* 2012 WL 3116026 at *5.

We hold that the district court exceeded the scope of authority granted to it pursuant to Section 1503(a) by ordering the State Department to return Hizam's CRBA. "A suit under section 1503(a) is not one for judicial review of the agency's action." *Richards v. Sec'y of State,* 752 F.2d 1413, 1417 (9th Cir.1985). "Rather, section 1503(a) authorizes a de novo judicial determination of the status of the plaintiff as a United States national." *Id.* The plain language of

Section 1503(a) authorizes a court only to issue a judgment declaring a person to be a national of the United States. Hizam, by his own admission, cannot satisfy the statutory requirements necessary to have acquired citizenship at birth, and thus cannot be declared a citizen or national of the United States. Once the district court concluded it could not declare Hizam a U.S. national, its inquiry should have ended.

Instead, the district court attempted to distinguish between declaring Hizam a citizen and returning his citizenship documents. In the district court's view, its order served as "an order that the State Department comply with Section 2705, which barred the agency from re-opening its prior adjudication of Mr. Hizam's status or revoking his citizenship documents based on second thoughts." *Hizam*, 2012 WL 3116026, at *8. But nothing in the language of Section 1503(a) allows the district court to provide a plaintiff with such a remedy. And at bottom, the record evidence did not allow the district court to provide Hizam with the only remedy referenced in Section 1503(a): a declaration that Hizam is a U.S. national.

* * * *

2. *Gonzalez*: Lack of Derivative Citizenship for Child Without Legal Status

On July 18, 2014, the United States submitted its brief in the U.S. Court of Appeals for the Fifth Circuit in *Gonzalez v. Holder*, an appeal from the Board of Immigration Appeals' affirmance of an immigration judge's order deporting Mr. Gonzalez, denying his claim to U.S. citizenship derived from his father's naturalization. Mr. Gonzalez was fourteen and was living with his father in the United States when his father naturalized. However he had entered the United States at age seven and remained without lawful immigration status. The United States brief argues that the immigration judge and Board properly construed former section 321(a) of the INA to deny Mr. Gonzalez's claim to citizenship based on the fact that Mr. Gonzalez did not "begin[] to reside permanently in the United States while under the age of eighteen years" because he did not enter the United States as a lawful permanent resident ("LPR"). Excerpts follow (with footnotes and citations to the record omitted) from the U.S. brief, which is available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

A nationality claim is a purely legal question that this Court reviews *de novo*. *Alwan v. Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004). Citizenship statutes should be narrowly construed, as it is a petitioner's burden to establish that he meets all of the statutory requirements for citizenship. *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 394-95 (5th Cir. 2006).

II. The Board Properly Determined That Mr. Gonzalez Did Not Derive Citizenship Under Former INA § 321(a) Based on His Father's Naturalization Because he Did Not Acquire Lawful Permanent Resident Status While Under Eighteen Years of Age.

A. The Board's Construction of Former INA § 321(a), as Examined in *Matter of Nwozuzu*, is Correct.

Former Section 321(a) provides, in relevant part, that, in order to derive United States citizenship from the naturalization of an alien parent, a foreign-born child must, among other things:

> resid[e] in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized . . . or *thereafter begin[] to reside permanently* in the United States while under the age of eighteen years.

8 U.S.C. § 1432(a)(5) (repealed) (emphasis added). In *Matter of Nwozuzu*, the Board concluded that the phrase "begins to reside permanently in the United States while under the age of eighteen years" meant that the alien must have acquired [Legal Permanent Resident] LPR status while under the age of eighteen. 24 I&N Dec. at 612-16. In support of this interpretation, the Board referred to the definitions for "permanent" and "residence" in the INA, and determined that the concept of "residing permanently" included the implied requirement that the residence be lawful, as an alien could not reside in the United States permanently if such residence was not lawful. *Id*. at 612-13. In addition, the Board noted that this interpretation was bolstered by the similarity between the phrase "begins to reside permanently" in former INA § 321(a), 8 U.S.C. § 1432(a), and the definition of "lawfully admitted for permanent residence" in INA § 101(a)(20), 8 U.S.C. § 1101(a)(20). *Id*. at 613-14. Finally, the Board explained that the second clause of the provision was not surplusage, because the phrase "clarifie[d] that an alien [did] not have to be a lawful permanent resident at the time his or her parent naturalize[d] to qualify for derivative citizenship . . . ." *Id*. at 614. Rather, "as long as the alien [was] admitted as a lawful permanent resident before he or she turn[ed] eighteen, citizenship may be derived from a naturalized parent," even if the parent naturalized while the alien child was outside the United States. *Id*. Therefore, the Board concluded that the second clause was "not surplusage [because it] is necessary to explain the time by which the lawful permanent residence requirement of section 321(a)(5) must be satisfied." *Id*. In the present case, the Board properly applied the reasoning of *Matter of Nwozuzu* and concluded that, because Mr. Gonzalez did not acquire LPR status while he was under the age of eighteen years, he could not qualify for derivative citizenship under former INA § 321(a)(5), 8 U.S.C. § 1432(a)(5).

Notably, the Ninth and Eleventh Circuit Courts of Appeals have also interpreted the phrase "begins to reside permanently in the United States while under the age of eighteen years" to require an alien to have acquired LPR status in order to derive citizenship from a naturalized parent. See *United States v. Forey-Quintero*, 626 F.3d 1323, 1326-27 (11th Cir. 2010); *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, l062-63 (9th Cir. 2008). In reaching its decision, the Ninth Circuit held that, "in order to obtain the benefits of derivative citizenship, a petitioner must not only establish permanent residence, but also demonstrate that he was residing in some lawful status." *Romero-Ruiz*, 538 F.3d at 1062. The court explained that:

> A plain reading of the statute evidences the requirement that the child be residing pursuant to lawful admission either at the time of the parent's naturalization or at some subsequent time [after the naturalization] while under the age of [eighteen]. The phrase

> "or thereafter begins to reside permanently" alters only the timing of the residence requirement, not the requirement of legal residence.

Id. The court rejected the petitioner's assertion that an individual could meet the statute's requirements merely by residing in the United States (with or without legal status) at the time of the naturalization, noting that this interpretation "would render the first clause—requiring legal permanent residence—superfluous." *Id*. Because the petitioner already was residing in the United States at the time of his mother's naturalization but had not been lawfully admitted as a permanent resident, the Ninth Circuit agreed with the Board that the petitioner could not qualify for derivative citizenship under former INA § 321(a), 8 U.S.C. § 1432(a). *Id*. at 1063.

In *Forey-Quintero*, the Eleventh Circuit noted that it would defer to the Board's "three-member decision" in *Nwozuzu* if the Court were reviewing that decision directly. *Forey-Quintero*, 626 F.3d at 1326 n.3. The Court nevertheless agreed that the phrase "'reside permanently'" meant that "a dwelling place [could not] be 'permanent' under the immigration laws if it [was] unauthorized,'" and that "requiring anything less than the status of lawful permanent resident would essentially render the first clause of subsection [five] 'mere surplusage.'" *Id*. at 1327 (quoting *Matter of Nwozuzu*, 24 I&N Dec. at 613) (alterations added).

In Mr. Gonzalez's case, there is no dispute that he did not have any lawful immigration status prior to turning eighteen, and that he entered the United States without inspection. Interpreting the statutory subsection as he suggests would have the perverse effect of essentially "negat[ing] the lawful permanent resident requirement of the first clause," *Matter of Nwozuzu*, 24 I&N Dec. at 614, because any alien who is not a lawful permanent resident at the time of the qualifying parent's naturalization would only need to demonstrate "some lesser form of residence [whether lawful or not] . . . before the alien reached the age of [eighteen]," *id*., combined with some evidence of an intent (whether subjective or objective under Mr. Gonzalez's interpretation) to reside here permanently, in order to automatically derive United States citizenship. As the Board properly found, this could not have been Congress's intent. *Id*.; see also *Forey-Quintero*, 626 F.3d at 1327; *Romero-Ruiz*, 538 F.3d at 1062-63. Therefore, the Court should not disturb the agency's proper determination that Mr. Gonzalez failed to qualify for derivative citizenship under former INA § 321(a), 8 U.S.C. § 1432(a).

B. The Court Should Decline to Follow the Second Circuit's Decision in *Nwozuzu v. Holder*, as the Court's Reasoning Misconstrues Legislative History, Obviates Statutory Language, and Ignores Supreme Court Precedent Requiring Strict Interpretations of Citizenship Statutes.

In support of his assertion that he was not required to obtain LPR status before turning eighteen in order to derive citizenship through his father under prior INA § 321(a)(5), 8 U.S.C. § 1432(a)(5), Mr. Gonzalez relies on the decision of the U.S. Court of Appeals for the Second Circuit in *Nwozuzu v. Holder*, *supra*, which overruled the Board's precedent decision in *Matter of Nwozuzu*, insofar as Second Circuit law is concerned. Respondent submits that the Second Circuit's analysis is not persuasive authority for several reasons. First, in concluding that it was unnecessary for the petitioner to obtain lawful permanent residence in order to "begin[] residing permanently in the United States," the Second Circuit relied primarily on Congress's express inclusion of such a requirement in the first clause of former INA § 321(a)(5), 8 U.S.C. § 1432(a)(5), and the omission of a similar requirement in the second. See *Nwozuzu*, 726 F.3d at 327-28. The court's conclusion, however, failed to take into account the entire history of the statute. The court recounted how the provision originated from a 1790 statute, noting that, prior to 1907, the law was unclear as to when a child living abroad at the time of his parent's

naturalization would derive citizenship and be deemed a citizen. See *id*. at 329-30. The court further noted that the law enacted in 1907 created the language at issue in this case, declaring that citizenship "'shall begin at the time such minor child begins to reside permanently in the United States.'" *Id*. (quoting the Citizenship Act of 1907, Ch. 2534, § 5, 34 Stat. 1228, 1229). As the court observed, Congress "did not . . . significantly alter" this language when enacting former INA § 321(a)(5), 8 U.S.C. § 1432(a)(5), in 1952, see *Nwozuzu*, 726 F.3d at 331, even while it added the express lawful permanent residency requirement for children who were present in the United States at the time of the parents' naturalizations. The second clause of INA § 321(a)(5), 8 U.S.C. § 1432(a)(5), thus originated amid concerns about children who began to permanently reside in the United States after their parents naturalized, not individuals like Mr. Gonzalez, who entered the United States without inspection prior to his father's naturalization.

Contrary to the conclusions drawn by the Second Circuit, as well as the interpretation urged by Mr. Gonzalez, the statute's history underscores the need for an individual's residence in the United States to be lawful under the second clause of former Section 321(a)(5) in order to derive citizenship. In its analysis of the direct predecessor of the current statute, the United States Supreme Court—using the very language of former section 321(a)(5)—declared that an individual denied lawful admission "never ha[d] begun to reside permanently in the United States. . . ." *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). Congress's continued use of this phrase shows that it agreed with the existing judicial interpretation of the phrase. See *Bowen v. Massachusetts*, 487 U.S. 879, 892, 896, 900-01 (1988) (noting "the well-settled presumption that Congress understands the state of existing law when it legislates"). Indeed, the Senate Report on the enactment of the Immigration and Nationality Act in 1952 explicitly noted that "[l]awful permanent residence has always been a prerequisite to derivative citizenship." S. Rep. No. 81-1515, at 707 (1950), available at *http://www.ilw.com/immigrationdaily/news/2008,0701-senatereport81-1515part4of5.pdf*; see also *Matter of M-*, 3 I&N Dec. 815, 816 (BIA 1949) (noting that a "lawful admission for permanent residence [was] required in order for [a minor alien] to establish that she derived citizenship" from her parent under the immigration laws in existence in 1936). Furthermore, in the successor version of the statute, Congress has reiterated the requirement of lawful permanent residence. See INA § 320(a)(3), 8 U.S.C. § 1431(a)(3) (maintaining a "lawfully admitted for permanent residence" criterion for all foreign-born children to derive citizenship based on their parents' naturalizations). All of this supports the Board's conclusion, contrary to the Second Circuit's, that Congress's use of different terminology in the two clauses of former 8 U.S.C. § 1432(a)(5) was a direct result of the terminology used in the predecessor statutes, which consistently reflected a requirement of lawful permanent residence for all minors whose parents had naturalized in order to derive citizenship. See *Matter of Nwozuzu*, 24 I&N Dec. at 614-15 (noting cases that reviewed the predecessor provisions to the former 8 U.S.C. § 1432(a)(5) that required, "at the very least, an alien . . . to be lawfully admitted to this country before he or she could be considered to be dwelling or residing here permanently"); *Matter of C-*, 8 I&N Dec. 421, 422 (BIA 1959) ("Until one is admitted in conformity with the immigration laws, no rights of citizenship can be acquired."); see also *id*. ("Lawful permanent residence has always been a prerequisite to derivative citizenship.") (citing S. Rep. No. 81-1515, at 707 (1950)).

Second, the court's and Mr. Gonzalez's construction of the second clause of the provision undermines and renders superfluous the express lawful permanent residence requirement set forth in the provision's first clause. See *Matter of Nwozuzu*, 24 I&N Dec. at 614; cf. *Romero-Ruiz*, 538 F.3d at 1062 (recognizing the problem of rendering the first clause superfluous);

Forey-Quintero, 626 F.3d at 1327 (same). As noted previously, Mr. Gonzalez entered the United States without inspection and was unlawfully present in the United States before his father's naturalization. By allowing individuals in Mr. Gonzalez's situation to derive citizenship merely by creating (under his construction) any intent to permanently reside in the United States, or (under the Second Circuit's construction) an "official objective manifestation" of an intent to permanently reside after the qualifying parent naturalizes, and without having to legalize their unlawful presence, Mr. Gonzalez's and the Second Circuit's interpretation obviates the first clause of former INA § 321(a). *Nwozuzu*, 726 F.3d at 328-29 (quoting *Ashton v. Gonzales*, 431 F.3d 95, 99 (2d Cir. 2005)).

Finally, in reaching its decision, the Second Circuit disregarded Supreme Court decisions requiring strict interpretation of citizenship statutes. The court properly stated that "doubts should be resolved in favor of the United States and against the claimant," *Nwozuzu*, 726 F.3d at 332 (internal quotations and citations omitted), but failed to consider the important policies underlying the rule of strict construction. In fact, "[a] [p]etitioner has the burden of proving that he qualifies for naturalization, and he must do so in the face of the Supreme Court's mandate that [the Courts] resolve all doubts 'in favor of the United States and against' those seeking citizenship." *Bustamante-Barrera*, 447 F.3d at 394-95 (quoting *Berenyi v. Dist. Dir.*, INS, 385 U.S. 630, 637 (1967)). Indeed, it is the Constitution and the democratically elected branches of government that define this country's citizenry:

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

INS v. Pangilinan, 486 U.S. 875, 884 (1988) (quoting *United States v. Ginsberg*, 243 U.S. 472, 474 (1917)); accord *Fedorenko v. United States*, 449 U.S. 490, 507 (1981); see also *United States v. Cervantes-Nava*, 281 F.3d 501, 503 (5th Cir. 2002) ("Any right to citizenship must be granted by Congress . . . ."). Narrow construction of citizenship statutes not only assures that Congress's naturalization authority is not usurped, but also reduces the chance for conflicts in interpretation among the courts and the need for litigation where (as here) bright-line rules result.

Certainly, adopting an "official objective manifestation of intent to reside permanently in the United States" standard as the Second Circuit has done, or any subjective intent standard as Mr. Gonzalez proposes, as the test for satisfying the second clause of former 8 U.S.C. § 1432(a)(5) is going to lead to a myriad of interpretations in both the administrative and federal courts. But an interpretation that both clauses require a residence pursuant to a lawful permanent admission prior to the age of eighteen is consistent with the overall statutory language, the statutory history, the interpretation of both the Board and two of three circuit courts to have addressed it, and the well-settled principle of strict interpretation of citizenship statutes.

* * * *

Accordingly, because the Board properly determined that, as a matter of law, Mr. Gonzalez did not derive citizenship from his father's naturalization in 1999, this Court should not disturb the Board's correct construction of statute and its denial of Mr. Gonzalez's claim to derivative citizenship. In addition, because there is no genuine issue of material fact regarding Mr. Gonzalez's nationality, the Court need not transfer his case to the U.S. District Court for a new hearing on his nationality claim.

* * * *

On October 21, 2014, the Court of Appeals for the Fifth Circuit issued its opinion, agreeing with the United States that the Board's denial of Mr. Gonzalez's claim to citizenship was correct. Excerpts follow from the opinion of the Court of Appeals. *Gonzalez v. Holder*, No. 14-60378 (5th Cir. 2014).

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* * * *

On appeal, Gonzalez argues that the BIA misinterpreted § 1432(a)(5). He contends that we should interpret the second clause as having "a continuing or lasting . . . place of general abode in the U.S., even though it is one that [might] be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." He argues that "permanent" is defined in a manner that does not require that the relationship be "lawful from inception." Under that interpretation, Gonzalez would meet the requirement in § 1432(a)(5) because he has resided in the United States since 1992.

Alternatively, Gonzalez contends that we should adopt the Second Circuit's reasoning in *Nwozuzu*. He satisfies the Second Circuit's interpretation, he argues, because of the I-130 petition filed on his behalf by his father. We decline to decide whether the Second Circuit or the BIA has the correct interpretation of § 1432(a)(5) because Gonzalez does not qualify for derivative citizenship under either interpretation. We also reject Gonzalez's claim that § 1432(a)(5) does not require an individual to be lawfully present in the country.

a. BIA Interpretation

As Gonzalez concedes, under the BIA's interpretation, he is not entitled to derivative citizenship under § 1432. The BIA interprets § 1432 as requiring that minors have lawful permanent resident status before receiving derivative citizenship. *Matter of Nwozuzu*, 24 I. & N. Dec. at 616. It is undisputed that Gonzalez did not become a lawful permanent resident until the age of twenty-three. Section 1432 requires that a minor satisfy all eligibility requirements before "the age of eighteen years." Because Gonzalez's citizenship claim fails under the BIA's interpretation, we therefore proceed to evaluate his claim under the Second Circuit's interpretation.

b. Second Circuit Interpretation

The Second Circuit held that the second clause in § 1432 "requires something less than a lawful admission of permanent residency." *Nwozuzu*, 726 F.3d at 328. Gonzalez's argument that he satisfies this test is unavailing. Gonzalez did not exhibit "an objective and official manifestation" of an intent to remain in the country. See *id*. at 334. In *Nwozuzu*, the petitioner's father filed an I-130 petition on his behalf, and the petitioner filed an application for adjustment of his legal status before he turned eighteen. *Id*. at 325, 334. The court also noted that Nwozuzu's siblings and parents were naturalized. *Id*. at 334. Conversely, although Gonzalez's father filed an I-130 form on his behalf when he was fourteen, no further action was taken until Gonzalez applied for an adjustment of status at the age of twenty-three. As we have previously noted, an undocumented individual "who has acquired unlawful or illegal status (either by overstaying a visa or illegally crossing the border without admission or parole) cannot relinquish that illegal status until his application for adjustment of status is approved." *United States v. Elrawy*, 448

F.3d 309, 314 (5th Cir. 2006) (emphasis added). Gonzalez failed to take even the initial step of applying for adjustment of status while he was under the age of eighteen. We are not persuaded that he presented "some objective official manifestation of" a permanent residence. See *Nwozuzu*, 726 F.3d at 333 (citation and internal quotation marks omitted).

c. Gonzalez's Interpretation

Gonzalez also urges his own interpretation of § 1432, which extends the Second Circuit's construction of the statute. He contends that an individual may "reside permanently" as contemplated by the statute although the individual does not have legal status. Rather, the person need only have "protection from being forced to leave at any time." He further argues that a person's entry into the United States need not be lawful at its inception. Under this interpretation, Gonzalez contends that he resided permanently once his father filed an I-130 petition because he could not be required to leave after that point. We are not persuaded.

It is not readily apparent that the phrase "reside permanently" contains a legality requirement. The phrase "reside permanently" is not defined in the INA; however, "permanent" is defined as "a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." 8 U.S.C. § 1101(a)(31). The INA defines "residence" as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." *Id*. § 1101(a)(33).

Conversely, "lawfully admitted for permanent residence" is defined in the INA as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." *Id*. § 1101(a)(20). "[I]n accordance with law" can be read as only modifying the dissolution of the relationship, not the type of relationship. See *Ashton*, 431 F.3d at 98 ("Nothing in the definition of § 1101(a)(31) suggests that to be 'permanent,' a 'relationship' must be 'in accordance with law.'").

We need not decide, however, whether "in accordance with law" modifies the entire definition of "permanent" because Gonzalez entered the country illegally and at no time before his eighteenth birthday did he take action to ensure that his presence was lawful. When construing precursors to § 1432, the Supreme Court has reasoned that an individual must lawfully enter the United States to qualify for derivative citizenship. See *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) ("The appellant could not lawfully have landed in the United States. . . and until she legally landed 'could not have dwelt within the United States'. . . . Still more clearly she never has begun to reside permanently in the United States. . . ."); *Zartarian v. Billings*, 204 U.S. 170, 175 (1907) (noting that the individual "was debarred from entering the United States . . . and, never having legally landed, of course could not have dwelt within the United States"). We acknowledge that the Second Circuit has described these cases as "'unhelpful' in interpreting [§ 1432] of the INA." Nwozuzu, 726 F.3d at 330 n.6. However, the Second Circuit ultimately refrained from deciding whether "reside permanently" contains "an implicit 'lawful entry' requirement." *Id*. Moreover, the court reasoned that *Kaplan* and *Zartarian* involved situations where the minor fell within the category of individuals excluded from being admitted into the country. *Id*. The court noted that, in contrast, the petitioner in *Nwozuzu* legally entered the country. *Id*.

We therefore hold that Gonzalez did not reside permanently in the country as contemplated by § 1432 because of his unlawful entry and status until the age of twenty-three. The fact that he has lived in the country since his entry at age seven does not remedy his unlawful entry. Gonzalez's attempt to distinguish Kaplan is unavailing. He argues that the individual in Kaplan was excluded from entering the country whereas he entered the United States at the age of seven, albeit illegally, and has remained in the country since that time. See *Kaplan*, 267 U.S. at 230. We are not persuaded by his distinction. Similar to the individual in *Kaplan*, Gonzalez was not lawfully permitted to enter the country—a fact Gonzalez concedes. Thus, the Court's analysis would appear to also apply to Gonzalez.

* * * *

Because Gonzalez is not entitled to derivative citizenship under § 1432, we also deny his motion to stay and transfer his case. See *Chambers v. Mukasey*, 520 F.3d 445, 451 (5th Cir. 2008) (stating that a stay of removal is warranted if the petitioner proves, *inter alia*, "a likelihood of success on the merits") (internal quotation marks omitted); see also 8 U.S.C. § 1252(b)(5)(B) (stating that a transfer is warranted if "the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented"). We reiterate that we decline to decide whether the proper interpretation of § 1432 is that of the Ninth and Eleventh Circuits or the Second Circuit because Gonzalez's claim fails under either approach.

* * * *

3. *Chacoty*: Definition of Residence under the Immigration and Nationality Act

On October 10, 2014, the United States filed a brief in U.S. District Court for the District of Columbia in support of its motion to dismiss an action brought by several individuals whose claims to U.S. citizenship had been rejected in various ways (either passport or CRBA applications were denied, or previously granted CRBAs were cancelled). *Chacoty v. Kerry*, No. 1:14-764-KBJ (D.D.C. 2014). The U.S. brief argues that the proper vehicle for challenging citizenship determinations is through an action pursuant to 8 U.S.C. § 1503. Further, the brief argues that some of the claims are barred by the statute of limitations. Finally, the brief describes why the statutory residence requirement for parent/s of a child born abroad has been interpreted and applied reasonably to deny citizenship rights in these cases. Under the Immigration and Nationality Act ("INA"), at least one of the parents of an applicant seeking a citizenship record (passport or CRBA) must have had a residence in the United States prior to the applicant's birth. 8 U.S.C. § 1401(c) ("INA 301(c)"); 7 Foreign Affairs Manual ("FAM") § 1133.3-1(a)(2). Excerpts follow (with footnotes omitted) from the U.S. brief, which is also available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

As a threshold matter, Plaintiffs fail to state a claim under the [Administrative Procedure Act or] APA because Congress expressly provided an alternative adequate remedy under the INA for any person denied a right or privilege as a national of the United States. See 8 U.S.C. § 1503. Because Plaintiffs seek review of the Department's denial of Plaintiffs' claims to rights or privileges to United States citizenship, they must challenge the Department's decisions under the INA's review provisions and may not proceed under the APA. See *Hassan v. Holder*, 793 F. Supp. 2d 440, 445-46 (D.D.C. 2011).5

A. Alternative Adequate Remedy Under 8 U.S.C. § 1503

The APA provides a general cause of action to "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, but judicial review is only available where "there is no other adequate remedy in a court," 5 U.S.C. § 704. The limitation on judicial review shows that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). In determining if an adequate remedy exists, the D.C. Circuit focuses on whether a statute provides an independent cause of action or an alternative review procedure, see *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004), which exists where a statute affords an opportunity for *de novo* district court review, see *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). Where an adequate remedy is available, the plaintiff lacks a cause of action under the APA to challenge an agency's alleged error. See *Washington Legal Foundation v. Alexander*, 984 F.2d 483, 486 (D.C. Cir. 1993); see also *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (plaintiff's failure to allege a proper cause of action under the judicial review provisions of the APA warrants dismissal of the complaint for failure to state a claim).

Plaintiffs seek relief under the APA based on the Department's alleged refusal "to follow and correctly apply federal law" and for "wrongfully applying the unfounded and unsubstantiated updates to the FAM." But Plaintiffs' claims under the APA must fail because they have another adequate remedy under 8 U.S.C. § 1503, which provides for a *de novo* judicial determination of whether Plaintiffs are United States citizens. See *Kahane*, 700 F. Supp. at 1165. It is established law in this circuit that no APA claim may lie "where a statute affords an opportunity for *de novo* district court review" of the contested agency action. See *Garcia*, 563 F.3d at 522 (citation omitted). The express right of action for *de novo* review under the INA mandates that Plaintiffs pursue this statutory remedy as an alternative to the default APA review. See *Washington Legal Foundation*, 984 F.2d at 486 (plaintiff is required to pursue an implied statutory remedy). Thus, Plaintiffs' APA claims must be dismissed for failure to state a cause of action under the APA. See *Hassan*, 793 F. Supp. 2d at 445-46.

* * * *

Plaintiffs may argue that they are not required to proceed under 8 U.S.C. § 1503 because they are bringing a system-wide challenge to the manner in which the Department interprets the residence requirement under INA 301(c). It is unclear whether Plaintiffs intend to pursue a system-wide claim, see Second Amend. Compl. ¶¶ 63, 70, 86-87, but such a challenge is nevertheless precluded by the express review provision under 8 U.S.C. § 1503. Where Congress provides for a specific review regime, an allegedly aggrieved party cannot circumvent the

statute's exclusive review provisions by dressing up his claim as a system-wide challenge to an agency's administration of a program. See *Fornaro v. James*, 416 F.3d 63, 67-69 (D.C. Cir. 2005). In this case, Congress channeled all challenges to denials of citizenship claims through individual declaratory judgment actions for a de novo determination of whether the aggrieved party is a United States citizen. See *Rusk*, 369 U.S. at 373; *Kahane*, 700 F. Supp. at 1165. An aggrieved party must challenge a discrete, final agency action to seek relief under 8 U.S.C. § 1503, see *Parham v. Clinton*, 374 F. App'x 503, 504 (5th Cir. 2010), and the relief is limited to a declaration that the aggrieved party is a United States citizen, see *Hizam*, 747 F.3d at 108. Thus, the only remedy available to Plaintiffs under the governing statute is an individualized *de novo* determination regarding each of their citizenship statuses, which precludes a system-wide challenge to the manner in which the Department adjudicates applications for citizenship documentation at the administrative level.

* * * *

C. Failure to State a Claim Under the APA

Even if the remaining Plaintiffs' APA claims were not precluded by the alternative adequate remedy requirement, see 5 U.S.C. § 704, they still fail to state a cause of action under the APA because they do not present any plausible claim that the Department's denials of their applications for CRBAs were arbitrary and capricious or otherwise contrary to law, see 5 U.S.C. § 706(a)(2).

* * * *

2. Plaintiffs Do Not Allege Sufficient Facts

With the exception of Kayla and Chana Sitzman, Plaintiffs fail to allege any particularized facts relating to their or their parents' time in the United States or whether they (or one of their parents) had a residence in the United States before the birth of their children outside the United States. …

The statute provides that a person born abroad to United States citizen parents must show that at least one parent "has had a residence in the United States or one of its outlying possessions, prior to the birth of such person" to establish United States citizenship. 8 U.S.C. § 1401(c); 7 FAM § 1133.3-1(a)(2). Congress defined the term "residence" in the INA as "the place of general abode," which means a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). Because the statute distinguishes between physical presence and residence, see 8 U.S.C. §§ 1401(c), (g), the Department has determined, consistent with longstanding Department policy, that a person's residence in the United States is not established solely by the length of time a person spends in a place, but necessarily implicates "the nature and quality of the person's connection to the place," which requires consular officers to apply a "fact-specific test" to the circumstances in each application for a CRBA. See Dep't of State Cable, 12 State 3735, ¶ 2.

Plaintiffs challenge the Department's interpretation as inconsistent with the statutory definition of residence, see Second Amend. Compl. ¶¶ 43, 52, 63, 72, but they fail to allege any facts that arguably demonstrate they had a residence in the United States before the birth of their children overseas, id. ¶¶ 2-20, 30, 41-44. Although the government disputes Plaintiffs' reading of the statutory definition, even if the controlling definition were beyond dispute, Plaintiffs fail t marshal sufficient facts to show that they fall within the definition of residence. …

3. The Department's Interpretation Controls

Unlike the other Plaintiffs, the Sitzmans might allege sufficient facts for a claim under the APA based on their exhibits, … but their claims nevertheless fail as a matter of law because they cannot show that the Department's interpretation of the statute is unreasonable. See 5 U.S.C. § 706(a)(2); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 709 (D.C. Cir. 2008) (agency's interpretation controls as long as it is reasonable). Thus, the Court should dismiss Plaintiffs' APA claims under Rule 12(b)(6). See *Marshall County Health Care Authority*, 988 F.2d at 1226-27.

In matters of statutory interpretation, the Court applies the two-part test under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). The first step of this familiar inquiry is considering "the text, structure, purpose, and history of an agency's authorizing statute" to determine whether a provision reveals congressional intent about the precise question at issue. *Hearth, Patio & Barbecue Ass'n v. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013) (internal quotation marks omitted). If the Court cannot readily divine Congress's clear intent, it must defer to the agency's interpretation of the statute so long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

The *Chevron* framework controls in this case because the Department acted pursuant to an express delegation of authority in issuing its interpretation through the consular cable and corresponding FAM sections. See Dep't of State Cable, 12 State 3735. Congress delegated to the Department the responsibility to determine the nationality of persons outside the United States, including establishing regulations and taking other actions necessary to carry out this authority. See 8 U.S.C. § 1104(a). … The delegation of authority under 8 U.S.C. § 1104(a) indicates that Congress intended the Department to fill in the interstices of the statute with interpretive decisions having the force and effect of law, which decisions warrant *Chevron* deference. See *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229 (D.C. Cir. 2007).

Even if the controversy in this case did not turn on the Department's interpretation in the consular cable and the FAM guidance, at least two of the Plaintiffs' citizenship claims were resolved by the Deputy Assistant Secretary's formal adjudication through a hearing on the record. See 22 C.F.R. §§ 51.71(a)-(c); Second Amend. Compl. ¶ 49; ECF Nos. 2-1, 2-2. Because the Department announced its interpretation through the Deputy Assistant Secretary after a formal hearing on the record, the *Chevron* framework controls the evaluation of the Department's statutory interpretation. …

(a) The Statute Clearly Distinguishes Residence and Physical Presence

Before addressing the Department's interpretation of the ambiguous aspects of the definition of residence, the Plaintiffs' initial argument that physical presence in the United States alone is sufficient to establish a residence under INA 301(c) … is easily defeated by the plain meaning of the statute. Although the statutory definition of residence is ambiguous in several respects, on the issue of physical presence in relation to residence, the statute clearly precludes Plaintiffs' position. As the Department explained in its cable to all consular posts, the statute distinguishes between physical presence and residence, see 8 U.S.C. §§ 1401(c), (g), which indicates that Congress intended to distinguish the two concepts. See Dep't of State Cable, 12 State 3735, ¶ 7. The distinction that the Department elaborated is well recognized by the Courts in the context of the INA. See *United States v. Arango*, 670 F.3d 988, 997 (9th Cir. 2012); *De Rodriguez v. Holder*, 724 F.3d 1147, 1151 (9th Cir. 2013). Because Congress did not use the term "physical presence" as a requirement for establishing citizenship under INA 301(c), as it had done in other contexts, the legislature intended "residence" under INA 301(c) to mean

something more than simply being physically present in the United States. See *Dean v. United States*, 556 U.S. 568, 573 (2009) ("when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that congress acts intentionally and purposely in the disparate inclusion of exclusion"). Thus, Congress's distinction between residence and physical presence undercuts Plaintiffs' reading of the term residence as equivalent to physical presence alone.

(b) The Remaining Elements of the Residence Definition Are Ambiguous

Setting aside the clear distinction between physical presence and residence under the INA, which defeats Plaintiffs' claims to citizenship, their additional argument that the statute is unambiguous regarding the remaining elements of the residence definition fails. Congress left an ambiguity for the Secretary to resolve in administering the statute based on the legislature's open-ended use of the term "residence" as "principal, actual dwelling place in fact" to be further determined by the objective facts in each particular case.

Under the INA, a person born abroad to two married United States citizen parents must show that at least one parent "has had a residence in the United States or one of its outlying possessions, prior to the birth of such person" to establish United States citizenship. 8 U.S.C. § 1401(c). Congress defined the term "residence" in the INA as "the place of general abode," which means a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). This definition of residence and the stated congressional purpose in adopting the definition only establish that Congress rejected the common law concept of "domicile" in determining a person's residence. See *Arango*, 670 F.3d at 997. Under the common law, a domicile is the person's place of residence accompanied with positive proof of an intention to remain there for an unlimited time. See *Mitchell v. United States*, 88 U.S. 350, 352 (1874); *Shafer v. Children's Hospital Society*, 265 F.2d 107, 112-13 (D.C. Cir. 1959). Because "intent" cannot be a factor in determining residence under the INA, Congress meant to displace the general common law concept of domicile, which indicates that the legislature left it to the Department to determine the permutations of the definition through the empiric process of administration by applying the broad statutory definition to the facts of each individual case. See *Board v. Hearst Publications*, 322 U.S. 111, 124-131 (1944); cf. *Christ the King Manor v. HHS*, 730 F.3d 291, 306 (3d Cir. 2013) (an agency's application of law to facts is reviewed under the Chevron framework).

Stripped of the intent requirement, the statute nevertheless mandates that a "residence" is determined in terms of a person's "principal, actual dwelling place in fact." Congress did not further qualify the scope of "residence" beyond directing the agency to determine the facts surrounding a person's dwelling place, which renders the term's connotation ambiguous because the qualities constituting its significance are left open. Congress did not address the issue of what type of relationship to the United States is sufficient to establish a residence, nor did Congress direct the agency to consider specific factors in determining whether a person has established a dwelling place in the United States. See 8 U.S.C. § 1101(a)(33). The statute is silent about these relevant issues, and this lack of clarity regarding the precise connotation of the term "residence" indicates that Congress left an ambiguity for the agency to resolve. See *White Stallion Energy Center v. EPA*, 748 F.3d 1222, 1243 (D.C. Cir. 2014) (ambiguity arises from a statutory phrase's two possible connotations); *Port of Seattle v. FERC*, 499 F.3d 1016, 1032 (9th Cir. 2007) (same).

Plaintiffs intimate that the statue clearly allows a person to establish a residence by his or her mere physical presence in the United States as a visitor. …But as the Department explained in its cable to all consular posts, the statute distinguishes between physical presence and residence, see 8 U.S.C. §§ 1401(c), (g), which indicates that Congress did not intend to conflate the two concepts. See Dep't of State Cable, 12 State 3735, ¶ 7. The distinction that the Department elaborated is well recognized by the Courts in the context of the INA. See *Arango*, 670 F.3d at 997; *De Rodriguez v. Holder*, 724 F.3d 1147, 1151 (9th Cir. 2013). Congress's distinction between residence and physical presence, as recognized by the Secretary, undercuts Plaintiffs' reading of the term residence as equivalent to physical presence alone, but it still leaves unanswered the question of what relationship a person must have to the United States for purposes of establishing a "principal, actual dwelling place in fact."

The only certainty that the statutory definition provides, based on the text and legislative history, is that Congress intended to direct the agency to make a fact-specific inquiry into a person's relationship to a place in the United States to determine whether he or she established a residence or principal dwelling place, and that residence is something more than physical presence. Congress's definition is a codification of judicial construction of the term "residence" as elaborated in *Savorgnan v. United States*, 338 U.S. 491 (1950). See *Arango*, 670 F.3d at 997.

…

(c) The Department's Interpretation Is Reasonable

Because there is an ambiguity in the statute for the Secretary to resolve in determining the citizenship of individuals outside the United States, the Court must uphold the Secretary's resolution of the ambiguity as long as the agency's interpretation is not arbitrary and capricious. See *Judulang v. Holder*, 132 S. Ct. 476, 484 n.7 (2011); *Agape Church v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013). Under this "deferential standard," *Illinois Public Telecom. Ass'n v. FCC*, 752 F.3d 1018, 1024 (D.C. Cir. 2014), a "reasonable" interpretation is good enough under *Chevron* step two, see *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 709 (D.C. Cir. 2008). Even if the Plaintiffs had a "better" reading of the statute, which they do not, the Secretary's interpretation still controls as long as it is reasonable. See *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 295 (D.C. Cir. 2013).

The Department's cable to all consular posts, see Dep't of State Cable, 12 State 3735, and the Deputy Assistant Secretary's interpretation through a formal adjudication, see ECF No. 2-2, are reasonable because they take into account the statutory distinction between physical presence and residence and advance the legislative purpose of ensuring that a residence is tied to a person's objective relationship to the United States. See *Alaska Dep't of Health & Social Serv. v. Centers for Medicare & Medicaid Serv.*, 424 F.3d 931, 942 (9th Cir. 2005) (agency's interpretation that is consistent with the text and purpose of the statute warrants Chevron deference).

Based on the text and structure of the statute, the Department determined that a residence requires something more than mere physical presence in the United States. The Department's cable and the Deputy Assistant Secretary's final administrative decision reiterated that a significant distinction between the two concepts turns on the manner in which a person spends time in the United States. See Dep't of State Cable, 12 State 3735, ¶ 8. The distinction is reasonable because it stems from Congress's use of the two concepts in different contexts under the INA, see 8 U.S.C. §§ 1401(c), (g), which is well-recognized by the courts, see *Arango*, 670 F.3d at 997; *De Rodriguez*, 724 F.3d at 1151. Since Congress recognized that a residence is distinct from physical presence, the Department reasonably determined that a residence is not

established solely by the length of time a person spends in a place, but necessarily implicates "the nature and quality of the person's connection to the place," which requires consular officers to apply a "fact-specific test" to the circumstances in each application for a CRBA. Dep't of State Cable, 12 State 3735, ¶ 2.

The Department's interpretation also takes into account Congress's purpose in adopting the definition of residence as a person's "principal, actual dwelling place in fact." Congress's definition is a codification of judicial construction of the term "residence," as elaborated in *Savorgnan v. United States*, 338 U.S. 491 (1950). See *Arango*, 670 F.3d at 997. In that case, the plaintiff departed the United States to accompany her foreign national husband in Italy where she lived with him for four years. *Savorgnan*, 338 U.S. at 506. Although the plaintiff may have intended to return to the United States, she established a residence overseas because her "principal dwelling place" or "place of general abode" was in Italy where she established a home with her husband. *Id*. Because the Court determined that the plaintiff's home was in Italy, she no longer resided in the United States. *Id*.

The Department's interpretation of a "residence" tracks the analysis in *Savorgnan*. Underscoring the irrelevance of a person's intent, the Secretary advised consular officers that "[r]esidence is not a state of mind that travels with a person," but depends on the "nature and quality of a person's connection" to the United States. Dep't of State Cable, 12 State 3735, ¶ 2. Just as the *Savorgnan* Court reasoned, see 338 U.S. at 505, the Department re-affirmed that the person's wishes and reasons for being in the United States have no bearing on the essential question, but turn on whether the person in fact established a principal dwelling place in the United States where the person lived and conducted normal daily activities, as opposed to a mere sojourn or visit to the United States, see Dep't of State Cable, 12 State 3735, ¶¶ 3-4. Like the guiding analysis in *Savorgnan*, the Department determined that a person can show a residence if he or she had a home at some point in time in the United States. *Id*. Thus, the Department's interpretation is reasonable because it comports with the legislative purpose in adopting the definition of residence, as reflected in *Savorgnan*.

Moreover, the Department's interpretation is consistent with the established connection between a residence and a home. See Restatement (First) of Conflict of Laws § 13 (1934). A home is "a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place." Id. The concept of a home as a "dwelling place" tracks Congress' use of these terms in defining a residence as a "principal, actual dwelling place in fact." 8 U.S.C. 1101(a)(33). Moreover, the concept of a home turns on a consideration of a number of objective facts in point of a person's relationship to a place, see Restatement (First) of Conflict of Laws § 13, comment a, which involves the same focus on objective facts for determining residence under the INA, see *Savorgnan*, 338 U.S. at 505. The connection of a residence with a home also respects Congress's directive to exclude considerations of intent, or the common law definition of domicile, because a person may have more than one home or dwelling place in addition to a domicile. See Restatement (First) of Conflict of Laws § 12, comment b, § 24, comment a(2).

Finally, the plain language of the Department's cable, and the plain language of the FAM, shows a clear directive to exclude considerations of intent from the determination of residence. See Dep't of State Cable, 12 State 3735, ¶ 2; 7 FAM 1133.5(a)-(b). As such, Plaintiffs' contention that the Department impermissibly imported an intent requirement into the definition of residence…is undercut by the Department's explicit directive and its focus on the objective facts in each particular case. The Department's interpretation does not rely in any way

on a person's subjective motives or state of mind, which is consistent with the statutory exclusion of an intent element in the governing definition. See 8 U.S.C. § 1101(a)(33); *Savorgnan*, 338 U.S. at 505. Thus, Plaintiffs' allegation that the Department's interpretation is outside the bounds of the statute fails.

4. The FAM Codifies a Longstanding Department Interpretation

Plaintiffs also allege that the interpretation of "residence" under INA 301(c) in the FAM has not risen to the level of Department policy or guidance because various consulates are not following the FAM. … Based on the supposed discrepancy in interpretations at various consular posts, Plaintiffs appear to allege that the Department's interpretation is inconsistent and not entitled to any deference. This argument fails for two reasons.

First, the FAM provisions relating to the meaning of "residence" under INA 301(c) reflect a longstanding interpretation carried over from the Department's prior interpretation of similar language in the predecessor statute. See 7 FAM 1134.3-2(a) (updated April 1, 1998). The Department has always interpreted the meaning of "residence" and "place of general abode" to exclude visits to the United States. *Id*. The Department referred to this longstanding interpretation when it issued the cable further elaborating the meaning of residence under INA 301(c), see Dep't of State Cable, 12 State 3735, ¶ 2, and it further stated that the guidance "does not constitute in any respect a change in interpretation," *id*. ¶ 1. Thus, Plaintiffs' argument that the FAM provisions interpreting INA 301(c) represent a change in policy fails.

Second, the FAM provisions reflect the Department's further elaboration of its longstanding policy, which it transmitted through a cable to all consular officers. See Dep't of State Cable, 12 State 3735; 7 FAM § 1133.5. By statute, the Secretary determines the citizenship of persons outside the United States, see 8 U.S.C. § 1104(a), and the Secretary delegated to consular officers the authority to execute the Department's interpretations and directives through the adjudication of applications for CRBAs, see 22 C.F.R. §§ 50.2, 50.7. Even if Plaintiffs are correct that some consular officers refuse to follow the Department's interpretation of the statute or the corresponding FAM provisions, their refusal would at most reflect impermissible conduct outside the scope of the consular officers' authority. The Department is not bound by the actions of subordinate employees acting outside the scope of their authority. See *Saulque v. United States*, 663 F.2d 968, 976 (9th Cir. 1981). Nor is the Department bound to uphold, adopt, or repeat errors made by subordinate employees who misinterpret the law.

* * * *

Because the Department's reasonable interpretation of the statute controls, Plaintiffs cannot rely on any decisions or recommendations that are inconsistent with the Department's official interpretation and its longstanding policy. Plaintiffs cannot show that the Department's interpretation is arbitrary and capricious or that any particular agency decision following the Department's interpretation in their cases was inconsistent with the statute, and as such, they fail to state a claim as a matter of law under the APA. See 5 U.S.C. § 706(a)(2).

* * * *

4. Policy Change Regarding Children Born Abroad Through Assisted Reproductive Technology ("ART")

On January 31, 2014, the U.S. Department of State issued new policy guidance to all diplomatic and consular posts regarding citizenship of children born abroad through the use of assisted reproductive technology ("ART"). 14 State 10952. Prior to the new policy, only genetic mothers were able to transmit citizenship and immigration benefits to children born abroad. Under the new policy, gestational mothers who are also the legal parent of the child will be treated the same as genetic mothers for the purposes of citizenship and immigration benefits. Excerpts follow from the cable sent to all diplomatic and consular posts. On October 28, 2014, the Department of Homeland Security's U.S. Citizenship and Immigration Services ("USCIS") issued a policy alert (PA-2014-09) explaining the new policy relating to the use of ART, noting that the policy was developed by USCIS and the Department of State in collaboration. The USCIS policy alert (not excerpted herein) is available at *www.uscis.gov/policymanual/Updates/20141028-ART.pdf*.

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2. Transmission of Citizenship at Birth via Genetic or Gestational U.S. Citizen Legal Mothers: The Department of State and the Department of Homeland Security are now interpreting relevant U.S. law to permit acquisition of U.S. citizenship at birth based upon a genetic and/or gestational relationship to a U.S. citizen legal mother at the time and place of birth. See examples in paragraph 6.

3. Transmission After Birth under the Child Citizenship Act: Both departments are further interpreting the Immigration and Nationality Act (INA) Sections 101(c), 320, and 322 (8 U.S.C. Sections 1101(c), 1431, and 1433), such that a "parent" includes a genetic or gestational legal parent, and a "child" includes the child of a genetic or gestational parent who is also a legal parent at the time of the child's birth. This interpretation allows transmission of citizenship after birth by a U.S. citizen gestational, legal mother who is not the genetic mother of the child to whom she gave birth.

4. Immigration of Children of Gestational, Legal Mothers: Under the new interpretation, INA Section 101(b) (8 U.S.C. Section 1101(b)) treats a child as being born "in wedlock" under INA Section 101(b)(1)(A) when the genetic and/or gestational parents are legally married to each other at the time of the child's birth and both parents are the legal parents of the child at the time and place of birth. A "child legitimated" and a "legitimating parent or parents" in INA Section 101(b)(1)(C) includes a gestational mother who is also the legal mother of the child.

The term "natural mother" in INA Section 101(b)(1)(D) includes a gestational mother who is the legal mother of a child at the time and place of birth, as well as a genetic mother who is a legal mother of the child at the time and place of birth.

5. Retroactive Application: The new policy will be retroactive. There will be cases in which children born abroad to a gestational and legal mother were previously denied a citizenship or immigration benefit under the prior interpretation. In such cases, parent(s) must submit a new application for their child, if they wish to apply for a passport, Consular Report of

Birth Abroad (CRBA), or other document. The application must include sufficient evidence demonstrating that they meet all relevant statutory and regulatory requirements as well all appropriate fees.

6. Case Examples:

A woman who gives birth abroad to a child that is not genetically related to her (i.e., the child was conceived using a donor egg), and who is also the legal mother of the child at the time and place of its birth, may transmit U.S. citizenship to the child under Section 301 and Section 309 of the INA (8 U.S.C. Sections 1401 and 1409).

A U.S. citizen who gives birth abroad to a child, but who is not the legal mother at the time and place of birth, (i.e., a gestational surrogate) may not transmit citizenship. In this example, the child also would not be born "in wedlock". Under the new interpretation, a child is considered to be born "in wedlock" for purposes of applying INA Section 301, when the child is born to persons who are:

(1) legally married to one another at the time of the child's birth;
(2) both the legal parents of the child at the time and place of the child's birth; and
(3) the genetic and/or gestational parents of the child.

* * * *

5. Passports as Proof of Citizenship

See discussion in Section 1.B., below, of several cases relating to the interaction between issuance of a passport and the demonstration of citizenship.

B. PASSPORTS

1. Corrected Opinion in *Edwards* relating to Passport as Proof of Citizenship

As discussed in *Digest 2013* at 14-16, the U.S. Court of Appeals for the Third Circuit decided two cases in 2013 involving the issue of whether or when a U.S. passport serves as proof of U.S. citizenship, *Edwards v. Bryson* and *United States v. Moreno*. In 2014, the Third Circuit issued an amended and superseding version of the *Edwards* decision, adding a footnote that substantively amends the conclusion in *Moreno* that a valid passport will serve as conclusive proof of citizenship only if it was issued by the Secretary of State *to a citizen of the United States*. The footnote states that "in some contexts, a passport may serve as conclusive proof of citizenship without a showing that the holder was actually a citizen when the passport was issued. A valid passport, for example, may serve as conclusive proof of citizenship in some administrative proceedings, or when questions of citizenship arise between private parties." *Edwards*, 578 Fed. Appx. at 83 n.4. The Third Circuit amended its *Edwards* decision after the U.S. Government submitted briefs in January 2014 in opposition to a petition for *en banc* rehearing in *Edwards* and in opposition to a petition for a writ of certiorari in *Moreno*.

Excerpts follow from the U.S. brief in opposition to the petition for certiorari in *Moreno v. United States*, No. 13-457, which is available in full at

www.state.gov/s/l/c8183.htm. The Supreme Court denied the petition for certiorari on February 24, 2014.

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* * * *

[22 U.S.C.] 2705 specifies that, "during its period of validity (if such period is the maximum period authorized by law)," a passport issued to a U.S. citizen "shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship." Like such certificates, an unexpired passport must be accepted as conclusive evidence of citizenship in administrative proceedings and against third parties. A passport does not, however, prevent the United States from disproving the holder's citizenship in a criminal prosecution. The relatively few authorities interpreting 22 U.S.C. 2705 support both of these propositions.

i. Shortly after the statute's enactment in 1982, the BIA held that Section 2705 means that a "valid United States passport" must be treated as "conclusive proof" of citizenship "in administrative immigration proceedings." *In re Villanueva*, 19 I. & N. Dec. 101, 103 (1984). Courts have likewise stated that Section 2705 "makes a passport conclusive proof of citizenship in administrative immigration proceedings." *Keil v. Triveline*, 661 F.3d 981, 987 (8th Cir. 2011); accord *Vana v. Attorney Gen.*, 341 Fed. Appx. 836, 839 (3d Cir. 2009). And a passport has also been held to preclude a private party from challenging the holder's citizenship. See *United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009).

The court of appeals thus wrote too broadly to the extent it interpreted 22 U.S.C. 2705 to mean that a passport cannot be invoked as proof of citizenship unless the holder first establishes that she is a citizen. As Judge Smith's dissent explains, that interpretation would deprive the statute of much of its practical effect. Pet. App. 12a-13a. Instead, the statutory requirement that the passport must have been issued "to a citizen of the United States" operates to exclude passports issued to noncitizen nationals from proving citizenship in administrative contexts. See *id*. at 14a-15a.

ii. Contrary to Judge Smith's view, however, a passport is not conclusive proof of citizenship against the government in all circumstances. Like an administrative certificate of citizenship, a passport is subject to revocation by the issuing agency: The State Department is authorized to revoke a passport if the agency concludes it was obtained "illegally, fraudulently, or erroneously." 8 U.S.C. 1504(a). The Department need only provide notice of the action and an opportunity for the passport holder to seek "a prompt post-cancellation hearing." *Ibid*.; see 22 C.F.R. 51.62, 51.70-74. And just as 8 U.S.C. 1451(e) makes clear that the government need not cancel a certificate of naturalization before prosecuting the holder for procuring naturalization in violation of law, see p. 11, *supra*, the government is not required to cancel an erroneously issued passport before prosecuting the holder for falsely claiming citizenship in violation of 18 U.S.C. 911. As the Eighth Circuit observed, "no court has held that possession of a passport precludes prosecution under § 911, and there are indications in the case law that it does not." Keil, 661 F.3d at 987; see *ibid*. ("Non-citizens in possession of passports at the time of their arrests have been convicted of violating § 911 for using those passports as proof of citizenship."). Petitioner provides no sound reason to require the government to revoke a passport through the administrative process before litigating exactly the same citizenship dispute under a higher standard of proof in a criminal prosecution.

* * * *

Similarly, the U.S. brief in opposition to the petition for *en banc* rehearing in *Edwards v. Bryson*, No. 12-3670, (3d Cir. Jan. 17, 2014), explains the contexts in which an unexpired passport can provide proof of citizenship. Excerpts follow from the U.S. brief, which is also available at *www.state.gov/s/l/c8183.htm*. The Third Circuit ultimately denied the plaintiff's petition for *en banc* rehearing in the *Edwards* case, but on the same day that it issued the denial decision, it filed the amended and superseding decision with the new footnote described above to clarify its holding in *Moreno* and *Edwards*. See *Edwards v. Bryson*, No. 12-3670, Doc. No. 3111760567 (3d Cir. Oct. 8, 2014) (*en banc*).

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Edwards' primary argument for rehearing *en banc* is that *Moreno* was wrong to conclude that 22 U.S.C. § 2705 makes a passport "conclusive proof of citizenship only if its holder was actually a citizen of the United States when it was issued." 727 F.3d at 261. Edwards argues that the *en banc* Court should adopt the interpretation of the statute set forth in Judge Smith's dissenting opinion, which would have held that Section 2705 makes a passport conclusive proof of citizenship without "requir[ing] a preliminary showing that the passport holder is a U.S. citizen." *Id*. at 264 (Smith, J., dissenting). As explained below, see *infra* Part III, the government believes that *Moreno* reached the correct result in the context of that criminal case, but acknowledges that, in some other circumstances, a valid, unexpired passport can be used to prove citizenship without a preliminary showing that the holder is a United States citizen. But this question has no bearing on the proper outcome in this case because Section 2705 prescribes the evidentiary force of a passport only "during its period of validity." Here, Edwards' passport was expired at all relevant times, and thus entitled to no weight under any interpretation of Section 2705. And because Edwards could not prevail even if the *en banc* Court adopted the interpretation of the statute Judge Smith advocated in his *Moreno* dissent, *en banc* review is not warranted.

Because Section 2705 has no bearing on the evidentiary weight of Edwards' expired passport, this case presents no occasion to reconsider *Moreno*'s interpretation of the statute. Moreover, *Moreno* correctly concluded that nothing in Section 2705 precludes the criminal prosecution of a passport holder for falsely claiming to be a U.S. citizen in violation of 18 U.S.C. § 911. But as the government explained in its opposition to the pending petition for certiorari in *Moreno*, § 2705 does require that a valid, unexpired passport be given independent effect as proof of citizenship in some contexts, and this Court in *Moreno* wrote too broadly to the extent it suggested otherwise. See Brief for the United States in Opposition at 7-15, *Moreno v. United States*, No. 13-457, 2014 WL 108364 (U.S. Jan. 10, 2014).

Section 2705 links the "force and effect" of a passport to the "force and effect" of "certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." Such certificates, in turn, are conclusive proof of citizenship in administrative proceedings and against third parties. The government has long taken the position that, in general, "a decree of naturalization or a certificate of naturalization is not subject to impeachment in a collateral proceeding." 41 Op. Att'y Gen. 452, 459 (1960) (citing cases).

Such certificates are thus conclusive when questions concerning citizenship arise in private litigation. See, *e.g.*, *Campbell v. Gordon*, 10 U.S. (6 Cranch) 176, 182 (1810). A facially valid certificate of citizenship or naturalization is also conclusive proof of citizenship in administrative proceedings. …

Although a certificate of citizenship or naturalization is thus conclusive proof of citizenship in many circumstances, it does not bind the government "for all purposes." *Johannessen v. United States*, 225 U.S. 227, 236 (1912). For example, the Department of Justice is authorized by statute to bring a suit to "revok[e] and set[] aside the order admitting [a] person to citizenship and cancel[] the certificate of naturalization." 8 U.S.C. § 1451(a). In addition, the Department of Homeland Security is authorized to cancel an administrative certificate of citizenship or naturalization whenever it finds "that such document or record was illegally or fraudulently obtained." 8 U.S.C. § 1453. And the government may also pursue a criminal prosecution predicated on the defendant's non-citizenship or ineligibility for naturalization even if it does not first cancel the defendant's certificate of citizenship or naturalization. See, *e.g.*, *United States v. Chin Doong Art*, 180 F. Supp. 446, 447 (E.D.N.Y. 1960) (rejecting a claim that the government was required to revoke the defendants' certificates of citizenship before prosecuting them for "falsely represent[ing] themselves to be citizens").

Section 2705 provides that, "during its period of validity," a passport must be given the same force and effect as a certificate of citizenship or naturalization. As Edwards observes, some authorities have concluded that § 2705 means that a "valid United States passport" must be treated as "conclusive proof" of citizenship "in administrative immigration proceedings." *In re Villanueva*, 19 I. & N. Dec. 101, 103 (1984); *Keil v. Triveline*, 661 F.3d 981, 987 (8th Cir.2011); see also *United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009) (a valid passport precludes a private party from challenging the holder's citizenship). The government agrees that in the context of administrative proceedings and vis-à-vis third parties, a valid passport can be invoked as proof of citizenship without a preliminary showing that the holder is a citizen.

But these precedents provide no assistance to Edwards — and no reason to grant rehearing in this case — because they speak to the force of "valid" passports. *Villanueva*, 19 I. & N. Dec. at 103. And these authorities also do not call into question the result reached in *Moreno* because they address the force and effect of passports in administrative proceedings and against third parties, not criminal prosecutions. Section 2705 only requires that a passport be given "the same force and effect" as a certificate of citizenship or naturalization, and, as explained above, the government is not required to revoke such a certificate before prosecuting the holder for falsely claiming to be a citizen. See also *Keil*, 661 F.3d at 987 ("[N]o court has held that possession of a passport precludes prosecution under § 911 [for falsely claiming to be a citizen], and there are indications in the case law that it does not.").

* * * *

2. *Tuaua*: Notation on Passports Issued to Non-Citizen U.S. Nationals

On August 11, 2014, the United States filed its brief in the U.S. Court of Appeals for the D.C. Circuit in a case brought by American Samoan individuals and a social services organization that works on their behalf. *Tuaua et al. v. United States*, No. 13-5272 (D.C. Cir.). Plaintiffs brought the action challenging the placement of a notation on their U.S.

passports ("Endorsement Code 09") indicating they are U.S. nationals, but not U.S. citizens, in accordance with INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), which designates American Samoa as an "outlying possession" of the United States. The district court dismissed plaintiffs' claims, ruling that birthright citizenship based on the Fourteenth Amendment for American Samoans was effectively precluded by a series of early-twentieth century Supreme Court decisions known as the "Insular Cases." Plaintiffs appealed. The U.S. brief argues that the plain language of the Fourteenth Amendment, read in context, along with court precedents considering the issue, preclude plaintiffs' argument. The government of American Samoa, as represented by the Congressional representative for American Samoa, intervened on the side of the U.S. government, arguing that application of the Fourteenth Amendment to American Samoa would be anomalous to the American Samoan way of life. Excerpts below are from the section of the U.S. brief explaining why the plaintiffs' claims under the Fourteenth Amendment of the U.S. Constitution must fail and the section of the brief identifying plaintiffs' alternative remedies to seek the rights of U.S. citizenship. The brief is available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

A. The Constitution and, in Particular, the Plain Language of the Fourteenth Amendment, Do Not Support Plaintiffs' Interpretation.

The first introductory words of Plaintiffs' initial brief reveal the flaw in Plaintiffs' logic and misinterpretation of the Citizenship Clause of the Fourteenth Amendment. Specifically, Plaintiffs selectively quote the Clause, stating: "The Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution provides that '[a]ll persons born . . . in the United States . . . are citizens of the United States . . . .'" …The words Plaintiffs omitted and replaced with ellipses have meaning, however, and provide context. The entire clause actually reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the Statenwherein they reside.

U.S. Const. amend. XIV, § 1, cl. 1. The phrases "or naturalized" and "and subject to the jurisdiction thereof" when read in conjunction with the phrase "in the United States" demonstrate precisely why Plaintiffs' claims fail as a matter of law and why every federal court to examine claims like Plaintiffs' have found them wanting—these phrases contemplate that the grant of birthright citizenship will not simply "follow the flag," but rather will be defined and confined or expanded by Congressional action.

1. The Plain Language of the Amendment

The Fourteenth Amendment's first clause plainly declares that it confers automatic birthright citizenship to persons "born in the United States and subject to the jurisdiction thereof." While the history of American Samoa's relationship with the United States …, including its oversight first by the U.S. Navy and now by the Department of Interior, lends itself to placing American Samoa "subject to the jurisdiction" of the United States, it is not "in the United States." Thus, Plaintiffs' selective editing of the Amendment in the first line of their brief cannot alter the plain reading of the full text. …

2. The Constitution Places Naturalization and the Definition of the Boundaries of the United States within the Purview of Congress.

The first phrase in the Amendment omitted by Plaintiffs, "or naturalized," refers to Congress's ability to determine under what terms, if any, a person may become a U.S. citizen. In fact, the Constitution vests in Congress the sole power to make laws regarding naturalization, see U.S. Const., Art. I, § 8, cl. 4, which the Supreme Court noted as far back as *Boyd v. State of Nebraska*, 143 U.S. 135, 160 (1892), stating, "The constitution has conferred on congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so."

Additionally, the Supreme Court in *Boyd* recognized that the ability to naturalize and obtain citizenship was not a right guaranteed by the Constitution, but rather that "Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen." *Id*. at 162. Indeed, the Supreme Court has stated that "Citizenship can be granted only on the basis of the statutory right which Congress has created." *Schneiderman v. United States*, 320 U.S. 118, 165 (1943) (emphasis added). This conclusion, supported by the exclusive grant of naturalization regulation provided to Congress rests on the assumption "that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit." *Schneiderman*, 320 U.S. at 131.

Due to the exclusive role of Congress, courts have consistently declined to interfere with Congressional action when taken in this area. As the Supreme Court has noted:

> An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

United States v. Ginsberg, 243 U.S. 472, 474 (1917); *Rogers v. Bellei*, 401 U.S. 815, 830-31 (1971) (approving of Congressional scheme to provide path to citizenship for persons born abroad which could then be revoked if certain qualifications were not met). Even more relevantly, the Supreme Court has instructed that if an individual does not qualify for citizenship under a statute, the "court has no discretion to ignore the defect and grant citizenship." *Fedorenko v. United States*, 449 U.S. 490, 517 (1981) (citations omitted). Thus, when Congress expressly provides a path to naturalization (as it has done for Plaintiffs and all other non-citizen U.S. nationals), the Court cannot simply ignore or bypass that process and declare persons citizens de jure or de facto by operation of judicial decree.

Similarly, the responsibility of Congress to govern this nation's territories has long been recognized and respected by the Courts. The "principles of constitutional liberty . . . restrain all the agencies of government" from impeding upon territories' citizens. *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885). But it is instead Congress which has the "legislative discretion" to grant "privileges" upon those born in the outlying possessions as they see fit. *Id*. Congress "has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments [and] may do for the Territories what the people, under the Constitution of the United States, may do for the States. *First Nat. Bank v. Yankton Cnty.*, 101 U.S. 129, 133 (1879) (emphasis added).

Critically, the Supreme Court has never found that the Congress *must* bestow all of the same panoply of privileges upon those born in the outlying possessions that the Constitution bestows on those born in the United States. Plaintiffs and the *amici* argue that this Court *must* bestow the privileges of birthright citizenship upon persons born in American Samoa, but such a

holding would run counter to over a century of jurisprudence affirming the preeminence of Congress in guaranteeing the rights of those in the outlying possessions.

In fact, Plaintiffs' and *amici*'s reliance on an overextension of the principle of *jus soli* and English common law has already been directly rejected by the Supreme Court in *Rogers* where the Court stated:

> We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli*, that is, that the place of birth governs citizenship status except as modified by statute.

401 U.S. at 828 (emphasis added). Thus, even if Plaintiffs were correct that their interpretation of the Fourteenth Amendment should generally confer birthright citizenship pursuant to *jus soli* on non-citizen American Samoans, Congress's direct modification of that status by statute trumps that interpretation under Supreme Court interpretation. See INA § 101(a)(29), 8 U.S.C. § 1101(a)(29); INA § 308(1), 8 U.S.C. § 1408(1); see also *Rogers*, 401 U.S. at 828.

* * * *

B. Every Court to Examine Claims Similar to Plaintiffs' Has Dismissed Them and Found No Basis in the Fourteenth Amendment for the Expansive View of Birthright Citizenship Urged by Plaintiffs.

Whether the Citizenship Clause applied or applies to an outlying, unincorporated territory of the United States has been examined and decided in a series of cases. In each case that courts have held that they could examine the issue, those courts have held that where Congress has not specifically enumerated that the outlying territory is subject to the territorial scope of the Citizenship Clause, the clause does not apply to those territories. Here, as outlined above, Congress has properly exercised its Constitutional duty to legislate the naturalization status for American Samoa, an unincorporated, outlying territory. And every federal court to examine similar claims to the ones Plaintiffs raised below has found them wanting.

* * * *

IV. CONTRARY TO PLAINTIFFS' ALLEGATIONS OF INCONVENIENCE, PLAINTIFFS HAVE OTHER REMEDIES WHICH DO NOT REQUIRE JUDICIAL INTERVENTION.

Plaintiffs' complaint fails as a matter of law and Plaintiffs' brief provides no reason to disturb the District Court's dismissal of it. Simply stated, the plain language of the Constitution, the overwhelming weight of statutory and case law authority, as well as the practical implications of Plaintiffs' requested relief prevent Plaintiffs' claims from surviving. In their complaint and their initial brief here, Plaintiffs have attempted to buttress their claims with descriptions of alleged opportunities lost and concern for their progeny due to their status as non-citizen U.S. nationals. Plaintiffs, however, not only downplay their current and ongoing ability to naturalize as U.S. citizens, overlook their affirmative choices not to attain citizenship, but also ignore the manner in which all other outlying possessions have achieved birthright citizenship—Congressional action.

First, as Plaintiffs acknowledge, they are eligible to apply for naturalization at any time of their choosing through travel to the United States and successful completion of the naturalization process. In fact, several of the individual Plaintiffs resided or currently reside in the United

States and can undertake this process at any time. … Further, Plaintiffs' claims of concern for their children and grandchildren's status could have been alleviated through their own naturalization as persons born on American Samoa to U.S. citizen parents qualify for birthright citizenship. 8 U.S.C. § 1401(e).

Additionally, Plaintiffs repeatedly refer to both their own military service and the service of other American Samoans, particularly during times of armed conflict. … But Plaintiffs ignore the fact that federal law provides a pathway to citizenship for persons serving in the military during times of conflict, 8 U.S.C. § 1440(a), and that those stationed in the United States during peacetime are immediately eligible for naturalization due to their status as U.S. nationals.

Finally, the manner in which the entire territory's inhabitants could acquire birthright citizenship would be to follow the path beaten by others: Congressional action. As the elected American Samoan representative to the U.S. Congress, Congressman Eni Faleomavaega has made plain, he stands ready to introduce and lobby for such legislation should the people of American Samoa determine that birthright citizenship is in their interests. Congress has not hesitated to provide this right when called upon. In fact, Congress affirmatively acted to bestow automatic, birthright citizenship on: (1) Puerto Rico, 8 U.S.C. § 1402; (2) the Panama Canal Zone during its period as a U.S. territory, 8 U.S.C. § 1403; (3) pre-statehood Alaska, 8 U.S.C. § 1404; (4) pre-statehood Hawaii, 8 U.S.C. § 1405; (5) the U.S. Virgin Islands, 8 U.S.C. § 1406; (6) Guam, 8 U.S.C. § 1407; and (7) the Commonwealth of the Northern Mariana Islands, Pub. L. No. 94-241, § 301, 90 Stat. 263, 265-66. Thus, it was action by Congress that granted citizenship to the citizens of the unincorporated, outlying territories, not mere exercise of authority by the United States Government over its physical territory.

Plaintiffs' arguments not only overlook this process, but their requested relief invites impractical results. First, as discussed immediately above, Plaintiffs ignore the history of every other similarly-situated outlying possession of the United States, each of which gained birthright citizenship for its inhabitants through Congressional action only. Second, Plaintiffs' argument invites an utterly impractical result. When would a U.S. territory suddenly shift from an outlying possession to one whose inhabitants receive automatic birthright citizenship—a period of years to be determined by a Court? Indeed, the only practical and efficient process of making this determination is the one in place: each individual territory decides for itself when it wishes for its inhabitants to receive birthright citizenship and Congress responds by deciding whether to issue a statutory grant of this privilege. Therefore, because this process not only comports with the Constitution, but also preserves the ability of territories to work with Congress to determine their own levels of integration into the United States, it is not only proper, but the preferred method to judicial determinations made by courts sitting thousands of miles away. Thus, the judgment of the District Court was plainly correct and should be affirmed.

* * * *

C. IMMIGRATION AND VISAS

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

As discussed in *Digest 2013* at 16-19, the United States appealed to the U.S. Supreme Court the judgment of the U.S. Court of Appeals for the Ninth Circuit (*en banc*) in *Mayorkas v. De Osorio*, No. 12-930. The Supreme Court issued its opinion in the case on June 9, 2014, reversing the judgment of the Court of Appeals that the Board of Immigration Appeals ("BIA" or "Board") had misinterpreted a provision of the INA, as amended by the Child Status Protection Act ("CSPA"), 8 U.S.C. § 1153(h)(3). *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191 (2014). Section 1153(h)(3) addresses how to treat an alien who reaches age 21 ("ages out"), and therefore loses "child" status under the INA. The BIA determined that, if a new petition and petitioner were required, the alien's priority date for a visa would be determined by the date of a subsequently-filed visa petition, and not the date of the original petition as to which the alien was a derivative beneficiary. See *Digest 2013 at 16-19* for further background on the case. Excerpts follow (with most footnotes omitted) from the plurality opinion of the U.S. Supreme Court.[**]

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Principles of *Chevron* deference apply when the BIA interprets the immigration laws. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *INS v. Aguirre–Aguirre*, 526 U.S. 415, 424–425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). Indeed, "judicial deference to the Executive Branch is especially appropriate in the immigration context," where decisions about a complex statutory scheme often implicate foreign relations. *Id*., at 425, 119 S.Ct. 1439. … Under Chevron, the statute's plain meaning controls, whatever the Board might have to say. See 467 U.S., at 842–843, 104 S.Ct. 2778. But if the law does not speak clearly to the question at issue, a court must defer to the Board's reasonable interpretation, rather than substitute its own reading. *Id*., at 844, 104 S.Ct. 2778.

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Begin by reading the statute from the top—the part favoring the respondents. Section 1153(h)(3)'s first clause—"If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)"—states a condition that every aged-out beneficiary of a preference petition satisfies. That is because all those beneficiaries have had their ages "determined under paragraph (1)" (and have come up wanting): Recall that the age formula of § 1153(h)(1) applies to each alien child who originally qualified (under "subsections (a)(2)(A) and (d)") as the principal beneficiary of an F2A petition or the

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[**] Editor's note: the plurality opinion, in a portion not excerpted herein, sets forth the family preference categories for family-sponsored immigrants as follows:

F1: the unmarried, adult (21 or over) sons and daughters of U.S. citizens;
F2A: the spouses and unmarried, minor (under 21) children of LPRs;
F2B: the unmarried, adult (21 or over) sons and daughters of LPRs;
F3: the married sons and daughters of U.S. citizens;
F4: the brothers and sisters of U.S. citizens.

8 U.S.C. §§ 1151(a)(1), 1153(a)(1)-(4).

derivative beneficiary of any family preference petition. On its own, then, § 1153(h)(3)'s opening clause encompasses the respondents' sons and daughters, along with every other once-young beneficiary of a family preference petition now on the wrong side of 21. If the next phrase said something like "the alien shall be treated as though still a minor" (much as the CSPA did to ensure U.S. citizens' children, qualifying as "immediate relatives," would stay forever young, see *supra*, at 2199 – 2200), all those aged-out beneficiaries would prevail in this case.

But read on, because § 1153(h)(3)'s second clause instead prescribes a remedy containing its own limitation on the eligible class of recipients. "[T]he alien's petition," that part provides, "shall automatically be converted to the appropriate category and the alien shall retain the original priority date." That statement directs immigration officials to take the initial petition benefitting an alien child, and now that he has turned 21, "convert[ ]" that same petition from a category for children to an "appropriate category" for adults (while letting him keep the old priority date). The "conversion," in other words, is merely from one category to another; it does not entail any change in the petition, including its sponsor, let alone any new filing. And more, that category shift is to be "automatic"—that is, one involving no additional decisions, contingencies, or delays. See, *e.g.*, Random House Webster's Unabridged Dictionary 140 (2d ed. 2001) (defining "automatic" as "having the capability of starting, operating, moving, etc., independently"); The American Heritage Dictionary 122 (4th ed. 2000) ("[a]cting or operating in a manner essentially independent of external influence"). The operation described is, then, a mechanical cut-and-paste job—moving a petition, without any substantive alteration, from one (no-longer-appropriate, child-based) category to another (now-appropriate, adult) compartment. And so the aliens who may benefit from § 1153(h)(3)'s back half are only those for whom that procedure is possible. The clause offers relief not to every aged-out beneficiary, but just to those covered by petitions that can roll over, seamlessly and promptly, into a category for adult relatives.

That understanding of § 1153(h)(3)'s "automatic conversion" language matches the exclusive way immigration law used the term when Congress enacted the CSPA. For many years before then (as today), a regulation entitled "Automatic conversion of preference classification" instructed immigration officials to change the preference category of a petition's principal beneficiary when either his or his sponsor's status changed in specified ways. See 8 CFR §§ 204.2(i)(1)-(3) (2002). For example, the regulation provided that when a U.S. citizen's child aged out, his "immediate relative" petition converted to an F1 petition, with his original priority date left intact. See § 204.2(i)(2). Similarly, when a U.S. citizen's adult son married, his original petition migrated from F1 to F3, see § 204.2(i)(1)(i); when, conversely, such a person divorced, his petition converted from F3 to F1, see § 204.2(i)(1)(iii); and when a minor child's [Legal Permanent Resident or] LPR parent became a citizen, his F2A petition became an "immediate relative" petition, see § 204.2(i)(3)—all again with their original priority dates. Most notable here, what all of those authorized changes had in common was that they could occur without any change in the petitioner's identity, or otherwise in the petition's content. In each circumstance, the "automatic conversion" entailed nothing more than picking up the petition from one category and dropping it into another for which the alien now qualified.

Congress used the word "conversion" (even without the modifier "automatic") in the identical way in two other sections of the CSPA. See *Law v. Siegel*, 571 U.S. ——, ——, 134 S.Ct. 1188, 1195, 188 L.Ed.2d 146 (2014) ("[W]ords repeated in different parts of the same statute generally have the same meaning"). Section 2 refers to occasions on which, by virtue of the above-described regulation, a petition "converted" from F2A to the "immediate relative"

category because of the sponsor parent's naturalization, or from the F3 to the F1 box because of the beneficiary's divorce. 8 U.S.C. §§ 1151(f)(2), (3). Then, in § 6, Congress authorized an additional conversion of the same nature: It directed that when an LPR parent-sponsor naturalizes, the petition he has filed for his adult son or daughter "shall be converted," unless the beneficiary objects, from the F2B to the F1 compartment—again with the original priority date unchanged. 8 U.S.C. §§ 1154(k)(1)-(3). (That opt-out mechanism itself underscores the otherwise mechanical nature of the conversion.) Once again, in those cases, all that is involved is a recategorization—moving the same petition, filed by the same petitioner, from one preference classification to another, so as to reflect a change in either the alien's or his sponsor's status. In the rest of the CSPA, as in the prior immigration regulation, that is what "conversion" means.

And if the term meant more than that in § 1153(h)(3), it would undermine the family preference system's core premise: that each immigrant must have a qualified sponsor. Consider the alternative addressed in Wang—if "automatic conversion" were also to encompass the substitution of a new petitioner for the old one, to make sure the aged-out alien's petition fits into a new preference category. In a case like Wang, recall, the original sponsor does not have a legally recognized relationship with the aged-out derivative beneficiary (they are aunt and niece); accordingly, the derivative's father—the old principal beneficiary—must be swapped in as the petitioner to enable his daughter to immigrate. But what if, at that point, the father is in no position to sponsor his daughter? Suppose he decided in the end not to immigrate, or failed to pass border inspection, or died in the meanwhile. Or suppose he entered the country, but cannot sponsor a relative's visa because he lacks adequate proof of parentage or committed a disqualifying crime. See § 1154(a)(1)(B)(i)(II); 8 CFR § 204.2(d)(2); *supra*, at 2197. Or suppose he does not want to—or simply cannot—undertake the significant financial obligations that the law imposes on someone petitioning for an alien's admission. See 8 U.S.C. §§ 1183a(a)(1)(A), (f)(1)(D); supra, at 2198. Immigration officials cannot assume away all those potential barriers to entry: That would run counter to the family preference system's insistence that a qualified and willing sponsor back every immigrant visa. See §§ 1154(a)-(b). But neither can they easily, or perhaps at all, figure out whether such a sponsor exists unless he files and USCIS approves a new petition—the very thing § 1153(h)(3) says is not required.

Indeed, in cases like [*Matter of Wang*, 25 I. & N. Dec. 28 (2009) or] *Wang*, the problem is broader: Under the statute's most natural reading, a new qualified sponsor will hardly ever exist at the moment the petition is to be "converted." Section 1153(h)(3), to be sure, does not explicitly identify that point in time. But § 1153(h)(1) specifies the date on which a derivative beneficiary is deemed to have either aged out or not: It is "the date on which an immigrant visa number became available for the alien's parent." See §§ 1153(h)(1)(A)-(B). Because that statutory aging out is the one and only thing that triggers automatic conversion for eligible aliens, the date of conversion is best viewed as the same. That reading, moreover, comports with the "automatic conversion" regulation on which Congress drew in enacting the CSPA, see *supra*, at 2204 – 2205: The rule authorizes conversions "upon" or "as of the date" of the relevant change in the alien's status (including turning 21)—regardless when USCIS may receive notice of the change. 8 CFR § 204.2(i); but cf. *post*, at 2224 (SOTOMAYOR, J., dissenting) (wrongly stating that under that rule conversion occurs upon the agency's receipt of proof of the change). But on that date, no new petitioner will be ready to step into the old one's shoes if such a substitution is needed to fit an aged-out beneficiary into a different category. The beneficiary's parent, on the day a "visa number became available," cannot yet be an LPR or citizen; by definition, she has just become eligible to *apply* for a visa, and faces a wait of at least several months before she can

sponsor an alien herself. Nor, except in a trivial number of cases, is any hitherto unidentified person likely to have a legally recognized relationship to the alien. So if an aged-out beneficiary has lost his qualifying connection to the original petitioner, no conversion to an "appropriate category" can take place at the requisite time. As long as immigration law demands some valid sponsor, § 1153(h)(3) cannot give such an alien the designated relief.

On the above account—in which conversion entails a simple reslotting of an original petition into a now-appropriate category—§ 1153(h)(3)'s back half provides a remedy to two groups of aged-out beneficiaries. First, any child who was the principal beneficiary of an F2A petition (filed by an LPR parent on his behalf) can take advantage of that clause after turning 21. He is, upon aging out, the adult son of the same LPR who sponsored him as a child; his petition can therefore be moved seamlessly—without the slightest alteration or delay—into the F2B category. Second, any child who was the derivative beneficiary of an F2A petition (filed by an LPR on his *spouse's* behalf) can similarly claim relief, provided that under the statute, he is not just the spouse's but also the petitioner's child. Such an alien is identically situated to the aged-out *principal* beneficiary of an F2A petition; indeed, for the price of another filing fee, he could just as easily have been named a principal himself. He too is now the adult son of the original LPR petitioner, and his petition can also be instantly relabeled an F2B petition, without any need to substitute a new sponsor or make other revisions. In each case, the alien had a qualifying relationship before he was 21 and retains it afterward; all that must be changed is the label affixed to his petition.

In contrast, as the Board held in *Wang*, the aged-out derivative beneficiaries of the other family preference categories—like the sons and daughters of the respondents here—cannot qualify for "automatic conversion." Recall that the respondents themselves were principal beneficiaries of F3 and F4 petitions; their children, when under 21, counted as derivatives, but lacked any qualifying preference relationship of their own. The F3 derivatives were the petitioners' grandsons and granddaughters; the F4 derivatives their nephews and nieces; and none of those are relationships Congress has recognized as warranting a family preference. See 8 U.S.C. §§ 1153(a)(3)-(4). Now that the respondents' children have turned 21, and they can no longer ride on their parents' coattails, that lack of independent eligibility makes a difference. For them, unlike for the F2A beneficiaries, it is impossible simply to slide the original petitions from a (no-longer-appropriate) child category to a (now-appropriate) adult one. To fit into a new category, those aged-out derivatives, like Wang's daughter, must have new sponsors—and for all the reasons already stated, that need means they cannot benefit from "automatic conversion."

All that said, we hold only that § 1153(h)(3) permits—not that it requires—the Board's decision to so distinguish among aged-out beneficiaries. …Section 1153(h)(3)'s first part—its conditional phrase—encompasses every aged-out beneficiary of a family preference petition, and thus points toward broad-based relief. But as just shown, § 1153(h)(3)'s second part—its remedial prescription—applies only to a narrower class of beneficiaries: those aliens who naturally qualify for (and so can be "automatically converted" to) a new preference classification when they age out. Were there an interpretation that gave each clause full effect, the Board would have been required to adopt it. But the ambiguity those ill-fitting clauses create instead left the Board with a choice—essentially of how to reconcile the statute's different commands. The Board, recognizing the need to make that call, opted to abide by the inherent limits of § 1153(h)(3)'s remedial clause, rather than go beyond those limits so as to match the sweep of the section's initial condition. On the Board's reasoned view, the only beneficiaries entitled to statutory relief are those capable of obtaining the remedy designated. When an agency thus

resolves statutory tension, ordinary principles of administrative deference require us to defer. See *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (When a statutory scheme contains "a fundamental ambiguity" arising from "the differing mandates" of two provisions, "it is appropriate to look to the implementing agency's expert interpretation" to determine which "must give way").

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2. Consular Nonreviewability

As discussed in *Digest 2013* at 19-22, the United States sought, but was not granted, rehearing at the court of appeals in *Din v. Kerry*, in which a panel of the U.S. Court of Appeals for the Ninth Circuit held that the government's identified statutory basis for a visa denial was insufficient for the American citizen spouse of the visa applicant and remanded to the district court for further proceedings. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013). Plaintiff in the lower court, an American citizen named Fauzia Din, had petitioned for her husband, Kanishka Berashk, a native and citizen of Afghanistan, to immigrate to the United States. Mr. Berashk's visa application was refused by a U.S. consular officer under the statutory provision covering terrorist activities (8 U.S.C. 1182(a)(3)(B)). On May 23, 2014, the United States filed a petition for writ of certiorari in the U.S. Supreme Court. Excerpts follow from the petition (with footnotes omitted).

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The Ninth Circuit clearly erred in ruling that respondent has a liberty interest in her marriage, protected under the Due Process Clause, that is implicated by denial of a visa to her alien spouse abroad. That ruling directly conflicts with the decisions of numerous other courts of appeals, and could have broad consequences across various areas of immigration law.

The Ninth Circuit also erred in concluding that respondent, as the U.S. citizen spouse of an alien whose visa is denied, has a right to judicial review of the consular officer's decision and to procedural due process in connection with the denial of a visa to the alien. The court then compounded that error by concluding that the government can defend the decision as "facially legitimate" only by providing the specific statutory subsection on which the denial was based and the factual basis for believing that the alien falls within the scope of that subsection. The Constitution confers no such rights, and neither Congress nor this Court has ever authorized such review. In addition, when a visa denial is (as in this case) based on security-related grounds, the review required by the Ninth Circuit conflicts with decisions of this Court and overrides a federal statute intended to protect the confidentiality of intelligence and other sensitive information on which a consular officer may rely in denying a visa to protect the national security. Review by this Court is warranted.

A. This Court's Review Is Warranted To Determine Whether A U.S. Citizen Has A Protected Liberty Interest That Is Implicated By The Denial Of A Visa Application Filed By An Alien Spouse

1. This Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1971), made clear that a non-resident alien abroad has no constitutional rights in connection with his application for a visa to enter the United States, and therefore no constitutional basis to insist upon an explanation for the denial of the visa or to obtain judicial review of the denial. See *id*. at 762, 766-768. The court of appeals ruled, however, that respondent, who has no legally cognizable rights under the INA in the issuance of a visa to Berashk, nevertheless is entitled under the Constitution to procedural due process in her own right in connection with the denial of the visa. The court reached that extraordinary result by reasoning that respondent possesses a substantive "protected liberty interest in marriage," derived directly from the Due Process Clause, in connection with her husband's visa application.…That ruling is deeply
flawed.

To qualify for substantive protection under the Due Process Clause, a liberty interest must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno v. Flores*, 507 U.S. 292, 303 (1993) (citation omitted); …. In ascertaining whether that test is satisfied, this Court has required "a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Flores*, 507 U.S. at 302).

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The court of appeals identified no basis for the notion that a person has a comparably fundamental due process interest in connection with the application for a visa to enter the United States filed by her alien spouse, who is subject to the plenary sovereign power of the United States to bar his admission. Perhaps recognizing that respondent's rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to Berashk,the court of appeals seized on language from *Cleveland Board of Education v. LaFleur, supra*—a case involving the decision whether to "bear or beget a child," 414 U.S. at 639 (internal quotation marks omitted)—that refers to "[f]reedom of personal choice in matters of marriage and family life." App., infra, 7a & n.1 (quoting 414 U.S. at 640) (internal quotation marks omitted) (brackets in original). As invoked by the court of appeals here, however, that exceedingly general language hardly qualifies as a "careful description" of a liberty interest that could confer a due process right on a U.S. citizen specifically concerning her spouse's admission to the United States. *Flores*, 507 U.S. at 302.

In reality, there is only one "choice" of respondent's that is directly affected by the denial of a visa to Berashk: her preference that her alien spouse live with her in the United States. The court of appeals resisted the suggestion that the rights to judicial review and procedural due process it fashioned were "predicated on a liberty interest in the ability to live in the United States with an alien spouse," insisting that a "more general right" was at issue. App., infra, 7a n.1. But the court did not explain any basis for that resistance—and, in light of the vagueness of the "more general right" on which it purported to rely and the fact that the visa denial does not impinge on the marriage-related interests that this Court has previously recognized, no such basis exists. It is apparent that the "freedom of personal choice" perceived by the court of appeals is, at bottom, an asserted constitutionally based liberty interest in having Berashk be present in the United States. …

There is no history in this Nation of recognizing a constitutionally protected liberty interest in having one's alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the spouse from entering. To the contrary, there is a long

history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States in Congress's complete discretion, as an exercise of that body's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Mandel*, 17 408 U.S. at 766. …

The contrary approach adopted by the court of appeals here could have sweeping consequences. Under such a legal regime, any U.S. citizen whose alien spouse is not permitted to enter this country, for any reason, might attempt to assert a constitutional claim. So, too, might any U.S. citizen whose alien spouse is placed in proceedings to remove him from this country because of (for instance) violation of the immigration laws, commission of a serious crime, or ties to terrorist activity. See 8 U.S.C 1227. Cf. *Payne-Barahona v. Gonzales*, 474 F.3d 1, 3 (1st Cir. 2007) ("If there were such a right, it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service."). None of those kinds of claims has been given credence by the courts, let alone viewed as implicating a constitutionally protected interest that confers a right to procedural due process and judicial review in connection with the application of the Nation's immigration laws to an alien family member abroad. In ruling otherwise, the Ninth Circuit went seriously astray.

2. The Ninth Circuit's erroneous ruling that respondent has an interest conferred by the Constitution that entitles her to challenge the denial of a visa for her alien spouse is in conflict with the decisions of numerous other courts of appeals.

In *Bangura v. Hansen*, 434 F.3d 487 (6th Cir. 2006), the Sixth Circuit reached a result directly contrary to the Ninth Circuit's decision here. *Bangura* involved claims brought by a U.S. citizen and his alien spouse that denial of a visa petition filed on behalf of the spouse violated their due process rights. The court of appeals ruled that the plaintiffs failed to allege a liberty interest that would allow them to state a procedural due process claim. See *id*. at 495-497. The court accepted that plaintiffs "have a fundamental right to marry," but explained that "[a] denial of an immediate relative visa does not infringe upon" that right. *Id*. at 496. The court also concluded that "[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country." *Ibid*. (internal quotation marks omitted) (citing *Almario v. Attorney Gen*., 872 F.2d 147, 151 (6th Cir. 1989)).

In *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), the Second Circuit relied on the same principle to reject claims virtually identical to those at issue here: that "the constitutional rights of a citizen wife had been violated by denial of her alien husband's visa application without reason * * * and that failure of the Department of State * * * to specify the reasons for denial of the husband's visa application denied him procedural due process." *Id*. at 554-555. The court refused to review the decision to deny the visa application under the rationale of *Mandel*, distinguishing that decision on the ground that "no constitutional rights of American citizens over which a federal court would have jurisdiction are 'implicated' here." *Id*. at 556-557. In particular, the court explained, the claim that denial of the alien's visa application implicated the constitutional rights of the citizen spouse was "foreclosed" by the principle that "no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse." *Id*. at 555 (citing, inter alia, *Noel v. Chapman*, 508 F.2d 1023, 1027-1028 (2d Cir.), cert. denied, 423 U.S. 824 (1975)).

As *Burrafato* indicates, courts of appeals addressing the issue in removal proceedings, as distinguished from proceedings involving denials of visa applications, have also reached the conclusion that no protected liberty interest is implicated by barring a U.S. citizen's alien spouse

from being present in the United States. See, *e.g.*, *Garcia v. Boldin*, 691 F.2d 1172, 1183-1184 (5th Cir. 1982) ("Mrs. Garcia and the children are United States citizens. The deportation order has no legal effect upon them. It does not deprive them of the right to continue to live in the United States, nor does it deprive them of any constitutional rights."); *Silverman*, 437 F.2d at 107 (rejecting argument that "the government's action" in seeking to deport an alien spouse of a U.S. citizen "is destroying [the] marriage"); *Swartz*, 254 F.2d at 339 ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband.").That differing context does not lessen the conflict between the holdings of those cases and the holding of the court below; the question about the existence and status of the relevant liberty interest is the same in both arenas.

In short, numerous decisions from other courts of appeals are irreconcilable with the Ninth Circuit's conclusion that respondent has a fundamental liberty interest implicated by the government's decision to deny her alien spouse a visa for entry into the United States that entitles her to procedural due process in her own right. This Court should grant certiorari to correct the Ninth Circuit's errors and restore nationwide uniformity on this previously settled issue.

B. The Court of Appeals' Imposition Of Judicial Review And Notice Requirements On A Consular Officer's Visa Determination Warrants This Court's Review

1. Even assuming that respondent's own constitutional rights are somehow implicated in this case, the Ninth Circuit decision is wrong. Purporting to apply the statement in *Mandel* that a "facially legitimate" exercise of discretion survives judicial review, the court of appeals authorized a searching inquiry into the reasons for denial of a visa and improperly imposed, as a matter of constitutional law, requirements of detailed notice with respect to aliens denied a visa on national security grounds.

a. As an initial matter, *Mandel* did not authorize judicial review of a consular officer's decision to deny a visa, and—contrary to the ruling below, see App., *infra*, 7 n.1—such a decision is not subject to review under *Mandel*'s rationale.

In *Mandel*, this Court assumed (but did not hold) that if a U.S. citizen's First Amendment rights were implicated, then that citizen could obtain review of a discretionary denial by the Attorney General of a waiver of the grounds that required the refusal of an alien's nonimmigrant visa application. In that narrow context, the Court examined the reason for the denial of the waiver that appeared in the record and concluded that because that reason was "facially legitimate and bona fide," it was not appropriate to "look behind the exercise of [the Attorney General's] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 769-770. The Court specifically declined to address whether the Attorney General was required to furnish such a reason. See *id*. at 770 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address or decide in this case.").

Moreover, a rationale that might support such limited review of a discretionary waiver of a ground of inadmissibility by the Attorney General does not extend to the underlying decision by a consular officer that such a ground applies. Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision that an alien is not eligible for a visa must, by definition, be tethered to the legal provisions that define such ineligibility. See, e.g., 8 U.S.C. 1182(a), 1201(g). It does not make sense to ask if the reasons for visa denial set forth in an Act of Congress are "facially

legitimate"; those reasons are legitimate on their face by their very nature, and courts are in no position to second-guess Congress's choices about which aliens should and should not be permitted to enter the United States. See generally *Fiallo*, 430 U.S. at 792-795; *Mandel*, 408 U.S. at 765- 767.

Accordingly, extension beyond the discretionary waiver context of the approach in *Mandel*—which, in any event, formed the narrow basis for decision in that case simply because a facially legitimate decision already appeared in the record, and not because the approach was deemed constitutionally mandated—is unwarranted. See *Mandel*, 408 U.S. at 767 ("[Plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [statutory provisions], and that First Amendment rights could not override that decision."). …Because the decision of a consular officer was directly at issue here, the Ninth Circuit erred in subjecting that decision to judicial scrutiny and insisting upon a further explanation for the visa denial.

b. Beyond that basic flaw at the threshold, moreover, the Ninth Circuit erred in ruling that the government must identify the specific subsection of 8 U.S.C. 1182(a)(3)(B) under which the visa application was denied and the factual basis for the determination of inadmissibility—and must do so not for the benefit of the alien affected, who has no constitutional rights in connection with his visa application, but for his spouse, who has no legally cognizable interest under the INA in issuance of such a visa. There is no basis in the Constitution to require the government to provide such information, and all the more so in a case involving terrorism-related grounds for refusing to admit the alien into the United States.

Congress recognized the special concerns associated with terrorism-related (and crime-related) reasons for a visa denial in 8 U.S.C. 1182(b)(3), which provides that when such reasons are at issue the consular officer need not furnish the alien with a written notice that states the determination and lists "the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1) and (3).12 Section 1182(b)(3) reflects Congress's judgment regarding the need for deference to the Executive's national security determinations, and the real risk that disclosure of the information underlying a visa denial could be harmful to the Nation's security. See, *e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting the "heightened deference to the judgments of the political branches with respect to matters of national security"); see generally *Galvan v. Press*, 347 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.").

The Ninth Circuit's decision permits an end-run around Congress's considered judgment to permit the Executive to shield information related to visa denials in those circumstances. That result turns on its head the established principle that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988); see generally *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("when it comes to * * * drawing factual inferences" in the national security context, " 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate") (quoting *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)).

Several decisions of this Court involving provisions similar to Section 1182(b)(3) recognize exactly these concerns. For instance, in *Shaughnessy v. United States ex rel. Mezei*,

345 U.S. 206 (1953), the Court considered the constitutionality of the exclusion of an alien on security-related grounds. See *id*. at 207. A regulation then in effect provided that the Attorney General could deny a hearing to aliens excludable "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." *Id*. at 211 n.8. The Court emphasized that in an exclusion case Congress dictates the relevant procedures and, "because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; 'it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.'" *Id*. at 212 (quoting *Knauff*, 338 U.S. at 543). The Court therefore ruled that "the Attorney General may lawfully exclude respondent without a hearing as authorized by the * * * regulations * * * . Nor need he disclose the evidence upon which that determination rests." *Id*. at 214-215; see, *e.g*., *Knauff*, 338 U.S. at 544 (rejecting challenge by excluded alien spouse of U.S. citizen to regulations under which the Attorney General could deny a hearing to such an alien when he "concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States" and "the disclosure of the information on which he based that opinion would itself endanger the public security"). Surely the holdings of those cases could not be overcome simply by having the excluded alien's spouse request the information. A fortiori that is true with respect to an alien, like Berashk here but unlike the aliens in *Mezei* and *Knauff*, who has not even reached our shores.

The Ninth Circuit's decision also is inconsistent with *Mandel*, the very decision that the court of appeals purported to be following. Emphasizing that a court should not "look behind" a visa-related determination, 408 U.S. at 771, *Mandel* did not require the government to provide a reason for its actions that did not already appear in the record, or engage in anything resembling the type of review that the decision below dictates. The Ninth Circuit has mandated that the government list a specific statutory subsection governing ineligibility for a visa and specific facts about what the alien did to fall within that subsection, so that a court could test those facts to "verify" that they "constitute a ground for exclusion under the statute." App., infra, 12a. That plainly entails "look[ing] behind" a consular officer's visa-denial decision.

2. In addition to being inconsistent with this Court's precedent, the Ninth Circuit's decision threatens to interfere with U.S. national-security interests in a number of different respects. Such serious adverse consequences counsel strongly in favor of review by this Court.

First, the disclosure that the Ninth Circuit has mandated could compromise classified or other sensitive information. The information supporting a visa denial pursuant to 8 U.S.C. 1182(a)(3)(B) is often classified or related to a sensitive ongoing law-enforcement or national-security investigation. Furnishing such information to the alien or his U.S. citizen spouse could jeopardize the public safety or the safety of individual operatives in the field by revealing information specific to the alien or classified sources and methods more generally. It is for these reasons—to protect the government's ability to keep confidential information about security- or crime-related investigations from targets or their associates and to protect law-enforcement and intelligence sources and methods—that Congress authorized consular officers to withhold notice of the ground for a visa denial in the first place. See 8 U.S.C. 1182(b)(3); see also 8 U.S.C. 1202(f) (providing that visa records shall be considered confidential); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 55 (1952) (House Report) (describing "information of a confidential nature" as

being information "the disclosure of which would be prejudicial to the interests of the United States").

Those concerns do not arise only from the Ninth Circuit's requirement that the government disclose "facts" about "what the consular officer believes the alien has done," App., infra, 9a, 14a; they are also relevant to that court's insistence that the government reveal the particular subsection of 8 U.S.C. 1182(a)(3)(B) that formed the basis for the visa denial, see App., *infra*, 12a, 14a. For example, the government's disclosure to a U.S. citizen that it has reason to believe that his or her spouse has solicited funds for a terrorist organization (see 8 U.S.C. 1182(a)(3)(B)(i)(I) and (iv)(IV)), or has been to a terrorist training camp (see 8 U.S.C. 1182(a)(3)(B)(i)(VIII)), could well enable anyone who learns the substance of that disclosure to make educated guesses about, or even to identify definitively, the nature and sources of the government's knowledge. That is precisely the type of harm Congress intended to prevent by enacting 8 U.S.C. 1182(b)(3).

Second, and relatedly, the Ninth Circuit's decision, if allowed to stand, could have a chilling effect on the sharing of national security information among federal agencies and between the United States and foreign countries. When making visa ineligibility determinations, consular officers rely largely on information that other agencies or entities provide to the Department of State. See 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); see also, *e.g*., House Report 36 (explaining that Congress intended Section 1105 to "strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States"). If the Department of State were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, consular officers may not receive or be permitted to rely upon the complete information needed to protect the national security. See, *e.g*., National Commission on Terrorist Attacks Upon the United States, *9/11 Commission Report* 384 (2004) ("For terrorists, travel documents are as important as weapons.").

The Ninth Circuit suggested that any harm to the United States could be ameliorated by providing information about the reasons for a visa denial to a district court in camera "if necessary." App., *infra*, 21a. But that proposed solution does not respect the sovereign power of the United States to bar the admission of aliens on security grounds, and does not adequately safeguard the political Branches' ability to make visa decisions in the interest of national security. The panel's ruling is vague about exactly what "procedures" should be followed and under what circumstances, *ibid*., and courts have sometimes been reluctant to "dispose of the merits of a case on the basis of ex parte, in camera submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987); … Moreover, any widening of access to sensitive information, even in controlled settings, increases the risk of unauthorized or inadvertent disclosure. The Ninth Circuit's imposition of a regime of judicial review of terrorism-related grounds for barring an alien from the United States is therefore likely to disrupt the government's efforts to safeguard national security and public safety.

3. The difficulties raised by the Ninth Circuit's decision could affect a significant number of visa applications every year. According to the Department of State, between January 1, 2012,

and December 31, 2012, consular officers denied 226,761 visa applications under 8 U.S.C. 1182(a), of which approximately 1400 were filed by aliens on the basis of their engagement or marriage to a U.S. citizen and were denied on Section 1182(a)(2) or (3) grounds. While some of those denials do not involve sensitive criminal or national security grounds, a meaningful number of them would.

For these reasons, and because of the serious errors in the Ninth Circuit's decision and the conflicts it creates with decisions of this Court and other courts of appeals, this Court's intervention is warranted.

* * * *

The Supreme Court granted the petition for certiorari on October 2, 2014 and the United States filed its brief on the merits on November 26, 2014. *Kerry v. Din*, No. 13-1402. Excerpts follow from the brief of the United States (with footnotes omitted).

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* * * *

A. The Court Of Appeals Erred In Holding That A U.S. Citizen Has A Protected Liberty Interest That Is Implicated By The Denial Of A Visa Application Filed By An Alien Spouse

The Ninth Circuit ruled that respondent—a U.S. citizen who is the spouse of a non-resident alien—has a due process right that is implicated by a consular officer's denial of the alien's visa application. That right, the court held, entitles her to judicial review of the denial of the alien's visa application and a fuller explanation of the basis for the denial—even though the alien himself has no such rights. That ruling is deeply flawed. The INA confers no legally cognizable interest on a U.S. citizen if her alien spouse abroad is denied a visa because he has been found personally ineligible on terrorism (or other) grounds under the INA. Nor does the Due Process Clause itself confer such an interest.8

1. Respondent was afforded access to certain procedures under the INA in connection with her own petition, at the first step of the visa process, for classification of Berashk as an immediate relative to whom a visa could be made available if he was later found admissible in his own right. But she cannot derive from the INA or its implementing regulations any protected interest in connection with Berashk's subsequent and distinct application on his own behalf. If a qualified "citizen of the United States" files a petition with USCIS to obtain immediate-relative status for an alien, 8 U.S.C. 1154(a)(1); see *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191, 2197-2198 (2014) (opinion of Kagan, J.), and USCIS determines that "the facts stated in the petition are true," then (absent circumstances not at issue here) USCIS "shall * * * approve the petition," 8 U.S.C. 1154(b); see 8 U.S.C. 1151(b). With respect to such a petition, the U.S. citizen is the party who is seeking action from the government. The decision whether to approve the petition generally turns on an assessment of whether the U.S. citizen is qualified to file it, and whether the U.S. citizen in fact has the claimed family relationship to the alien. If the petition is denied, the U.S. citizen can seek administrative reopening or reconsideration, see 8 C.F.R. 103.5, and can appeal an adverse decision to the Board of Immigration Appeals, see 8 C.F.R. 103.3(a), 1003.1(b)(5), 1003.5(b). In this case, respondent's petition was approved, and she therefore

received all of the process that she was due under the INA and pertinent regulations with respect to her petition.

But approval of a U.S. citizen's visa petition is not sufficient for the actual issuance of a visa to the alien beneficiary; it merely makes the alien eligible to submit his own application for a visa. See 8 U.S.C. 1201(a), 1202(a) and (e); 22 C.F.R. 42.31, 42.42; see also *Cuellar De Osorio*, 134 S. Ct. at 2198. A consular officer's decision to grant or deny a visa application filed by an alien abroad, see 8 U.S.C. 1201(a)(1), does not turn on the status of the original petitioner (here, the alien's U.S.-citizen family member), or on the nature of the petitioner's relationship to the alien or her reasons for filing the petition in the first instance. Rather, regardless of whether the alien's ability to apply for a visa rests on an approved petition filed by a family member—or on some other basis (such as an approved petition filed by a prospective employer, see 8 U.S.C. 1151(d), 1153(b))—the adjudication of the visa application by a consular officer is based on a close examination of the alien's own history, health, associations, criminal record, and other characteristics, in order to determine whether one of the grounds of inadmissibility in the INA might bar the alien's entry into the United States. See 8 U.S.C. 1182, 1201(a), (c), (d), and (g), 1202(a), (b), and (e).

The U.S.-citizen petitioner has no rights under the INA or implementing regulations with respect to the submission and consideration of the alien's visa application. An alien who is the subject of an approved petition need not, of course, apply for a visa at all. If he does apply, the citizen is not entitled under the INA or its implementing regulations to be present at the visa interview, or to obtain notice that the visa has been denied, see 8 U.S.C. 1182(b), or to review any "records of the Department of State and of diplomatic and consular offices of the United States pertaining to the * * * refusal" of the visa, 8 U.S.C. 1202(f). Indeed, in some cases information an alien discloses in his application, or the reasons for the ultimate refusal of a visa, may be of such a sensitive nature that the alien would not wish to reveal them to his own spouse or family members. See 8 U.S.C. 1182. Nor does the petitioner possess any basis in law to insist or expect that the alien's application will be granted, or any statutory or regulatory right to challenge or appeal a consular officer's denial of the application.

These provisions make clear that the INA and implementing regulations create no legally protected interest in the petitioning U.S. citizen with respect to the alien's separate visa application. See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999) (when U.S. sponsors' "petition was granted," their "cognizable interest" under the INA "terminated"); …. To the contrary, the INA and applicable regulations recognize that spouses are independent actors responsible for their own actions and for establishing their own eligibility for government benefits, such as admission to the United States.

2. In ruling that respondent is entitled to due process in her own right with respect to the denial of Berashk's visa application, the court of appeals did not rely on any provision of immigration law. Instead, the court reasoned that respondent possesses a substantive "protected liberty interest in marriage," derived directly from the Due Process Clause, in connection with her alien husband's visa application. … Although "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,'" *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), no such fundamental interest is implicated by this case. In light of Congress's plenary control over the admission of aliens—and Congress's exercise of that power in the INA, which confers no legally cognizable interest in a U.S. citizen with respect to an alien's visa application—there is simply no history in this Nation of recognizing a liberty interest in "the ability to live in the United States with an alien spouse." Pet. App. 7a n.1. And any

indirect harm experienced by respondent as a result of the government's denial of Berashk's visa application does not deprive respondent herself of an interest protected by the Due Process Clause.

a. The range of liberty interests protected by the Due Process Clause "is not infinite." *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972); see *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Under either a procedural or substantive due process analysis, determining whether an asserted liberty interest is "[a]mong the historic liberties" encompassed by the Clause, *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), requires examination of "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); see *Reno v. Flores*, 507 U.S. 292, 303 (1993) (explaining that to qualify for substantive protection under the Due Process Clause, a liberty interest must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental") (citations omitted); *Ingraham*, 430 U.S. at 672-675 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Such an assessment can be made only by first ascertaining "the precise nature of the private interest" that is allegedly threatened; merely stating a claimed interest in vague or general terms is not sufficient. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983); see *Glucksberg*, 521 U.S. at 721 (requiring "a 'careful description' of [an] asserted fundamental liberty interest" for purposes of substantive due process analysis) (quoting *Flores*, 507 U.S. at 302); see also *Roth*, 408 U.S. at 570-571.

This Court has recognized a deeply rooted liberty interest, protected by the Due Process Clause, in "rights to marital privacy and to marry and raise a family." *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965); see *Glucksberg*, 521 U.S. at 720 ("[T]he 'liberty' specially protected by the Due Process Clause includes the right[] to marry.") (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *Cleveland Bd. of Educ. v. LaFleu*r, 414 U.S. 632, 639-640 (1974) (citing cases regarding decisions to marry and have children to support the proposition that the Due Process Clause protects "freedom of personal choice in matters of marriage and family life"); see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (opinion of Powell, J.). Those rights are "of similar order and magnitude as the fundamental rights specifically protected" in the Constitution. *Griswold*, 381 U.S. at 495.

Those recognized rights, however, are not implicated here. The consular officer's denial of Berashk's visa application did not interfere with respondent's ability to marry him—their marriage was solemnized years before the denial took place. See Pet. App. 3a. 23 The visa denial did not nullify the marriage, or deprive respondent of the legal benefits the marriage created, or prevent her from living with her spouse anywhere in the world besides the United States. See *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) ("Even assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States. It does not attack the validity of the marriage."), cert. denied, 402 U.S. 983 (1971); cf. *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir.) ("[Deportation] would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created."), cert. denied, 357 U.S. 928 (1958). Nor did the denial of a visa to Berashk prevent respondent from "rais[ing] a family," either in the United States or elsewhere. *Griswold*, 381 U.S. at 495.

Perhaps appreciating that respondent's rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to Berashk, the court of appeals seized on language from *Cleveland Board of Education v. LaFleur*, *supra*—

a case involving the decision whether to "bear or beget a child," 414 U.S. at 640— that refers to "[f]reedom of personal choice in matters of marriage and family life." Pet. App. 7a & n.1 (citing *Bustamante*, 531 F.3d at 1062 (citing *LaFleur*, 414 U.S. at 639-640)). That vaguely worded passage cannot properly be divorced from the specific issue before this Court. See *Cohens v. Virginia*, 19 U.S. (6 24 Wheat.) 264, 399 (1821) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used"). As invoked by the court of appeals in the wholly distinct context here, that exceedingly general language hardly qualifies as a "precise" or "careful" description of a liberty interest that could confer a due process right on a U.S. citizen specifically concerning her spouse's admission to the United States. *Flores*, 507 U.S. at 302; *Lehr*, 463 U.S. at 256.

In reality, there is only one "choice" of respondent's that is directly affected by the denial of a visa to Berashk: her preference that he be admitted to the United States so that she can live in this country with him. See Br. in Opp. 17 (asserting "a constitutionally protected liberty interest in choosing where to live with [one's] spouse"). The court of appeals resisted the suggestion that the review it fashioned was "predicated on a liberty interest in the ability to live in the United States with an alien spouse," insisting that a "more general right" was at issue. Pet. App. 7a n.1. But the court did not explain any basis for its resistance to that suggestion. And in light of the vagueness of the "more general right" on which it purported to rely—and the fact that the visa denial does not impinge on the marriage-related interests that this Court has previously recognized—no such basis exists. The "freedom of personal choice" perceived by the court of appeals is, at bottom, an asserted constitutionally based liberty interest in having Berashk be present in the United States. See, *e.g.*, *Swartz*, 254 F.2d at 339 ("[T]he essence of appellants' claim, when it is analyzed, is a right to live in this country."); see also *Silverman*, 437 F.2d at 107.

There is no history in this Nation of recognizing a liberty interest in having one's alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the alien from entering. To the contrary, there is a long history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States in Congress's complete discretion, as an exercise of Congress's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Mandel*, 408 U.S. at 766 (citation omitted); see generally *Galvan v. Press*, 347 U.S. 522, 531 (1954) (explaining that the principle "that the formulation" of policies pertaining to the entry of aliens and their right to remain here "is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government," representing "not merely a page of history, but a whole volume") (citation and internal quotation marks omitted).

That power has often been recognized even when Congress's choices or the Executive's enforcement decisions result in separation of family members. See, *e.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539, 543-544, 547 (1950) (upholding Executive's right to deny entry to U.S. citizen's alien spouse based on confidential "security reasons" without providing a hearing); see also *Fiallo*, 430 U.S. at 798 (disclaiming any "authority to substitute our political judgment for that of the Congress," even when "statutory definitions deny preferential status to parents and children who share strong family ties"); see generally *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 232-234 (1896). Accordingly, in the immigration context, an asserted liberty interest in having an alien spouse admitted to the United States cannot be counted among

the "historic liberties," *Ingraham*, 430 U.S. at 673, arising directly from the Fifth Amendment. Decisions of the courts of appeals stretching back many decades have reached the same conclusion, "repudiat[ing]" the existence of a protected liberty interest in living in the United States with an alien spouse (or other alien relative). Pet. App. 7a n.1.

To counter that conclusion, respondent has pointed (Br. in Opp. 14-15, 20) to this Court's decision in *Fiallo v. Bell*, *supra*, which involved constitutional challenges to statutory provisions governing the system under which U.S. citizens and permanent residents can petition for immediate-relative or other family-related classifications for their alien parents or children. 430 U.S. at 791. But *Fiallo* does not aid respondent's cause. It did not concern review of a consular officer's decision denying an alien's visa application based on the distinct grounds on which an alien may be inadmissible because of his own circumstances. Moreover, as noted above, the decision soundly rejected the proposition that U.S. citizens have a "fundamental right" under the INA to have their alien family members admitted to the United States. *Id*. at 795 n.6; see p. 20, *supra*. The decision also emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." 430 U.S. at 792 & n.4 (citation and internal quotation marks omitted). While *Fiallo* recognizes that Congress's decisions embodied in immigration statutes are not always immune from judicial review, it does not suggest the existence of a constitutionally protected liberty interest in marriage that extends to having one's alien spouse admitted to the United States. See *id*. at 793-795 & nn.5-6, 798.

Respondent has also placed heavy reliance (Br. In Opp. 18-19) on *Moore*, *supra*, which recognizes a substantive due process right for a U.S.-citizen grandmother to live in the same household as her U.S.-citizen grandson. See 431 U.S. at 499 (opinion of Powell, J.) (explaining that a State cannot enter into the private realm of family life so as to make "a crime of a grandmother's choice to live with her grandson"). But Moore does not speak to the nature of a citizen's liberty interests in an immigration context. To the contrary, the purported liberty interest in living in this country with a non-resident alien who has been deemed inadmissible and denied a visa "is one far removed from the right of United States citizens to live together as a family." *Morales-Izquierdo v. DHS*, 600 F.3d 1076, 1091 (9th Cir. 2010). *Moore*'s holding is grounded in history and tradition. See 431 U.S. at 503-505 & n.12 (opinion of Powell, J.) (finding "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children" to be "deserving of constitutional recognition" because of its "venerable" roots) (footnote omitted). No such grounding exists with respect to the wholly distinct liberty interest that respondent claims.

That analysis does not, as respondent has insisted (Br. in Opp. 16-17), erroneously conflate the question of the existence of an asserted liberty interest with the question of the strength of the government's regulatory interest. Rather, it recognizes that where the government's regulatory powers have "tradition[ally]" been absolute, as is true of the admission of aliens, the asserted interest could never have taken sufficient "root[]" in the first place to enjoy protection arising directly from the text of the Due Process Clause itself. *Ingraham*, 430 U.S. at 672-675; *Flores*, 507 U.S. at 303; see generally *Mandel*, 408 U.S. at 770 (stating that in the visa context there is no call to "balanc[e]" the government's "justification" for its action against the interests of a U.S. citizen).

b. Respondent's contention that the denial of a visa to her alien spouse implicates her own liberty interests under the Due Process Clause suffers from another fatal flaw: it cannot be reconciled with the longstanding principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon v.*

Town Court Nursing Ctr., 447 U.S. 773, 789 (1980).

As this Court explained in *O'Bannon*, due process jurisprudence has long drawn a "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally," and has rejected the notion that the latter sort of action can be said to have interfered with the citizen's constitutionally protected liberty or property interests. *O'Bannon*, 447 U.S. at 788-789 (citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)) (stating that the Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals").

* * * *

The principle that "an indirect and incidental result of the Government's enforcement action * * * does not amount to a deprivation of any interest in life, liberty, or property," *O'Bannon*, 447 U.S. at 787, is fully applicable to this case, and it defeats respondent's claim that she has been deprived of any protected liberty interest. The United States has taken no adverse action against respondent herself; indeed, DHS approved respondent's petition to have Berashk classified as an alien who may apply for an immigrant visa. Respondent's only complaint is that an adverse decision solely concerning her spouse—the denial of his visa application, based on his own failure to satisfy the qualifications for obtaining a visa under the INA— has had a ripple effect, depriving her of her husband's company so long as she elects to remain within the borders of the United States. That is exactly the kind of "indirect and incidental" harm, *ibid*., that this Court has held "does not amount to a deprivation of any interest in life, liberty, or property," *ibid*.; see *id*. at 789-790. In the face of this Court's precedents, the Ninth Circuit's ruling that "the denial of a spouse's visa" impinges upon a U.S. citizen's "protected liberty interest in marriage" under the Due Process Clause, Pet. App. 7a, cannot be sustained.

c. The Ninth Circuit's due process ruling would have sweeping implications. Under such a legal regime, any U.S. citizen whose alien spouse is not permitted to enter this country, for any reason, might assert a constitutional claim. So, too, might any U.S. citizen whose alien spouse is deemed inadmissible at the border or is placed in proceedings to remove him from this country because of (for instance) violation of the immigration laws, commission of serious crimes, or ties to terrorist activity. See, *e.g*., 8 U.S.C 1227. And, because the constitutional right that the Ninth Circuit posited covers "personal choice" not just in "marriage" but also in "family life" more generally, Pet. App. 7a n.1 (citation omitted), such claims might also be asserted by U.S.-citizen children, parents, or even siblings whose alien family members have been deemed inadmissible to or removed from the United States. That result would work a sea change in the law, creating obstacles to the government's exercise of its plenary power over the Nation's borders and burdening the courts. See, *e.g*., *Morales-Izquierdo*, 600 F.3d at 1091.

Moreover, by breaking down the long-accepted "distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally," *O'Bannon*, 447 U.S. at 788, the Ninth Circuit's ruling would open the door to a host of constitutional claims outside the immigration context. If government action directed solely at respondent's alien spouse gave rise to a claim on respondent's part that her protected liberty interests have been infringed, "it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service."

Payne Barahona v. Gonzáles, 474 F.3d 1, 3 (1st Cir. 2007); cf. *Flores*, 507 U.S. at 301-303. Indeed, in support of her position in this case, respondent has embraced the very notion that such due process rights exist and that such claims may be brought. See Br. in Opp. 21 n.4 (stating that children "certainly would have" a constitutional right to challenge a parent's imprisonment). That state of affairs would overturn more than a century of precedent, see *O'Bannon*, 447 U.S. at 788-789, and flood the courts with suits by plaintiffs who claim a species of constitutional injury that has never previously been cognizable.

B. The Court Of Appeals Erred In Imposing Judicial Review And Notice Requirements On A Consular Officer's Visa Determination

The Ninth Circuit's decision is fundamentally flawed for additional reasons. Relying on the conclusion in *Mandel* that a "facially legitimate" exercise of discretion is sufficient (assuming that some judicial review of the denial of a waiver of inadmissibility is available at all), the court of appeals imposed, as a matter of constitutional law, requirements of detailed notice with respect to aliens denied a visa on security and related grounds identified by Congress. The court mandated a disclosure that would permit plaintiffs like respondent to obtain information not only about the legal basis for a terrorism-related denial of a visa to an alien spouse but also about the "facts" of "what the consular officer believes the alien has done." Pet. App. 9a, 14a. That ruling cannot be reconciled with this Court's precedents, including *Mandel* itself, or with Congress's judgment that visas refusals are not to be subject to judicial review or that the reasons for such refusals may remain undisclosed. Moreover, the notice requirements imposed by the court of appeals would give rise to serious national-security-related harms.

1. The doctrine of consular nonreviewability has deep roots in the law. For virtually as long as Congress has required immigrants to present documentation when arriving at a port of entry, see Immigration Act of 1924, Pub. L. No. 68-139, § 2(f), 43 Stat. 154 ("No immigration visa shall be issued to an immigrant if it appears to the consular officer * * * that the immigrant is inadmissible to the United States under the immigration laws."), courts have recognized that an alien has no right to challenge the refusal of a visa by a consular officer in the absence of affirmative congressional authorization. See, *e.g.*, *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928); …. That principle has become deeply embedded in judicial decisions, including decisions by this Court. See, *e.g.*, *Mandel*, 408 U.S. at 769-770; *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956) (declining to suggest that "an alien who has never presented himself at the border of this country may avail himself of [a] declaratory judgment action by bringing the action from abroad"); see also, *e.g.*, *Knauff*, 338 U.S. at 543; *Saavedra Bruno*, 197 F.3d at 1160, 1162 (discussing nonreviewability doctrine's history and collecting cases).

Powerful justifications support the preclusion of judicial second-guessing of decisions made by consular officers abroad relating to aliens' qualifications for admission to the United States. First, the consular nonreviewability doctrine is a necessary corollary of the principle that the political Branches have plenary power to make rules for the admission of aliens and to exclude those who do not qualify under those rules. …. That power is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Mandel*, 408 U.S. at 765; see *Knauff*, 338 U.S. at 542; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-660 (1892); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952) (explaining that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government").

This Court has therefore long held—including in decisions that predate the visa system—that "[t]he power of Congress to * * * prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications," even in cases in which there is some question about whether the alien falls within "a class forbidden to enter the United States." *Wong Wing*, 163 U.S. at 232-234 (emphasis added); see *Harisiades*, 342 U.S. at 588-589.

Second, Congress has repeatedly acknowledged the consular nonreviewability doctrine and chosen to leave it undisturbed. When putting the visa system into place in 1924, Congress understood that no form of review would be available to challenge a consular officer's denial of a visa. See H.R. Rep. No. 176, 68th Cong., 1st Sess. Pt. 2, at 10 (1924) (view of minority); 65 Cong. Rec. 5466 (1924). When Congress drafted the INA in 1952, there were suggestions to authorize judicial review of visa denials or to create "a semijudicial board * * * with jurisdiction to review consular decisions pertaining to the granting or refusal of visas," H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952) (House Report); see S. Rep. No. 1515, 81st Cong., 2d Sess. 622 (1950). But Congress declined to enact any such procedure. As a Senate Report explained, although "[o]bjection has been made to the plenary authority presently given to consuls to refuse the issuance of visas," allowing "review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws. * * * [T]he question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officer." S. Rep. No. 1515, at 622. And in 1961, when the INA was amended to authorize judicial review of determinations affecting aliens in the United States subject to deportation or exclusion proceedings, Congress provided no corresponding right to judicial review for aliens outside the United States claiming some right to enter. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651; see also 37 H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961) (stating that "[t]he sovereign United States cannot give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States"); see also 8 U.S.C. 1201(i) (allowing judicial review of visa revocations, as distinguished from initial visa denials, but only in proceedings to remove an alien who is in the United States and when "revocation provides the sole ground for removal").

It is within Congress's power to provide for some judicial (or administrative) review of a consular officer's refusal of a visa. But no statutory provision of that nature exists, see pp. 7-8, supra, or has ever existed, and the whole history of the immigration laws therefore reflects a congressional judgment that no such judicial examination should take place. "[U]nless expressly authorized by law," it is "not within the province of any court * * * to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543.

2. *Mandel* was decided against the backdrop of—and articulated justifications for—the long-standing consular nonreviewability doctrine. See 408 U.S. at 765-767. Contrary to the ruling below, see Pet. App. 6a-7a & n.1, *Mandel* did not authorize judicial review of a consular officer's denial of a visa, and there is no basis for recognizing any right to judicial review of such a decision.

In *Mandel*, this Court assumed (but did not hold) that if a U.S. citizen's First Amendment rights were implicated, then that citizen could obtain very limited review of the Attorney General's discretionary denial of a waiver of the grounds that required the refusal of an alien's nonimmigrant visa application by a consular officer. See 408 U.S. at 765, 770. In that narrow

context, the Court concluded that the reason for the Attorney General's denial of the waiver that appeared in the record was "facially legitimate and bona fide" and that it was not appropriate to "look behind the exercise of [the Attorney General's] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." Id. at 769-770. The Court specifically declined to address whether the Attorney General was required to furnish such a reason at all. See *id*. at 770 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.").

That narrow decision cannot be transmuted into a warrant for judicial review of a decision made by a consular officer abroad to deny an alien a visa. A rationale that might support limited judicial review of a discretionary waiver of a ground of inadmissibility by the Attorney General—and the Court in Mandel did not hold that there was a right of judicial review even then—simply does not extend to the underlying decision that such a ground for denying a visa applies. Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision not to issue a visa because an alien is ineligible must, by definition, be tethered to the legal provisions that define the alien's ineligibility. See, e.g., 8 U.S.C. 1182(a), 1201(g). It does not make sense to ask if the reasons for visa denial set forth in an Act of Congress are "facially legitimate"; those reasons are legitimate on their face by their very nature because Congress has prescribed them.

Attempting to examine the "facial[] legitima[cy]" of a statutorily grounded determination by a consular officer would ultimately put courts in the untenable position of second-guessing Congress's choices about which aliens abroad should and should not be granted visas as well as decisions by consular officers at distant posts about whether individual aliens who appear before them satisfy the conditions Congress has laid down. Such a task is outside the judiciary's realm; it cannot be reconciled with the consular nonreviewability doctrine and the fundamental principles that undergird it. That conclusion is not altered by the fact that Congress's choices might have an indirect effect on an alien's U.S-citizen family members or other persons in this country. A congressional decision to permit some aliens to be admitted and require other aliens to be excluded—and consular officers' application of those criteria—is a line-drawing exercise that will keep some family members apart and prevent some citizens who "would wish to meet and speak with" an ineligible alien from fulfilling that goal. *Mandel*, 408 U.S. at 768; see *id*. at 765-767; *Fiallo*, 430 U.S. at 792-795. That incidental consequence has never been thought to undermine Congress's plenary power to make those kinds of decisions or to vest consular officers with the authority to make final determinations in such matters abroad.

Accordingly, extension beyond the discretionary waiver context of the language in *Mandel* is not justified. See 408 U.S. at 767 ("[Plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [statutory provisions], and that First Amendment rights could not override that decision."); cf. *Saavedra Bruno*, 197 F.3d at 1161-1165 (acknowledging distinction between consular officer's visa denial and Attorney General's refusal to waive applicable grounds of inadmissibility); but see *American Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009). Because the decision of a consular officer to refuse a visa was directly at issue here, the Ninth Circuit erred in subjecting that decision to judicial scrutiny.

3. In any event, *Mandel* did not require the government to supply a reason that did not already appear in the record of a case so that a court could scrutinize that reason and determine whether it was sufficiently valid. See 408 U.S. at 769-770. But that is exactly what the Ninth

Circuit required here when it ruled that the government must identify the precise subsection of 8 U.S.C. 1182(a)(3)(B) under which the 41 visa application was denied and the factual basis for the determination of inadmissibility. Pet. App. 7a-21a. There is no basis in the Constitution to mandate disclosure or judicial review of such information.

a. By statute, the government is generally required to provide an alien whose visa application has been denied with a statement of the determination and "the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1). That notice provision does not apply, however, when the alien is found inadmissible on "[s]ecurity and related grounds," which include "terrorist activity," or on "[c]riminal and related grounds." See 8 U.S.C. 1182(a)(2), (a)(3), and (b)(3). Congress adopted that exception to the statutory notice requirement as part of a subtitle of the Antiterrorism and Effective Death Penalty Act of 1996 entitled "Exclusion of Members and Representatives of Terrorist Organizations," Pub. L. No. 104-132, Tit. IV, Subtit. B, 110 Stat. 1268, in order to ensure that "no explanation of the denial need be given to aliens excluded on the basis of their terrorist or other criminal activity," H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 116 (1996).

When the government invokes the protections of Section 1182(b)(3) to limit the information supplied to an alien whose visa application has been denied under Section 1182(a)(3) on security or related grounds, it does so for national-security or foreign-policy reasons. Deference to the political Branches is at its zenith in matters of national security and foreign affairs. See *Wayte v. United States*, 470 U.S. 598, 611-612 (1985) (stating that "[f]ew interests can be more compelling than a nation's need to ensure its own security")…

In keeping with that principle, decisions of this Court recognize that the government is entitled to shield information relating to the entry of aliens that "would itself endanger the public security," *Knauff*, 338 U.S. at 544—the very concern on which Section 1182(b)(3) is based. …

* * * *

b. By requiring the government to come forward with a detailed reason for the visa refusal that has been properly withheld from the alien himself, the Ninth Circuit's decision threatens to interfere with U.S. national-security and foreign-policy interests in a number of different respects. Those serious adverse consequences, which would leave an "unprotected spot in the Nation's armor," *Zadvydas*, 533 U.S. at 695-696 (citation omitted), counsel strongly against creating a disclosure requirement that the *Mandel* Court did not adopt and then subjecting the consular decision-making to judicial scrutiny.

First, the type of disclosure that the Ninth Circuit has mandated could compromise classified or other sensitive information. The information supporting a visa denial pursuant to 8 U.S.C. 1182(a)(3)(B) is often classified or related to a sensitive ongoing national-security or law-enforcement investigation. Furnishing such information to an alien's U.S.-citizen spouse (or perhaps even his parent, child, or sibling)—who is very likely to pass on the information to the alien and his associates—could jeopardize the national security, the public safety, or the safety of individual intelligence or other personnel in the field by revealing information specific to the alien or classified sources and methods more generally. …

Those concerns arise not only from the Ninth Circuit's requirement that the government disclose "facts" about "what the consular officer believes the alien has done," Pet. App. 9a, 14a, but also from its insistence that the government reveal the particular subsection of 8 U.S.C. 1182(a)(3)(B) that formed the basis for the visa denial, see Pet. App. 12a-15a. For example, the government's disclosure to a U.S. citizen that it has reason to believe that her spouse has

solicited funds for a terrorist organization (see 8 U.S.C. 1182(a)(3)(B)(i)(I) and (iv)(IV)), or has been to a terrorist training camp (see 8 U.S.C. 1182(a)(3)(B)(i)(VIII)), could well enable anyone who learns the substance of that disclosure to make educated guesses about, or even to identify definitively, the nature and sources of the government's knowledge. That is precisely the type of harm Congress intended to prevent by enacting 8 U.S.C. 1182(b)(3).

Second, the requirement imposed by the Ninth Circuit would have a chilling effect on the sharing of national-security information among federal agencies and between the United States and foreign countries. Visa ineligibility determinations are frequently based on information that other agencies or entities, including foreign governments and officials, provide to the Department of State. See, e.g., 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); House Report 36 …

Some of that information is reflected in State Department records that are routinely consulted when adjudicating visa applications, or are provided to consular officers by sources local to the consular post. Consular officers encountering visa applicants who might have terrorism-related or other security-related ineligibilities also obtain additional information needed to adjudicate the visa application by requesting a Security Advisory Opinion from the State Department, which undertakes an extensive review of all relevant information—including classified information—known to the Department or other agencies or sources. …

If consular officers were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, the State Department might well never receive all of the information relevant to enforcing the INA and protecting the national security. Certain foreign sources of information, in particular, may have strong interests in avoiding any action that might tend to reveal their assistance to the United States. … If consular officers were then forced to act upon aliens' visa applications without the Department of State or consular posts receiving pertinent information, the ineligibility criteria established by Congress would not be rigorously enforced, and the threat to national security would be grave indeed…

Respondent has noted (Br. in Opp. 31) that consular officers sometimes do disclose information to aliens whose visas are denied for terrorism-related (or crime-related) reasons. But that hardly suggests that the Constitution requires the government to make a particularized disclosure in every case in which a U.S.-citizen spouse demands one, even when it is the view of those who are familiar with intelligence reporting and terrorism trends and patterns that such a disclosure would cause harm to national security or foreign relations. See *Humanitarian Law Project*, 561 U.S. at 34. When disclosure of information to the alien is made, it reflects a considered determination that the information provided does not require invoking the protections of Section 1182(b)(3).

Contrary to the Ninth Circuit's suggestion (Pet. App. 21a), harm to the United States caused by the court of appeals' new disclosure requirements could not be ameliorated by providing information about the reasons for a visa denial to a district court in camera "if necessary." …

c. In this case, finally, the consular officer did supply a "facially legitimate" reason for the denial of Berashk's visa application: the fact that he is ineligible under Section 1182(a)(3)(B). *Mandel*, 408 U.S. at 769-770; see Pet. App. 27a-28a (Clifton, J., dissenting);

id. at 44a. For all the reasons set forth above, there is no basis for requiring the government to detail why the consular officer decided that the provision was applicable. And the prospect of such disclosure—with all of its attendant harms—could not in any event play any proper role in a *Mandel* analysis. Any determination by a court that the information in the government's hands was actually insufficient to give the consular officer "reason to believe" that Berashk fell into one of the statutory categories of visa ineligibility, 8 U.S.C. 1201(g), would amount to exactly the kind of review that the *Mandel* Court deemed impermissible.

* * * *

Respondent here seeks exactly what Mandel refused to allow—a "peek behind" the challenged decision, 408 U.S. at 778 (Marshall, J., dissenting), in the hope that she will be able to muster an argument that the consular officer reached an erroneous decision, see Pet. App. 14a (calling for courts to "verify" that facts of a particular case "constitute a ground for exclusion under the statute"). Under Mandel, a court is not entitled to "look behind" the exercise of the consular officer's responsibilities in that fashion. See *Humanitarian Law Project*, 561 U.S. at 34 (characterizing tasks that involve drawing "factual inferences" in the "national security" context as ones as to which "the lack of competence on the part of the courts is marked") (citation omitted). Because the visa application submitted by respondent's alien spouse abroad was denied by the consular officer on the basis of a nondiscretionary reason set forth in Section 1182(b)(3)(B), neither Mandel nor any other relevant authority permits any further inquiry—even if, contrary to our submission, respondent had a right to obtain judicial review of the consular officer's decision at all.

* * * *

3. Addition of Chile to the Visa Waiver Program

On February 28, 2014, the Secretary of Homeland Security, in consultation with the Secretary of State, designated Chile for participation in the Visa Waiver Program ("VWP"). The Department of Homeland Security ("DHS") issued the final rule adding Chile to the list of countries designated for participation in the VWP in the Federal Register on March 31, 2014. 79 Fed. Reg. 17,852 (Mar. 31, 2014). In general, travelers from designated VWP participants may apply for admission to the United States at U.S. ports of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The Secretary of Homeland Security determined, after consulting with the Secretary of State, that Chile meets all requirements for participation in the VWP under section 217 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1187, including: (1) A U.S. Government determination that the country meets the applicable statutory requirement with respect to nonimmigrant visitor visa refusals for nationals of the country; (2) an official certification that it issues machine-readable passports that comply with internationally accepted standards; (3) a U.S. Government determination that the country's designation would not negatively affect U.S. law enforcement and

security interests; (4) an agreement with the United States to report, or make available through other designated means, to the U.S. Government information about the theft or loss of passports; (5) a U.S. Government determination that the government accepts for repatriation any citizen, former citizen, or national not later than three weeks after the issuance of a final executable order of removal; and (6) an agreement with the United States to share information regarding whether citizens or nationals of the country represent a threat to the security or welfare of the United States or its citizens.

4. Visa Restrictions and Limitations

a. Human Rights Abusers in Venezuela

On June 30, 2014, the U.S. Department of State announced the imposition of restrictions pursuant to the INA on travel by certain Venezuelan government officials responsible for human rights abuses. The press statement making the announcement appears below and is available at *www.state.gov/r/pa/prs/ps/2014/07/229928.htm*.

_____

* * * *

Venezuela in recent months has witnessed large-scale protests by demonstrators concerned about deteriorating economic, social, and political conditions. Government security forces have responded to these protests in many instances with arbitrary detentions and excessive use of force. We have seen repeated efforts to repress legitimate expression of dissent through judicial intimidation, to limit freedom of the press, and to silence members of the political opposition.

Taking this into consideration and pursuant to Section 212(a)(3)(C) of the Immigration and Nationality Act, the Secretary of State has decided to impose restrictions on travel to the United States by a number of Venezuelan government officials who have been responsible for or complicit in such human rights abuses.

With this step we underscore our commitment to holding accountable individuals who commit human rights abuses. While we will not publicly identify these individuals because of visa record confidentiality, our message is clear: those who commit such abuses will not be welcome in the United States.

We emphasize the action we are announcing today is specific and targeted, directed at individuals responsible for human rights violations and not at the Venezuelan nation or its people.

* * * *

On December 18, 2014, the President signed into law S.2142, the Venezuela Defense of Human Rights and Civil Society Act of 2014. The Act imposes economic sanctions and provides for exclusion from the United States and the revocation of visas held by individuals involved in certain human rights abuses and other actions. Steps taken to implement the Act will be discussed in *Digest 2015*.

b. Visa Determinations Concerning Proposed Representatives to the UN

On April 18, 2014, the President signed into law S.2195, an act concerning visa restrictions if the President makes certain determinations with respect to proposed representatives to the United Nations. The legislation was passed after Iran nominated, as its proposed permanent representative to the UN, Hamid Aboutalebi, an individual involved in the 1979 seizure of the U.S. Embassy in Tehran. The President issued a signing statement explaining why legislation such as S.2915 must not be interpreted as presenting any constraint on the exclusive executive authority under the U.S. Constitution to receive foreign ambassadors. The signing statement, which follows, is available at *www.whitehouse.gov/the-press-office/2014/04/18/statement-president*:

> Today I have signed into law S. 2195, an Act concerning visa limitations for certain representatives to the United Nations. S. 2195 amends section 407 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, to provide that no individual may be admitted to the United States as a representative to the United Nations, if that individual has been found to have been engaged in espionage or terrorist activity directed against the United States or its allies, and if that individual may pose a threat to United States national security interests. As President Bush observed in signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, this provision "could constrain the exercise of my exclusive constitutional authority to receive within the United States certain foreign ambassadors to the United Nations." (Public Papers of the President, George Bush, Vol. I, 1990, page 240). Acts of espionage and terrorism against the United States and our allies are unquestionably problems of the utmost gravity, and I share the Congress's concern that individuals who have engaged in such activity may use the cover of diplomacy to gain access to our Nation. Nevertheless, as President Bush also observed, "curtailing by statute my constitutional discretion to receive or reject ambassadors is neither a permissible nor a practical solution." I shall therefore continue to treat section 407, as originally enacted and as amended by S. 2195, as advisory in circumstances in which it would interfere with the exercise of this discretion.

Following the White House statement at a press briefing on April 11, 2014, that "[w]e have informed the United Nations and Iran that we will not issue a visa to Mr. Abutalebi," the UN Host Country Committee met on April 22, 2014, to discuss issues concerning entry visas issued by the host country. The UN "Report of the Committee on Relations with the Host Country," available at *http://usun.state.gov/documents/organization/235945.pdf*, summarizes the U.S. statement as follows.

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* * * *

21. The representative of the host country stressed that the United States took its responsibilities as host country seriously and was mindful of the provisions of the Headquarters Agreement. The United States received thousands of applications annually for entry visas to transit to and from the Headquarters district and had an excellent track record of issuing such visas. Some applications required further administrative processing, which took additional time, she said, stressing that applicants were advised of that requirement when they applied. When administrative processing was required, the timing varied according to the circumstances of each case. The visa request for Mr. Aboutalebi had been taken extremely seriously.

22. She referred to events in 1979, when Iranian students had seized and taken over the United States embassy in Tehran and held United States diplomats hostage for 444 days. The hostage crisis had been a painful event in the history of the United States. At that time, Mr. Aboutalebi had been a member of the group responsible for the takeover. While he had claimed not to have been in Tehran when the embassy was seized, whether that was the case or not, he had acknowledged publicly that, after the storming of the embassy, he had later entered the premises on a couple of occasions to help to translate for the hostage-takers, including in public press conferences. When travelling to Algeria in 1979, Mr. Aboutalebi had claimed to have represented the group holding the diplomats hostage. At that time, he had been travelling with Abbas Abdi, who had admitted to taking part in the seizure. While in Algeria, Mr. Aboutalebi had boasted of his support for terrorist actions, specifically student activities that had resulted in the seizure of the embassy.

23. She said that her Government had given careful thought to how the request fit with its responsibilities under the Headquarters Agreement. It was a very rare and exceptional case when a participant in the hostage crisis sought to come to the United States. The position of her Government not to grant visas to participants in the crisis was not new. She assured the Committee that the United States had given the matter the most prompt and careful consideration at the highest levels in order to make a timely decision. Her Government had raised its concerns with the Government of the Islamic Republic of Iran some time previously and made its views clear in the hope of a quiet resolution. In past cases, the United States had advised the Secretariat at high levels that it found the presence of such individuals in the United States to be intolerable. It had done so in the case at issue. Her Government found it intolerable that persons involved in depriving United States diplomats of diplomatic protection should themselves be cloaked with that protection. The United States did not consider its position to be a violation of the Headquarters Agreement, she said, assuring the Committee that the host country had taken, and would continue to take, its obligations under the Agreement seriously. She reiterated that the current situation was exceptional in that it concerned a unique and painful event in the history of her country.

* * * *

5. Visa and Immigration Information-Sharing Agreements

Australia

On August 27, 2014, representatives of the governments of the United States and Australia signed an agreement “For the Sharing of Visa and Immigration Information.” The full text of the agreement is available at

www.state.gov/s/l/c8183.htm. The stated purpose of the agreement is "to assist in the administration and enforcement of the respective immigration laws of the Parties" by sharing information that would help with immigration enforcement, detecting and preventing crime, and making visa and removal determinations, among other things. The U.S.-Australia agreement entered into force on December 12, 2014, in accordance with Article 14 of the agreement, after an exchange of diplomatic notes confirming that both parties had completed all internal procedures necessary for entry into force of the agreement.

6. Certain Limited Exemptions for Applicants Who Provided De Minimis or Incidental Material Support for Tier III Groups

On February 5, 2014, the Departments of State and Homeland Security published in the Federal Register notices of their determination to exercise discretion under INA section 212(d)(3)(B)(i), 8 U.S.C. 1182(d)(3)(B)(i), as amended, to allow exemptions from inadmissibility provisions relating to Tier III terrorist organizations. These two limited material support exemptions to certain terrorism-related grounds for inadmissibility under the INA address a range of cases of individuals whom the U.S. government does not consider to be threats but have been adversely affected by the broad terrorism bars of the INA. These exemptions cover discrete kinds of limited material support that have adversely affected refugees, asylum seekers, immigrants and other travelers: material support to undesignated terrorist organizations that was insignificant in amount, provided incidentally in the course of everyday social, commercial, or humanitarian interactions, or provided under significant pressure.

The exemption for de minimis material support allows that:

> paragraphs 212(a)(3)(B)(iv)(VI)(bb) and (dd) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb) and (dd), shall not apply with respect to an alien who provided *insignificant material support* to an organization described in section 212(a)(3)(B)(vi)(III) of the INA, 8 U.S.C. 1182(a)(3)(B)(vi)(III), or to a member of such an organization, or to an individual described in section 212(a)(3)(B)((iv)(VI)(bb) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb),

provided that the alien satisfies certain other criteria, including not having the intent to assist any terrorist organization or activity. 79 Fed. Reg. 6913 (Feb. 5, 2014) (emphasis added).

The exemption for incidental material support allows that:

> paragraphs 212(a)(3)(B)(iv)(VI)(bb) and (dd) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb) and (dd), shall not apply with respect to an alien who provided *limited material support* to an organization described in section

> 212(a)(3)(B)(vi)(III) of the INA, 8 U.S.C. 1182(a)(3)(B)(vi)(III), or to a member of such an organization, or to an individual described in section 212(a)(3)(B)((iv)(VI)(bb) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb), that involves (1) certain routine commercial transactions or certain routine social transactions (*i.e.*, in the satisfaction of certain well-established or verifiable family, social, or cultural obligations), (2) certain humanitarian assistance, or (3) substantial pressure that does not rise to the level of duress,

provided that the alien also satisfies other criteria, including not having the intent to assist any terrorist organization or activity. 79 Fed. Reg. 6914 (Feb. 5, 2014) (emphasis added).

D. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act ("INA" or "Act"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240-47; *Digest 2004* at 31-33; *Digest 2010* at 10-11; *Digest 2011* at 6-9; *Digest 2012* at 8-14; and *Digest 2013* at 23-24. In 2014, the United States extended TPS designations for Haiti, Honduras, Nicaragua, South Sudan, and Sudan and designated Liberia, Sierra Leone, and Guinea, as discussed below.

a. Haiti

On March 3, 2014, the Department of Homeland Security ("DHS") announced the extension of the designation of Haiti for TPS for 18 months from July 23, 2014 through January 22, 2016. 79 Fed. Reg. 11,808 (March 3, 2014). The extension was based on the determination that the conditions in Haiti that prompted the original TPS designation continue to exist, specifically the effects of the 7.0-magnitude earthquake that occurred on January 12, 2010 continue to cause a substantial, but temporary, disruption of living

conditions in Haiti and Haiti remains unable, temporarily, to adequately handle the return of its nationals. *Id*.

b. South Sudan and Sudan

On September 2, 2014, DHS announced the extension of the designation of South Sudan for TPS for 18 months from November 3, 2014 through May 2, 2016, and the redesignation of South Sudan for TPS for 18 months, effective November 3, 2014 through May 2, 2016. 79 Fed Reg. 52,019 (Sept. 2, 2014). The basis for the extension and redesignation is the persistence of the ongoing armed conflict and other extraordinary and temporary conditions that prompted the 2013 TPS redesignation, which would pose a serious threat to the personal safety of South Sudanese nationals if they were required to return to their country.

Also on September 2, 2014, DHS announced the extension of the designation of Sudan for TPS for 18 months from November 3, 2014 through May 2, 2016. 79 Fed. Reg. 52,027 (Sept. 2, 2014). The extension was based on the determination that the conditions in Sudan that prompted TPS designation continue to be met, specifically, Sudan continues to experience ongoing armed conflict and other extraordinary and temporary conditions that prevent its nationals from returning in safety.

c. Honduras and Nicaragua

On October 16, 2014, DHS announced the extension of the designation of Honduras for TPS for 18 months from January 6, 2015 through July 5, 2016. 79 Fed. Reg. 62,170 (Oct. 16, 2014). The extension is based on the determination that the conditions in Honduras that prompted the original TPS designation continue to be met, namely, there continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, and Honduras remains unable, temporarily, to handle adequately the return of its nationals.

Also on October 16, 2014, DHS announced the extension of the designation of Nicaragua for TPS for 18 months from January 6, 2015 through July 5, 2016. 79 Fed. Reg. 62,176 (Oct. 16, 2014). The extension for Nicaragua is likewise based on the continuing disruption resulting from Hurricane Mitch.

d. Liberia, Sierra Leone, and Guinea

Effective November 21, 2014, DHS designated Liberia, Sierra Leone, and Guinea for TPS for 18 months due to the Ebola Virus Disease ("EVD") outbreak in those countries. 79 Fed. Reg. 69,502, 69,506, and 69,511 (Nov. 21, 2014). The basis for the determination from the Liberia notice is excerpted below, and is similar in the Sierra Leone and Guinea notices.

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The Secretary has determined, after consultation with the Department of State (DOS) and other appropriate Government agencies, that there exist extraordinary and temporary conditions in Liberia that prevent Liberian nationals (and persons having no nationality who last habitually resided in Liberia) from returning in safety. The Secretary also has determined that permitting such aliens to remain temporarily in the United States would not be contrary to the national interest of the United States.

On November 7, 2014 the World Health Organization (WHO) reported that as of November 4, 2014 there had been 13,241 cases of EVD in Guinea, Liberia, and Sierra Leone, with 4,950 deaths, making the 2014 EVD epidemic the largest in history. The outbreak began in Guinea in March 2014 and spread to Liberia and Sierra Leone.

The course of the EVD epidemic currently cannot be predicted accurately as cases of EVD continue to rise every day. As of November 4, 2014 there are numerous areas in each of the three countries where transmission continues to occur at high rates. Large scale efforts to control the epidemic in Guinea, Liberia, and Sierra Leone are ongoing to address these hotspots. As of November 4, 2014, the WHO reported a total of 6,619 cases occurring in Liberia, resulting in 2,766 deaths. Ebola is a highly infectious, severe, and acute viral illness with a high fatality rate. Although experimental treatments and vaccines are under development, there are currently no approved vaccines or approved antivirals for treatment of the disease. It is unlikely that a medical vaccine or cure could be produced on a large scale in the near future.

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The EVD epidemic has overwhelmed the already weak health care systems in Liberia and Sierra Leone, and placed Guinea's system under great strain. As of November 4, 2014, the WHO reports that, 545 health care workers are known to have developed EVD (88 in Guinea, 318 in Liberia, 11 in Nigeria, and 128 in Sierra Leone). Three hundred and eleven health care workers have died as a result of EVD infection. Fears of transmission, overcrowding, and inadequate medical and protective supplies have resulted in patients refraining from seeking care and doctors and nurses refusing to work. Individuals in these countries are increasingly unable to get treatment for preventable or treatable conditions, such as malaria, diarrheal diseases, and pregnancy complications. Maternal and child health care is being especially undermined. Attempted containment measures such as cancellation of airline flights, international trade restrictions, and disruption to agriculture threaten future food shortages and have added to the suffering caused by the EVD epidemic.

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

Liberian nationals (and persons without nationality who last habitually resided in Liberia) cannot return to Liberia in safety due to extraordinary and temporary conditions. See INA section 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C);

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

The designation of Liberia for TPS will be for an 18-month period from November 21, 2014 through May 21, 2016. See INA section 244(b)(2), 8 U.S.C. 1254a(b)(2)

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An estimated 4,000 Liberian nationals (and persons without nationality who last habitually resided in Liberia) are (or are likely to become) eligible for TPS under this designation.

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2. Programs and Policies regarding Unaccompanied Minor Migrants from Central America

The United States and the international community became increasingly concerned in 2014 about the growing number of minors from El Salvador, Guatemala and Honduras who crossed, or attempted to cross, the border into the United States. For example, on July 25, 2015, the Permanent Council of the Organization of American States ("OAS") adopted Resolution CP/DEC. 54 (1979/14) expressing concern about the problem of unaccompanied minors from Central America and calling on countries to take steps to ensure these minors' safety and address the problem in other ways. U.S. Ambassador to the OAS, Carmen Lomellin, delivered a statement on July 24 at the regular session of the OAS Permanent Council commenting on the resolution. Her comments appear below. The remainder of this section describes U.S. responses in 2014 to the problem of unaccompanied migrant children from Central America.

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We welcome the opportunity to provide comments on behalf of the United States Government regarding the declaration presented today by the Governments of El Salvador, Guatemala, and Honduras regarding unaccompanied children.

We have consulted closely with each government's delegation, and look forward to the timely approval of the text before us this morning.

I would like to begin by reiterating the Obama Administration's concern over the rise in unaccompanied children crossing into the United States. These children are some of the most vulnerable—becoming in some cases victims of violent crime or sexual abuse along the dangerous journey to our southern border.

The United States has taken steps to increase our capacity to receive and provide services to unaccompanied children under our immigration laws, and coordinate with their countries of origin for return when appropriate.

Madam Chair, the United States is working closely with the Central American and Mexican governments to address the underlying factors of migration, which has directly impacted the increase of unaccompanied children. Together, we are working towards a regional solution to what is a regional problem.

This regional response, Madam Chair, seeks to address the shortfalls in security, economic prosperity, and governance that contribute to emigration from the region. In addition to current programs, the President has sought supplementary funding from Congress for this purpose.

With this in mind, we appreciate the initiative undertaken today to adopt an OAS declaration on the issue of unaccompanied children. This effort serves to recognize and underscore the importance we all place on resolving this complex issue in a comprehensive and cooperative fashion.

Let me be clear—the United States clearly shares with countries of origin and transit the responsibility to address this issue. We are working diligently to ensure that these children are treated as humanely as possible once they reach the U.S. border.

The United States also recognizes that it shares a commitment with partners in the region to inform potential migrants and their families of the dangers of putting children in the hands of criminal smugglers, and to combat misinformation being spread by criminal networks.

To this end, Madam Chair, we are actively working to disseminate this information throughout the region to reach as many people as possible—through service announcements throughout the region.

With these points in mind, Madam Chair, we hope that today's discussion helps advance a mutually beneficial resolution to this extremely important matter.

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a. Refugee/Parole Program for Minors with Parents Lawfully Present in the United States

On November 14, 2014, the U.S. Department of State, Bureau of Population, Refugees, and Migration, issued a fact sheet on the establishment of an in-country refugee/parole program in El Salvador, Guatemala, and Honduras to provide an alternative to children traveling unaccompanied to the United States. The fact sheet is excerpted below and available at *www.state.gov/j/prm/releases/factsheets/2014/234067.htm*. The Department also issued an announcement of the launch of the program on December 3, 2014, available at *www.state.gov/r/pa/prs/ps/2014/12/234655.htm* (not excerpted herein).

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The United States is establishing an in-country refugee/parole program in El Salvador, Guatemala, and Honduras to provide a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to the United States. This program will allow certain parents who are lawfully present in the United States to request access to the U.S. Refugee Admissions Program for their children still in one of these three countries. Children who are found ineligible for refugee admission but still at risk of harm may be considered for parole on a case-by-case basis. The refugee/parole program will not be a pathway for undocumented parents to bring their children to the United States, but instead, the program will

provide certain vulnerable, at-risk children an opportunity to be reunited with parents lawfully [present] in the United States.

Applications for this program are initiated in the United States. Beginning in December 2014, a parent lawfully present in the United States will be able to file Department of State form DS-7699 requesting a refugee resettlement interview for unmarried children under 21 in El Salvador, Guatemala, or Honduras. Under certain circumstances, if the second parent resides with the child in the home country and is currently married to the lawfully present parent in the United States, the second parent may be added to the child's petition and considered for refugee status, and if denied refugee status, for parole. Form DS-7699 must be filed with the assistance of a designated resettlement agency that works with the U.S. Department of State's Bureau of Population, Refugees, and Migration to help resettle refugees in the United States. The form will not be available on the Department of State website to the general public and cannot be completed without the assistance of a Department of State-funded resettlement agency. These resettlement agencies are located in more than 180 communities throughout the United States. When the program is launched, the Department of State will provide information on how to contact one of these agencies to initiate an application.

Once a form DS-7699 has been filed, the child in his/her home country will be assisted through the program by the International Organization for Migration (IOM), which manages the U.S. Resettlement Support Center (RSC) in Latin America. IOM personnel from the RSC will contact each child directly and in the order in which the forms filed by lawfully present parents have been received by the U.S. Department of State. IOM will invite the children to attend pre-screening interviews in their country of origin in order to prepare them for a refugee interview with the Department of Homeland Security (DHS). DNA relationship testing will be required to confirm the biological relationship between the parent in the United States and the in-country child. After the IOM pre-screening interview but before the DHS interview, the lawfully present parent in the United States will be notified by IOM via the resettlement agency about how to submit DNA evidence of the relationship with their claimed child(ren) in El Salvador, Guatemala, or Honduras. If DNA relationship testing confirms the claimed relationship(s), IOM will schedule the DHS refugee interview.

DHS will conduct interviews with each child to determine whether he or she is eligible for refugee status and admissible to the United States. All applicants must complete all required security checks and obtain a medical clearance before they are approved to travel as a refugee to the United States. IOM will arrange travel for the refugee(s) to the United States. The parent of the child will sign a promissory note agreeing to repay the cost of travel to the United States. Approved refugees will be eligible for the same support provided to all refugees resettled in the United States, including assignment to a resettlement agency that will assist with reception and placement, and assistance registering children in school.

Applicants found by DHS to be ineligible for refugee status in the United States will be considered on a case-by-case basis for parole, which is a mechanism to allow someone who is otherwise inadmissible to come to the United States for urgent humanitarian reasons or significant public benefit. In order for the applicant(s) to be considered for parole, the parent in the United States will need to submit a Form I-134, Affidavit of Support, with supporting documentation to DHS. An individual considered for parole may be eligible for parole if DHS finds that the individual is at risk of harm, he/she clears all background vetting, there is no serious derogatory information, and someone has committed to financially support the individual while he/she is in the United States. Those children and any eligible parent considered for parole

will be responsible for obtaining and paying for a medical clearance. An individual authorized parole will not be eligible for a travel loan but must book and pay for the flight to the United States. Parole is temporary and does not confer any permanent legal immigration status or path to permanent legal immigration status in the United States. Parolees are not eligible for medical and other benefits upon arrival in the United States, but are eligible to attend school and/or apply for employment authorization. Individuals authorized parole under this program generally will be authorized parole for an initial period of two years and may request renewal.

It is anticipated that a relatively small number of children from Central America will be admitted to the United States as refugees in FY 2015, given the anticipated December launch and the length of time it takes to be processed for U.S. refugee admission. Any child or parent admitted as a refugee will be included in the Latin America/Caribbean regional allocation of the U.S. Refugee Admissions Program, which is 4,000 for FY 2015. If needed, there is some flexibility within the U.S. Refugee Admissions Program to accommodate a higher than anticipated number from Latin America in FY 2015.

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b. U.S. Response to Special Rapporteurs

On November 25, 2014, the U.S. Mission to the UN in Geneva provided a letter to several UN special rapporteurs in response to their request for answers to eight questions about the detention of unaccompanied children and possible human rights violations they experienced while in detention. The response was addressed to the special rapporteurs on the human rights of migrants; on the sale of children, child prostitution, and child pornography; on trafficking in persons, especially women and children; and on violence against women, its causes and consequences. The U.S. response appears below.

* * * *

Dear [Special Rapporteur []]:

Thank you for your letter to Ambassador Hamamoto dated July 7, 2014. The United States supports the mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on the sale of children, child prostitution and child pornography; the Special Rapporteur on trafficking in persons, especially women and children; and the Special Rapporteur on violence against women, its causes and consequences. In your letter, you expressed concern about information you had received regarding unaccompanied children in the United States and sought additional information from the United States government. We appreciate the opportunity to respond to the eight questions you posed in your letter.

1. Please provide any additional information and any comment you may have on the above mentioned allegations.

The U.S. Government is focused on maximizing every available resource to process safely unaccompanied migrant children apprehended by U.S. Customs and Border Protection (CBP) officers, in accordance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), the Immigration and Nationality Act, the Homeland Security Act of 2002, and other applicable laws. The Department of Homeland Security (DHS) conducts a basic health screening during the unaccompanied children's processing, and provides initial shelter, emergency medical care, access to telephones and other basic necessities for these children until they are transferred to the care and custody of the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR).

The role of CBP, a component of the U.S. Department of Homeland Security (DHS), at the border is as follows: (1) CBP officers and Border Patrol agents encounter and identify the individual as an unaccompanied child; (2) CBP officers and Border Patrol agents process the administrative case for the unaccompanied child; and (3) at the completion of processing, CPB either transfers the child to ORR's care and custody or, if permitted under the limited circumstances provided by law, arranges for the child's voluntary return.

For an unaccompanied child to be permitted to withdraw his or her application for admission and return voluntarily, the child must be a national or habitual resident of a contiguous country (*i.e.*, Canada or Mexico), and CBP must determine that the child: (1) does not have a fear of return to his or her country of nationality or country of last habitual residence owing to a credible fear of persecution; (2) is not a victim of a severe form of trafficking or at risk of being trafficked upon return to his or her country of nationality of last habitual residence; and (3) is able to make an independent decision to withdraw his or her application for admission.

As required by law, DHS screens all unaccompanied children who are nationals or habitual residents of a contiguous country (Mexico or Canada) upon apprehension to determine if they meet these criteria. DHS also screens unaccompanied children from noncontiguous countries for persecution or trafficking concerns as a matter of policy. Mexican unaccompanied children are returned to Mexico in coordination with Mexican authorities and in accordance with repatriation agreements between the United States and Mexico, as required by the TVPRA. These repatriation agreements include specific arrangements regarding the time, location and notification instructions for the repatriation for members of vulnerable populations.

Unaccompanied children from contiguous countries who do not withdraw their application for admission, as well as unaccompanied children from noncontiguous countries, are transferred to the care and custody of ORR and generally are referred for removal proceedings before an immigration judge. After transfer, ORR places unaccompanied children in the least restrictive setting that is in the best interest of the child, as required by law. HHS gives each child a complete medical exam within 48 hours and provides them with medical care, dental care, opportunities for extracurricular activities, and access to educational programs. Children are also screened separately to determine if they are victims of abuse, crime, or human trafficking, or if there are any immediate mental health needs that require special services. ORR then seeks to release the child to U.S. sponsors, including family members.

Once placed in removal proceedings, children may apply for asylum or seek other forms of relief from removal. Asylum applications filed by unaccompanied children are considered in the first instance by U.S. Citizenship and Immigration Services (USCIS) asylum officers

The United States fully honors its obligations, as a party to the 1967 Protocol to the 1951 Refugee Convention, and is committed to the protection of those whom U.S. authorities have determined to have a well-founded fear of persecution, or have suffered past persecution, in their

home country based on race, religion, nationality, membership in a particular social group, or political opinion and who do not fall within one or more of the exclusion or cessation grounds under the convention.

Following the large influx of unaccompanied children into the United States earlier this year, several U.S. government agencies worked together to improve conditions for children awaiting transfer to HHS custody, following their initial apprehension, by opening alternate facilities with appropriate food service, recreation, and other services.

2. Please provide information about the measures being implemented by your Excellency's Government to protect the rights of these unaccompanied migrant children.

As noted above, upon apprehension, DHS screens all unaccompanied children for protection concerns, including to identify victims of human trafficking as required by TVPRA 2008 and to determine whether the child has a fear of persecution upon return to his or her home country. Furthermore, all USCIS asylum officers receive specialized training on child-appropriate interview techniques and guidelines for assessing children's asylum claims. Subsequent to apprehension, DHS serves all minors with a Form I-770, Notice of Rights and Request for Disposition for Minors, and explains their rights as minors, including the right to use the telephone, be represented by a lawyer, and have a hearing before an immigration judge. Under U.S. law, barring exceptional circumstances, federal agencies must transfer an unaccompanied child to ORR care and custody within 72 hours of determining that the child is unaccompanied.

Unaccompanied children in HHS custody are given information on their legal rights and are provided legal screenings and legal representation in certain cases. They also are provided access to legal counsel to the greatest extent practicable. Custodians of unaccompanied children receive legal orientation trainings provided through the Department of Justice's Legal Orientation Program (LOP) and administered by the Executive Office for Immigration Review (EOIR). Providers of a legal orientation program for custodians of unaccompanied children (LOPC) offer general group orientations, individual orientations, self-help workshops, and assistance with pro bono referrals. Additionally, LOPC providers are able to assist with school enrollment and make referrals to providers of social services to help ensure the well-being of the child. EOIR issues guidance to LOPC providers designed to assist them in identifying victims of mistreatment, exploitation, and trafficking; protecting the victims from further harm; and connecting the victims to needed social services.

DOJ and the Corporation for National and Community Service (CNCS), which administers AmeriCorps national service programs, have awarded $1.8 million in grants to increase the effective and efficient adjudication of immigration proceedings involving certain children who have crossed the U.S. border without a parent or legal guardian and whose parent or legal guardian is not in the United States or is in the United States but unavailable to provide care and physical custody. The grants will be disbursed through "justice AmeriCorps" and will enable legal aid organizations to enroll approximately 100 lawyers and paralegals to represent children in immigration proceedings. The "justice AmeriCorps" members will also help to identify children who have been victims of human trafficking or abuse and, as appropriate, refer them to support services and authorities responsible for investigating and prosecuting the perpetrators of such crimes. In addition, DOJ will be providing limited funding through EOIR for other direct representation initiatives for children.

3. As the issue of unaccompanied migrant children affects countries of origin, transit and destination, please provide information with regard to any regional protection

measures in place that provide protection to migrant children.

The United States is committed to working closely with the governments of El Salvador, Guatemala, Honduras, and Mexico to find a solution to this humanitarian crisis and to address the underlying factors that affect migration from Central America.

For instance, the Department of State (DOS) and DHS recently attended the 19th Regional Conference on Migration (RCM), which took place in Managua, Nicaragua in June 2014, and included representatives from the countries of Central America, Mexico, Canada, and the Dominican Republic. The RCM is an informal, state-led, consensus-based body that allows for non-political discussions of regional migration themes. Vice-ministers and heads of delegation jointly issued the "Managua Extraordinary Declaration" on unaccompanied children that, *inter alia*, endorses the creation of an *ad hoc* working group on migrant children, calls for countries to counter misinformation propagated by smugglers about immigration benefits, calls on member countries to take actions to discourage irregular migration and combat smuggling and human trafficking, and calls for cooperation with civil society and international organizations in providing protection to children.

CBP has initiated and run public campaigns in Central America to help convey that there is no pathway to U.S. citizenship. CBP has also run campaigns in the U.S. aimed at having individuals in the U.S. discourage their family members in Central America from making the journey to the United States.

In addition, DOS has partnered with the International Organization for Migration (IOM) to implement programs that build the capacity of Central American governments to identify, screen, protect, and refer unaccompanied child migrants to appropriate services. And through its partnership with IOM, United States Agency for International Development (USAID) is working with government officials, civil society organizations, and other partners in Honduras, Guatemala, and El Salvador, to provide immediate care, child protection services, and onward assistance for returning families and unaccompanied children.

4. Please explain all measures that have been taken, or are intended to be taken, by US Customs and Border Protection (CBP) and US Border Patrol to ensure adequate protection safeguards for unaccompanied children upon arriving at the US South Texas border and during their transfer and detention, including their right to seek asylum.

Note: The Office of the Border Patrol is a component of CBP.

DHS is required by the TVPRA 2008 to screen all unaccompanied children who are nationals or habitual residents of a contiguous country to determine if they have been victims of human trafficking, are at risk of being trafficked upon return, or have a fear of persecution if they return to their home country. DHS also screens unaccompanied children from noncontiguous countries for persecution or trafficking concerns as a matter of policy. Unaccompanied children from contiguous countries who present these factors or who do not voluntarily withdraw their applications for admission or lack the capacity to do so, as well as unaccompanied children from noncontiguous countries, are transferred to ORR's care and custody. In accordance with law, they generally are placed in removal proceedings before an immigration judge. In removal proceedings, the children are provided full opportunity to apply for asylum or seek other protections available under U.S. laws that would permit them to remain in the United States. Through internal policies and procedures and related training for its employees, DHS ensures adequate protection safeguards for unaccompanied children from the time they are encountered by CBP officers and Border Patrol agents until they are transferred to HHS custody.

5. As no child should be detained and because there is no empirical evidence that

detention deters irregular migration or discourages persons from seeking asylum, what alternatives rather than alternative forms of detention or alternatives to release – has your Excellency's Government considered for migrant unaccompanied children irregularly entering the country, bearing in mind that alternatives have been found to be significantly more cost-effective than traditional detention regimes.

Under U.S. law, DHS and other federal agencies must transfer an unaccompanied child to HHS custody within 72 hours of determining that child is unaccompanied, unless exceptional circumstances apply. HHS is required by law to promptly place these children in the least restrictive setting that is in the best interest of the child. Ninety-five percent of children who enter HHS custody are placed with a parent, relative, or non-relative sponsor within approximately 35 days, and HHS is working to reduce that time. Placement of children who are identified as victims of trafficking may include placement in the Unaccompanied Refugee Minor program if a suitable family member is not available to provide care.

6. Please inform us as to whether individual assessments are carried out in each case, and whether the child or a representative is allowed to submit the reasons why he or she should not be deported, and to have the case reviewed by the competent authorities.

The U.S. government makes individualized determinations as to whether each unaccompanied child is eligible for protection. Upon apprehension, DHS screens all unaccompanied children to determine protection concerns, including to identify victims of human trafficking as required by the Trafficking Victims Protection Reauthorization Act of 2008 and to determine whether the child has fear of persecution upon return to the home country.

Unaccompanied migrant children from noncontiguous countries, as well as children from contiguous countries who do not withdraw their application for admission, are placed in removal proceedings where their cases are individually reviewed by an immigration judge. These proceedings provide unaccompanied children the opportunity to assert a claim of asylum or seek other protections available. The children have the right to be represented by legal counsel in the proceedings, and there are various programs available to assist them with access to legal counsel to the greatest extent practicable.

7. Please inform us as to whether each child is quickly provided with a legal guardian who is competent and able to represent them in any ensuing legal proceedings, as well as a competent lawyer able to defend their rights in such proceedings.

HHS usually places unaccompanied children in short term shelters with child welfare specialists. During this time, HHS facilitates the child's safe and timely release to live with a parent or family member in the United States. During that time the children will be subject to removal proceedings and required to appear before an immigration judge. HHS has streamlined and accelerated this process by reducing the average length of stay for released unaccompanied children from 54 days in 2012 to 35 days in 2014. These children are provided with legal services, which includes information about their legal rights, screenings for legal relief eligibility, direct representation for certain cases, and access to legal counsel to the greatest extent practicable. HHS also ensures that all sponsors know that they have a responsibility to bring children to immigration court proceedings.

Furthermore, HHS is authorized to appoint independent child advocates for trafficking victims and other vulnerable unaccompanied children to promote the best interests of the child. The U.S. government is taking steps to facilitate legal representation for this vulnerable population. For example, as mentioned above, DOJ and the Corporation for National and Community Service (CNCS) have awarded $1.8 million in grants to enroll approximately 100

lawyers and paralegals to represent children in immigration proceedings. The "justice AmeriCorps" members will also help to identify children who have been victims of human trafficking or abuse and, as appropriate, refer them to support services and authorities responsible for investigating and prosecuting the perpetrators of such crimes. The Administration has also taken steps to encourage the private Bar to assist by providing pro bono representation to unaccompanied children.

8. Please provide us the details, and where available the results, of the procedures put in place for the rapid identification, provision of assistance and protection of potential child victims of trafficking and exploitation among these unaccompanied migrant children. If no such measures have been taken, please explain why?

As discussed above, although relevant laws and regulations do not require immediate screening of unaccompanied children from noncontiguous countries, DHS, as a matter of policy, screens all unaccompanied children at a land border or port of entry to determine if they have been victims of human trafficking, are at risk of being trafficked upon return, or have a fear of persecution if they return to their home country. Unaccompanied children may also apply to DHS and DOJ for immigration relief that would permit them to remain in the United States, including asylum for those who have a well-founded fear of persecution in their country of nationality.

All unaccompanied children in HHS custody are screened by trained child welfare specialists for trafficking concerns. Any suspected child trafficking victim is referred to HHS's Anti-Trafficking in Persons office. If there is credible information that indicates the child may be a victim of trafficking, the child may be granted an eligibility letter and provided federally funded benefits and services. As part of its sponsor assessment process, HHS will conduct a home study on any potential sponsor of a victim of trafficking to ensure that the child is released in a safe and supportive environment.

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3. Resettling Syrian Refugees

On December 9, 2014, Assistant Secretary of State Anne C. Richard of the Bureau of Population, Refugees, and Migration, delivered remarks in Geneva on U.S. plans to resettle Syrian refugees. Her remarks are excerpted below and available at *www.state.gov/j/prm/releases/remarks/2014/234855.htm*.

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We applaud the generosity of Syria's neighbors. They opened their borders and took in Syrian refugees. Like the High Commissioner I have visited all the host countries represented here today. These countries have helped save millions of lives.

As the flow of refugees has grown to a mass exodus, countries hosting refugees in the region have contended with overcrowded hospitals and schools, shortages of everything from housing to water, economic pressures and recent evidence of mounting public resentment.

But these very real burdens must pale in comparison to the daily struggles of Syrians themselves.

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For Syrians and for other victims of violence and persecution—resettlement offers not just an escape, but a chance to start over.

A family from Homs, a shop owner, his wife, and their six children, experienced this flight and rescue. In August of 2010, the father was standing in a crowd of peaceful protesters when the Syrian military arrived and opened fire. Bodies piled up in front of his shop, shells reduced it to rubble, neighbors disappeared, and soldiers ransacked the family's apartment and made threats. The family fled to Jordan, and they were eventually resettled in the United States. The parents say one of their dreams has already come true. All of their children are back in school.

Only a small fraction of those who want to be resettled can be—only about one hundred thousand refugees per year, worldwide. There are more than six times that many Syrian refugees in Jordan alone.

But war's true cost is measured in human suffering. Resettlement can help—one person at a time—to bring that suffering to an end.

We applaud the 25 countries that have agreed to resettle Syrian refugees, including some who will be accepting UNHCR refugee referrals for the first time. The United States accepts the majority of all UNHCR referrals from around the world. Last year, we reached our goal of resettling nearly 70,000 refugees from nearly 70 countries. And we plan to lead in resettling Syrians as well. We are reviewing some 9,000 recent UNHCR referrals from Syria. We are receiving roughly a thousand new ones each month, and we expect admissions from Syria to surge in 2015 and beyond.

Like most other refugees resettled in the United States, they will get help from the International Organization for Migration with medical exams and transportation to the United States. Once they arrive, networks of resettlement agencies, charities, churches, civic organizations and local volunteers will welcome them. These groups work in 180 communities across the country and make sure refugees have homes, furniture, clothes, English classes, job training, health care and help enrolling their children in school. They are now preparing key contacts in American communities to welcome Syrians.

I am inspired both by the resilience of refugees we resettle, and the compassion of those who help them. Resettlement cannot replace what refugees have lost or erase what they have endured. But it can renew hope and help restart lives. That can make all the difference.

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Cross References

ILC's Work on Expulsion of Aliens, **Chapter 7.D.5.**
Diplomatic relations, **Chapter 9.A.**
*Suit seeking to record Israel as place of birth on passport (*Zivotofsky*)*, **Chapter 9.C.**

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Federal Rules of Criminal Procedure Updated to Facilitate Compliance with Consular Notification and Access Obligations

The United States government updated the Federal Rules of Criminal Procedure in 2014 to help facilitate compliance with its consular notification and access obligations. The updated rules took effect December 1, 2014. A December 2, 2014 State Department press statement, available at *www.state.gov/r/pa/prs/ps/2014/12/234612.htm*, describes the key changes as follows:

> Pursuant to these changes, a defendant who is not a United States citizen and who has been charged with a federal crime shall be informed by a federal magistrate judge at the initial appearance that he or she "may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested."

The updates to the Federal Rules of Criminal Procedure are part of a broader effort to achieve compliance with consular notification and access obligations, including through training to law enforcement, prosecutors, and judges. See *Digest 2011* at 10-11 and *Digest 2010* at 13-22 describing some of these efforts.

2. State Actions Relating to *Avena*

As discussed in *Digest 2013* at 27-29, the U.S. Department of State requested that Texas authorities provide Edgar Arias Tamayo, a Mexican national named in the International Court of Justice's *Avena* decision, with the judicial "review and reconsideration" mandated by the ICJ decision and/or delay the execution until he is provided with such review and reconsideration. For further background on efforts to facilitate compliance with the Vienna Convention on Consular Relations, as well as the ruling of the ICJ in *Avena*, see *Digest 2004* at 37-43; *Digest 2005* at 29-30; *Digest 2007* at 73-77; *Digest 2008* at 35, 153, 175-215; *Digest 2011* at 11-23; *Digest 2012* at 15-16; and *Digest 2013* at 26-29. On January 22, 2014, the State of Texas executed Mr. Tamayo without conducting further review and reconsideration of his case in accordance with *Avena*. On January 23, 2014, the State Department issued the following press statement (available at *www.state.gov/r/pa/prs/ps/2014/01/220546.htm*) expressing regret at the execution.

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On January 22, 2014, the State of Texas executed Edgar Arias Tamayo, following his conviction for the murder of a Houston, Texas police officer in 1994. Mr. Tamayo was a Mexican national subject to the International Court of Justice's *Avena* decision. The Court in *Avena* found that the United States had failed to provide consular notification and access to 51 Mexican nationals, including Mr. Tamayo, as required under the Vienna Convention on Consular Relations (VCCR). The United States, like 170 other countries around the world, is party to the VCCR. The VCCR ensures that individuals who are detained in a foreign country can receive access to and assistance from their embassies and consulates overseas in order to navigate foreign legal systems or otherwise get the assistance that they need. In *Avena*, the International Court of Justice ordered the United States to provide "review and reconsideration" of the 51 Mexican nationals' convictions and sentences to determine whether they were actually prejudiced by not having been afforded consular notification and access in accordance with the VCCR.

The United States' compliance with our international obligations under *Avena* is critical to our ability to ensure consular access and assistance for our own citizens who are arrested or detained by foreign governments, as well as to maintain cooperation from foreign governments on a broad range of law enforcement and other issues. The Department of State had communicated these important interests to Texas authorities with respect to Mr. Tamayo's case, including urging Texas to delay Mr. Tamayo's execution in order to provide an opportunity for the review of Mr. Tamayo's conviction and sentence required under the *Avena* decision. The Department regrets Texas' decision to proceed with Mr. Tamayo's execution without that review and reconsideration, but remains committed to working to uphold our international obligations under the *Avena* judgment. This case illustrates the critical importance of Congress passing the

Consular Notification Compliance Act, which would provide an additional mechanism for the United States to meet our international obligations.

* * * *

The State of Texas executed another of the Mexican nationals named in *Avena*, Ramiro Hernandez Llanas, on April 9, 2014. The United States provided the following statement regarding the execution in response to the European Union at the Organization for Security and Cooperation in Europe ("OSCE") in Vienna on April 10, 2014. Gary Robbins, Deputy Chief of Mission for the U.S. Mission to the OSCE, delivered the statement, which is available at *http://osce.usmission.gov/apr_10_14_dp.html*.

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Mr. Hernandez was one of 51 Mexican nationals named in the International Court of Justice's *Avena* decision, wherein the court held that the United States had failed to comply with the consular notification and access provisions of the Vienna Convention on Consular Relations (VCCR). With respect to Mr. Hernandez, the International Court of Justice found that he was not informed of his option to have the Mexican Consulate notified of his arrest in accordance with the VCCR. The International Court of Justice ordered the United States to provide "review and reconsideration" of the 51 Mexican nationals' convictions and sentences in order to determine whether they were actually prejudiced by the VCCR violations identified in the decision.

The United States takes its international obligations under the *Avena* judgment and the VCCR seriously and has communicated these important interests to Texas authorities. The Department of State urged Texas to take into consideration the *Avena* judgment and the VCCR violation in determining whether to grant a reprieve of Mr. Hernandez's execution and remains committed to working to uphold the United States' international obligations under the *Avena* judgment and under the VCCR.

The United States respects the concerns of the European Union regarding the imposition of the death penalty in this case, but reminds the European Union that the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, provides for imposition of the death penalty for the most serious crimes when carried out pursuant to a final judgment rendered by a competent court, and accompanied by appropriate procedural safeguards and the observance of due process. This includes the right to seek pardon or commutation of sentence in all cases. The imposition of the death penalty, in appropriate circumstances, has also been upheld by the United States Supreme Court.

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B. CHILDREN

1. Adoption

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

b. Report on Intercountry Adoption

In March 2015, the State Department released its Annual Adoption Report to Congress. The report is available at *http://travel.state.gov/content/dam/aa/pdfs/fy2014_annual_report.pdf*. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2014, average times to complete adoptions, and median fees charged by adoption service providers.

c. Implementation of Intercountry Adoption Universal Accreditation Act

As discussed in *Digest 2012* at 19, the Intercountry Adoption Universal Accreditation Act of 2012 ("UAA") was enacted to extend the safeguards provided by accreditation and oversight of adoption service providers ("ASPs") established in the Intercountry Adoption Act of 2000 ("IAA") and the IAA's enforcement mechanisms to U.S. adoptive parents, foreign children, and birth families involved in intercountry adoption that do not fall within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993 ("Convention"). On July 14, 2014, the UAA took effect and the Department of State issued an interim, amended rule on the accreditation and approval of adoption service providers in intercountry adoptions, reflecting the requirement of the UAA that Convention standards apply in non-Convention cases, known as "orphan" cases in the INA. The interim rule also revised the accreditation rule by referring to Department of Homeland Security ("DHS") Convention home study regulation.

2. Abduction

a. 2014 Hague Abduction Convention Compliance Report

In April 2014, the Department of State submitted to Congress its Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention" or "Convention") pursuant to 42 U.S.C. § 11611. The report evaluates compliance by treaty partner countries with the Convention. The Convention provides a legal framework for securing the prompt return of wrongfully removed or retained children to the country of their habitual residence where a competent court can make decisions on issues

of custody and the child's "best interests." The compliance report identifies the Department's concerns about those countries in which implementation of the Convention is incomplete or in which a particular country's executive, judicial, or law enforcement authorities do not appropriately undertake their obligations under the Convention. The 2014 report, covering the period January 1, 2013 through December 31, 2013, identified Costa Rica, Guatemala, and Honduras as "Not Compliant with the Convention" and named the Bahamas and Brazil as states demonstrating "Patterns of Noncompliance." The report is available at *http://travel.state.gov/content/dam/childabduction/complianceReports/2014.pdf*

b. International Child Abduction Prevention and Return Act

The United States enacted a new law in 2014, the Sean and David Goldman International Child Abduction Prevention and Return Act ("ICAPRA"). Pub. L. No. 113-150, 22 U.S.C. 9101 note. ICAPRA creates additional reporting requirements for the State Department's annual Hague Abduction Convention compliance report and calls on the Department to initiate a process to develop and enter into bilateral arrangements, as appropriate, with certain countries with which the United States has not partnered under the Convention. The law also requires actions by the Secretary of State in response to patterns of noncompliance in cases of international child abductions. See "Compliance Information, " on the International Parental Child Abduction page of the Bureau of Consular Affairs at *http://travel.state.gov/content/childabduction/english/legal/compliance.html*.

c. Hague Abduction Convention Litigation

See Chapter 15.C. for a discussion of developments in 2014 Hague Abduction Convention cases in which the United States participated.

d. Hague Abduction Convention Partners

On January 27, 2014, the United States Embassy in Japan issued a statement welcoming Japan as a Hague Abduction Convention Partner. Japan became the 91st Contracting Party to the Hague Abduction Convention. See Hague Conference website at *www.hcch.net/index_en.php?act=events.details&year=2014&varevent=344*. The January 27 statement by the United States is available at *http://japan.usembassy.gov/e/p/tp-20140127-02.html* and is excerpted below.

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* * * *

The United States welcomes Japan's formal declaration to the Dutch Foreign Ministry on January 24 that Japan has ratified the Hague Abduction Convention. The Convention will enter into force between the United States and Japan on April 1, 2014.

We applaud the work of all those in Japan who have made the implementation of the Convention possible. [U.S.] Ambassador [to Japan Caroline] Kennedy stated, "I commend Japan for taking this final step allowing full domestic implementation of the Hague Convention. This Convention is a very important tool to resolve international parental child abductions. The United States also looks forward to continued progress, with the help of our Japanese counterparts and in the spirit of the Hague Convention, to resolve existing cases of children brought to Japan without the permission of both parents."

* * * *

The 1980 Hague Convention on the Civil Aspects of International Child Abduction is an international treaty that provides a legal framework for securing the prompt return of wrongfully removed or retained children, bringing them back to their country of habitual residence where a competent court can make decisions on issues of custody and the child's best interests. The Convention also secures the effective rights of parental access to a child. On April 1 the United States will welcome Japan as its 73rd partner under the Convention.

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Cross References

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

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Extradition Treaty with Chile

On September 17, 2014, President Obama transmitted to the Senate for its advice and consent to ratification the Extradition Treaty between the Government of the United States and the Government of the Republic of Chile. Daily Comp. Pres. Docs. 2014 DCPD No. 00673 p. 1 (Sept. 17, 2014). In his message transmitting the Extradition Treaty, President Obama said:

> The Treaty would replace the outdated extradition treaty between the United States and Chile, signed at Santiago on April 17, 1900 (the "1900 Treaty"). The Treaty follows generally the form and content of other extradition treaties recently concluded by the United States. It would replace an outmoded list of extraditable offenses with a modern "dual criminality" approach, which would enable extradition for such offenses as money laundering and other newer offenses not appearing on the list from the 1900 Treaty. The Treaty also contains a modernized "political offense" clause and provides that extradition shall not be refused based on the nationality of the person sought. Finally, the Treaty incorporates a series of procedural improvements to streamline and speed the extradition process.

The transmittal package, including the Department of State's report which provides an overview and article-by-article analysis of the Treaty, is available at *www.gpo.gov/fdsys/pkg/CDOC-113tdoc6/pdf/CDOC-113tdoc6.pdf*.

2. Cooperation Agreement with Southeast European Law Enforcement Center

On September 9, 2014, the United States and the Southeast European Law Enforcement Center ("SELEC") signed an agreement relating to cooperation in preventing, detecting, suppressing and investigating crime, including serious and organized crime, particularly crime involving trans-border activity. The agreement is available at *http://www.state.gov/documents/organization/235203.pdf.* The SELEC Convention was signed in 2009. The SELEC Council granted operational partner status to the United States as a predicate to its entering into the agreement and the United States had provided organizational and financial support in the development of SELEC. The agreement envisions cooperation in the forms of, *inter alia*, exchanging information and engaging in coordinated investigations.

3. Extraditions

On May 9, 2014, the State Department issued a press statement regarding the extradition on May 8, 2014 of Carlos Lobo to the United States on drug trafficking charges. The press statement, available at *www.state.gov/r/pa/prs/ps/2014/05/225844.htm*, explains that the Honduran Supreme Court had authorized the extradition and that it was a "historic step…which strikes a blow against impunity for organized crime and narcotics trafficking." The press statement further states:

> Mr. Lobo's extradition is an important affirmation of the rule of law in Honduras and a strong signal that President Juan Orlando Hernandez is fully committed to stopping the use of Honduran territory for illicit activity.
>
> The Government of Honduras, including its Supreme Court, has sent a clear message that those accused of crimes that jeopardize the safety of Honduran citizens will not be allowed to hide from justice. The United States fully supports Honduran efforts to strengthen the rule of law and improve the quality of life for all Hondurans.

4. Extradition Cases

a. Patterson

On May 29, 2014, the United States filed its brief in the U.S. Court of Appeals for the Ninth Circuit in an appeal from a district court decision denying a habeas petition by Mr. Patterson after he had been certified for extradition to the Republic of Korea to face a murder charge. *Patterson v. Wagner*, No. 13-56080. Patterson contended that the statute of limitations provision in the U.S. -Republic of Korea extradition treaty

("Treaty") and the Status of Forces Agreement ("SOFA") between the two countries both presented bars to his extradition. Excerpts follow (with footnotes and citations to the record omitted) from the section of the U.S. brief addressing petitioner's argument regarding the extradition treaty. The brief is available in full at *www.state.gov/s/l/c8183.htm*.

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C. The District Court Properly Denied the Habeas Petition Because the Discretionary Statute of Limitations Provision in the Treaty Did Not Bar the Magistrate Judge's Certification of Extradition

1. The unambiguous plain language of the statute of limitations provision in the Treaty is discretionary; therefore, the issue of whether extradition can be denied on this ground is solely within the authority of the Secretary of State

Article 6 of the Treaty provides:

> Extradition *may* be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State.

Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea, U.S.-S.Kor., art. 6, June 9, 1998, S. Treaty Doc. No. 106-2 ("the Treaty") (emphasis added) .

The magistrate judge certified petitioner for extradition based on the court's finding that there. The magistrate judge also found that, under federal law, the statute of limitations for bringing such a charge is five years from the date of the crime. There is no dispute that the Korean prosecution of petitioner for murder began more than five years after the killing. Based on the foregoing, petitioner contends that the Republic of Korea's extradition request is barred under the statute of limitations provision of the Treaty. However, the plain text of the Treaty and the direct holdings of several Ninth Circuit decisions refute petitioner's claim.

Where the language of a treaty is clear on its face, courts are powerless to divine a different meaning through an examination of other sources:

> "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008). And, where the text of a treaty is clear, a court has "no power to insert an amendment" based on consideration of other sources. *Chan v. Korean Air Lines, Ltd.* , 490 U.S. 122, 134, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989).

Chubb Ins. Co. of Europe S. A. v. Menlo Worldwide Forwarding, Inc. , 634 F.3d 1023, 1026 (9th Cir. 2011); ….

This Court has explicitly considered the meaning of the word "may" as used in an extradition Treaty. In *Vo*, 447 F.3d at 1246, this Court stated:

> Extradition treaties often provide for the general extraditability of individuals who commit offenses that are recognized as crimes in both the requesting and the requested states, subject to enumerated exceptions. These exceptions are of two general types: mandatory exceptions (including political offenses) and discretionary exceptions.

The Court explained that the word "shall" in a treaty indicates a mandatory exception, and "may" indicates a discretionary exception:

> The two types of exception are characterized by different language in extradition treaties. The use of "shall" language in a treaty indicates a provision constitutes a mandatory exception. For instance, Article 3(1)(a) of the Treaty provides, "[e]xtradition shall not be granted when: the offense for which extradition is sought is a political offense." The use of "may" language in a treaty indicates a provision constitutes a discretionary exception. Article 5(2) of the Treaty, for example, provides "[e]xtradition may be denied when the person sought is being or has been proceeded against in the Requested State for the offense for which extradition is requested."

Id. at 1246 n. 13. Of course, "[i]f an individual falls within a mandatory exception, the United States cannot extradite him to the requesting country and the magistrate may not certify him as extraditable." *Id*. at 1246. In contrast, "[i]f an individual falls within a discretionary exception …the United States can choose not to extradite him to the requesting country, but it is under no obligation to the relator to do so." *Id*. Accordingly, "[w]hen requested by the United States, the magistrate must certify [for extradition] an individual even though he may be subject to a discretionary exception." *Id*. (emphasis added).

Similarly, in *Prasoprat*, 421 F.3d at 1014, the relevant treaty stated that the requested nation "may refuse extradition" in the event that the offense involved the potential application of the death penalty in the requesting nation. This Court determined that the treaty "clearly provides that the executive branch holds the authority for determining extradition," and that, assuming all other elements of extradition were found, the court "must certify the individual as extraditable" without analyzing the discretionary exception to extradition in the treaty.

Therefore, when an extradition treaty contains a discretionary provision, it is for the executive branch of the United States through the Secretary of State to exercise that discretion; the magistrate judge hearing the extradition is prohibited from doing so. The *Vo* Court concluded that a person who falls into a discretionary exception to extradition "can still be extradited if the Secretary of State so decides." *Id*. at 1246; see also *Blaxland v. Commonweath Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003) ("Once a magistrate judge confirms that an individual is extraditable, it is the Secretary of State, representing the executive branch, who determines whether to surrender the fugitive."). The *Prasoprat* Court emphasized that the magistrate judge "simply does not have the authority to consider foreign policy concerns and other issues that may affect the executive branch's decision whether to extradite." 421 F.3d at 1017. See *Blaxland*, 323 F.3d at 1208 (stating that "the executive branch's ultimate decision on extradition may be based on a variety of grounds, ranging from individual circumstances, to foreign policy concerns, to political exigencies").

The language used in the statute of limitations provision of the Treaty here is identical to that used in *Vo* and *Prasoprat*. With the use of the word "may," the Treaty expressly creates a discretionary exception to extradition reserved to the executive branch of government. However, despite the use of the discretionary word "may" in Article 6 of the Treaty, petitioner continues to insist that the provision "was meant to serve as a mandatory bar to extradition." Petitioner misconstrues not only the discretionary nature of Article 6 as a whole but also the import of each of the sentences contained in the provision. The first sentence of Article 6 provides that extradition "may" be denied if the statute of limitations would bar prosecution in the requested state. The next two sentences explain how to properly calculate the statute of limitations for purposes of this provision. The second sentence provides for excluding the time when the person

sought to be extradited was a fugitive from justice and the third sentence provides for excluding time when any other act or circumstance would toll the statute of limitations according to the laws of either party to the Treaty.

These provisions are not, as petitioner contends, exceptions to a mandatory bar of extradition. They do not restrict the discretion of the executive branch to ultimately grant or deny extradition but rather merely provide the parameters for determining when the limitations period should be tolled. The ultimate question of whether a criminal can be extradited even if his crime was committed outside the limitations period remains within the discretion of the executive branch because of the word "may" in the first sentence of Article 6. The latter two sentences of the provision certainly do not constrain the magistrate judge's decision to certify the case for extradition. It is the word "may" in the first sentence of the provision that requires the magistrate judge to leave the ultimate question of whether the petitioner should be extradited despite a possible violation of the applicable statute of limitations up to the discretion of the executive branch. Indeed, the discretionary language of this provision prohibits the magistrate judge from denying certification on this basis.

Furthermore, because there is no ambiguity in the language of Article 6 of the Treaty, the magistrate judge's interpretation of the Treaty was "governed by the text" and he had "no power" to rewrite the Treaty through a consideration of other sources. *Chan*, 490 U.S. at 134. Petitioner contends, however, that the magistrate judge erred in relying on the plain language of Article 6 in determining that the statute of limitations provision is a discretionary one. While admitting that courts are required to analyze the plain language of a treaty in order to interpret its meaning, petitioner erroneously insists that courts are also required to look beyond the text and consider other sources even where the plain language of the text is not ambiguous.

However, the authorities petitioner relies on do not support this contention. Although courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties," *Eastern Airlines v. Floyd*, 499 U.S. 530, 535 (1991) (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985)), and "[o]ther general rules of construction may be brought to bear on difficult or ambiguous passages," id. (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988)), none of these cases requires consultation with extratextual sources especially where, as here, the plain text of the Treaty provision is unambiguous. …

* * * *

3. Construing Article 6 as discretionary furthers the object and purpose of the Treaty, which is to facilitate the extradition of criminals

Petitioner posits that a treaty should be interpreted so as to give effect to its "objects and purposes." However, rather than discussing the objects and purposes of the Treaty, petitioner cites authorities that discuss the purpose of a statute of limitations provision, which, as the government agrees, is to bar belated prosecutions of stale crimes. However, the individual provisions of a Treaty must further the objects and purposes of the Treaty as a whole. Thus, petitioner's argument that because the purpose of a statute of limitations provision is to bar the belated prosecution of a stale crime, all statute of limitations provisions should be interpreted as mandatory, is both self-serving and fails to further the objects and purposes of the Treaty.

The pre-ratification record of the Treaty at issue clearly demonstrates that the primary object and purpose of the Treaty was to facilitate the extradition of criminals for prosecution in the United States and the Republic of Korea…

The only discussion of the statute of limitations provision of the Treaty was in the context of a concern by both the legislative and executive members of the U.S. Senate Committee on Foreign Relations that the provision be worded in such a way that criminals would not be able to escape justice by fleeing the prosecuting country until the statute of limitations period had run out. Thus, the interpretation of this provision as discretionary, allowing for a case-by-case determination of the applicability of the statute of limitations bar by the Secretary of State, rather than by a magistrate judge who has limited authority in extradition matters, does comport with the objects and purposes of the Treaty.

* * * *

b. Trabelsi

On October 29, 2014 the United States filed its brief in opposition to defendant Nizar Trabelsi's motion to dismiss the superseding indictment against him based on his claim that his extradition to the United States violated the extradition treaty between the United States and the Kingdom of Belgium. Specifically, Trabelsi claimed that his extradition violated the double jeopardy provision in Article 5; the rule of specialty in Article 15; and Article 6 regarding the extraditing state's domestic law. Trabelsi was originally indicted in 2006, and in a superseding indictment in 2007, on multiple counts of federal crimes of terrorism. In 2008, the United States requested extradition, which Belgium's Minister of Justice granted in 2011. In October 2013, Trabelsi was extradited to the United States. See *Digest 2013* at 33. Excerpts follow (with footnotes and citations to the record omitted) from the U.S. brief in opposition to Trabelsi's motion to dismiss the indictment. The U.S. brief is available in full at *www.state.gov/s/l/c8183.htm*.

* * * *

A. The Belgian Minister of Justice Specifically Considered and Rejected Restrictions on Defendant's Extradition Based on the U.S. Indictment

Article 5 of the Treaty prohibits extradition "when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested." Defendant contends that his extradition "violated this provision because he was convicted in Belgium for the offenses charged in the Indictment." The Belgian Minister of Justice, however, specifically considered and rejected any restrictions on defendant's extradition to face charges in the U.S. indictment based on double jeopardy considerations set forth in Article 5.

The Minister of Justice, after comparing the offenses pursued in the Belgian prosecution and the offenses set forth in the U.S. indictment, explained that no double jeopardy concerns arise from Article 5:

> In this case, the offenses for which the person to be extradited was irrevocably sentenced by the Court of Appeal of Brussels on 9 June, 2004 do not correspond to the offenses listed under counts A through D that appear in the arrest warrant on which the U.S.

extradition request is based. The essential elements of the respective US and Belgian offenses, their scope and the place(s) and time(s) when they were committed do not correspond.

Indeed, each of the charged offenses in the U.S. indictment is notably distinct from the offenses prosecuted in Belgium. Significantly, for example, the U.S. indictment specifies that "the objects of the conspiracy were to destroy by terrorist means—including destructive violence and murder—people, property, and interests of the United States of America, *wherever located*." Thus, while paragraph 25 of the indictment references defendant's efforts "to scout the Kleine-Brogel Air Force Base … as a target for a suicide bomb attack," the indictment is not limited to that location, as defendant suggests. In fact, paragraph 9.D. of the indictment explains that "[o]perational targets were changed as circumstances changed."

Even defendant recognizes that each of the offenses set forth in the indictment is charged distinctly. … As a result, defendant attempts to support his challenge by stating that, "[i]f permitted to proceed with this prosecution, the government will present at trial only the narrow evidence of the plot to bomb Kleine-Brogel and thereby circumvent Article 5 of the Treaty". There is, of course, simply no evidence to support the contention that the government will not proceed at trial on the indictment as charged and, unsurprisingly, defendant cites none.

B. This Court Should Decline Defendant's Invitation to Second-Guess the Minister of Justice's Determination that Extradition Was Proper

Because the Belgian Minister of Justice—the country's designated official for authorizing extradition—determined that no double jeopardy concerns arise under Article 5, any further comparative analysis of the Belgian and U.S. offenses is simply unnecessary and inappropriate. As the Diplomatic Note recognizes, the Minister of Justice's Order "is the decision by the Belgian government that sets forth the terms of [defendant's] extradition to the United States." U.S. courts have repeatedly stressed the importance of not interfering with such extradition determinations. Accordingly, the Court should reject defendant's labored efforts to engage in an after-the-fact comparative analysis in an attempt to support his extradition challenge.

* * * *

C. The Minister of Justice Extensively Considered and Specifically Rejected Arguments Based on the Doctrine of Non bis in idem *in Approving the U.S. Extradition Request*

Even looking, *arguendo*, more closely into defendant's purported comparison analysis, his claim still fails. The Minister of Justice extensively considered, and specifically rejected, arguments based on the doctrine of *non bis in idem*, similar to the contentions heavily relied upon in defendant's motion. Indeed, an entire section of the Minister of Justice's Order is devoted to the topic. Defendant specifically contends that "Article 5 of the Treaty incorporates the doctrine of *non bis in idem*" and consequently, "[i]n examining [defendant's] claims based on the principle of *non bis in idem*, [the court] must look not only to the denomination of the charged crime but the acts that constitute the alleged crime." Defendant further contends that "[a] comparison of the offenses in the United States with the charges prosecuted in Belgium, along with the alleged conduct underlying the charges, demonstrates that prosecution in the United States violates the principle of *non bis in idem*."

In the section of the Minister of Justice's Order specifically entitled, "The application of Article 5 of the Convention on Extradition (1987)—The principle of 'double jeopardy' concerns 'offences' and not 'facts'," the Minister of Justice explicitly rejected the premise, upon which defendant bases his entire challenge, that Article 5 incorporates the broader doctrine of *non bis in*

idem, rather than double jeopardy. The Minister of Justice emphasized that "it is not the deeds, but the designation of these, the offenses, that have to be identical" for purposes of the extradition limitation set forth in Article 5. *Id*. at 14 (emphasis added).

First and foremost, the Minister of Justice explained that the plain language of Article 5 specifically refers to "offenses," rather than "facts." The Minister of Justice emphasized that Article 5's specific reference to "offense" was not lightly included, and cited consistent wording in the provisions of other international agreements addressing "double prosecution or double punishment." …

The Minister of Justice also explained that, "[c]ontrary to the principle of '*ne (*or *non) bis in idem*,' the principle of 'double jeopardy' set forth in Article 5 of the convention on extradition limits itself to the same crimes or to crimes which are substantially the same." Contrary to defendant's contention that the court "must look not only to the denomination of the charged crime but the acts that constitute the alleged crime", the Minister of Justice emphasized that Article 5's double jeopardy concept "excludes the (same) elements of evidence, the (same) evidence or the (same) presented material facts that were, where necessary, used for proving the offenses for which the person had previously been prosecuted, convicted, or acquitted."

Rather, only "[t]o the degree that these factual and/or evidential elements are identical or substantially identical as the basis of an identical or substantially identical offense, second prosecutions are prohibited." Thus, the Minister of Justice makes abundantly clear that it is a comparison of the offenses, rather than the underlying acts, that controls the narrower double jeopardy determination under Article 5. This Court should decline defendant's request to revisit that determination. …

Notably, the Minister of Justice's determination is consistent with the intended interpretation of Article 5 by the United States at the time of the Treaty's ratification. As set forth in the Senate Report addressing its ratification, Article 5 was specifically intended to permit extradition if the person sought is charged in each respective country with different offenses despite the alleged similarity of the underlying conduct:

> **Article 5 – Prior jeopardy for the same offense**
>
> Paragraph 1, which prohibits extradition if the person sought has been found guilty, convicted, or acquitted in the Requested State for the offense for which extradition is requested, is similar to provisions in many United States extradition treaties. *This paragraph permits extradition, however, if the person sought is charged in each Contracting State with different offenses arising out of the same basic transaction*.

S. Rep. No. 104-28 (July 30, 1996) (original emphasis in heading, emphasis in text added); see *United States v. Stuart*, 489 U.S. 353, 368 n. 7 (1989) (recognizing that the Senate's preratification reports are a proper interpretative guide). Thus, even where the offenses arise, unlike here, from the same basic transaction, Article 5 is not intended to bar extradition. This interpretative construction is also consistent with the "familiar rule that the obligations of [a]n treaty should be liberally construed to effect their purpose, namely, the surrender of fugitives to be tried for their alleged offenses." *Ludecke v. U.S. Marshal*, 15 F.3d 496, 498 (5th Cir. 1994) (further recognizing that the "obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, …should be construed more liberally than a criminal statute or the technical requirements of criminal procedure") (citations omitted).

D. The Minister of Justice Specifically Considered and Rejected the Imposition of Any Limitations on the Evidence that Could Be Presented to Support the Prosecution of the U.S. Indictment, Following an Analysis of the Double Jeopardy Considerations Arising from Article 5

Recognizing the Minister of Justice's conclusion that "[t]he constitutive elements of the American and Belgian offenses respectively, their significance, and the places(s) and time(s) a which they were committed do not match," defendant attempts to relitigate his extradition challenge before this Court by arguing that the "Minister of Justice's finding was based on the mistaken belief that Mr. Trabelsi would not be prosecuted in the United States for acts that occurred in Belgium." In particular, defendant raises an apparent anticipatory challenge to the Government's use of evidence to prove certain overt acts set forth in the indictment which arise from defendant's conduct in Belgium, to the extent that the same evidence was used by the Belgian government in its prosecution. The Minister of Justice rejected that argument as well.

The Minister of Justice clarified that, as long as the *offenses* are not the same or substantially similar, the requesting government may pursue its prosecution based on *all* available evidence, even in circumstances, unlike here, where *all* the facts are identical to the set of facts used in prior proceedings in the surrendering country:

> Conforming to the principle of "double jeopardy" as set forth in Article 5, cited above, the authorities in charge of the prosecution may make selection among all available evidence in order to prosecute the person concerned for such [facts] or such (a) charge(s), even if all the facts are identical to the set of facts used in prior proceedings. This choice having been once made, the principle of "double jeopardy" forbids prosecution for the same offense or a substantially similar offense based on substantially similar facts (citing Michael ABBELL, Extradition to and from the United States, Leiden and Boston, Martinus Nijhoff-Brill, charts, pp. 52-58, and M. Cherif BASSIOUN I, International Extradition: United States Law and Practice, New York, Oxford University Press, Oceana, 5th edition, 2007, p. 749 and following).

Notably, while defendant quotes selected language out-of-context from the above passage stating that "the principle of 'double jeopardy' forbids prosecution for the same offense or a substantially similar offense based on substantially similar facts", defendant omits the qualifying language in the preceding sentence stating that "the authorities in charge of the prosecution may make selection among all available evidence in order to prosecute the person concerned for such [facts] or such (a) charge(s), even if all the facts are identical to the set of facts used in prior proceedings." The notable absence of this pertinent language speaks volumes of its effectiveness at directly undercutting defendant's contention that the government is now somehow prohibited from selecting among "all available evidence" in order to prosecute him.

* * * *

Finally, to the extent that the Minister of Justice believed that evidentiary limitations were somehow necessary to prevent defendant's prosecution in the United States in a manner that would purportedly violate Belgian domestic law, the Minister of Justice could have explicitly set forth those limitations, as it had done on other topics, such as emphasizing the restrictions on the defendant's prosecution by a "special court, namely a military commission" or punishment by the death penalty. No such limitations on the charges to be prosecuted or on the evidence to be presented were set forth, because no such concerns existed.

E. Even Assuming, Arguendo, that Defendant Could Somehow Substantiate a Violation of Article 5, Dismissal of the Indictment Is Not an Available Remedy

In addition to the deference, as discussed above, that must be accorded to foreign decisions granting extradition, "the Supreme Court has long held that illegalities in the manner in which a defendant is apprehended and brought within a court's jurisdiction neither deprive that court of its power to try the defendant nor require dismissal of the underlying charges." *Salinas Doria*, No. 01 Cr. 21, 2008 WL 4684229, at *4 (citing *Ker v. Illinois*, 119 U.S. 436, 440 (1886); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992)). In situations in which the Supreme Court has invoked the *Ker-Frisbie* doctrine, "the illegalities attending the manner of a defendant's apprehension have been blatant—often involving forcible abduction—and orchestrated or undertaken principally by agents of the government seeking to prosecute him." *Salinas Doria*, No. 01 Cr. 21, 2008 WL 4684229, at *4 (citing *Alvarez-Machain*, 504 U.S. at 657: *Frisbie*, 342 U.S. at 520; *Ker*, 119 U.S. at 438)).

Here, "it follows that charges against a defendant in an American court should not be dismissed solely because of an alleged defect in the judicial or diplomatic processes leading to that defendant's extradition." *Salinas Doria*, No. 01 Cr. 21, 2008 WL 4684229, at *4. Tellingly, defendant has cited no cases in which a court has deviated from "the broad rule of disregarding major or minor alleged violations of extradition treaties." *Id.* (further recognizing that "the cases following this [broad rule] are legion") (citations omitted). While possible exceptions to the *Ker-Frisbie* doctrine have been recognized in cases involving egregious misconduct on the part of the United States, defendant does not—and could not—argue that the particular violations that he alleges here are so extreme that they would warrant such an exception. Defendant only contends that his extradition violated Article 5 of the Extradition Treaty, which precludes the requested state from granting extradition "when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested." The language of Article 5, however, sets forth circumstances in which extradition shall not be granted and makes clear that its prohibitions are directed to the extraditing state, not to the courts of the requesting state. Thus, the very treaty provision on which defendant relies even fails to offer any support for the proposition that the requesting state is prohibited from prosecuting where an Article 5 violation is alleged. See *id.*

II. Defendant's Challenge Based on Article 15, Embodying the Rule of Specialty, Must Fail

The rule of specialty is based on "principles of international comity and is designed to guarantee the surrendering nation that the extradited individual will not be subject to indiscriminate prosecution by the receiving government." *United States v. Leighnor*, 884 F. 2d 385, 389 (8th Cir. 1989) (citations omitted). The doctrine of specialty "requires that a requisitioning state may not, without the permission of the asylum state, try or punish a fugitive for any crimes committed before the extradition except the crimes for which he was extradited." *United States v. Kember*, 685 F. 2d 451 (D. C. Cir. 1982) (citations omitted); see *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) ("a nation that receives a criminal defendant pursuant to an extradition treaty may try the defendant only for those offenses for which the other nation granted extradition").

The Treaty incorporates the rule of specialty in Article 15, which provides that "[a] person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for . . . the offense for which extradition has been granted or a differently denominated offense based on the same facts on which extradition was granted… ." On the basis

of this doctrine, defendant asserts that the indictment must be dismissed. In particular, defendant claims that, although he is being prosecuted solely on the offenses set forth in the indictment upon which he was extradited, the Minister of Justice allegedly refused extradition with respect to Overt Acts 23, 24, 25, and 26, and those acts form the basis for charges in the indictment. Defendant's challenge is meritless and should be denied.

A. Standing to Assert a Rule of Specialty Violation

As a preliminary matter, there is some question whether defendant has standing to claim a violation of the rule of specialty. The United States Court of Appeals for the District of Columbia Circuit has twice recognized, without resolving, the "conflicting authority as to whether a criminal defendant—as opposed to the extraditing state—has standing to assert the doctrine of specialty." *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 206 (D. C. Cir. 2013) (citing *United States v. Sensi*, 879 F. 2d 888, 892 n. 1 (D. C. Cir. 1989)); see also *United States v. Day*, 700 F.3d 713, 721 (4th Cir. 2012) (recognizing "the circuits are split on the question of whether an individual defendant has standing to raise a specialty violation"). One court in this district stated, after *Sensi*, that "the rule of specialty is not a right of the accused but is a privilege of the asylum state," *Kaiser v. Rutherford*, 827 F. Supp. 832, 835 (D. D. C. 1993), but proceeded to "assum[e], arguendo, that the [defendant] had standing" and to reject the specialty challenge on the merits. *Id*. As in these three cases, this Court need not resolve whether defendant is permitted to raise a specialty claim because, as is explained below, that claim fails on the merits.

B. Even Assuming Defendant Has Standing to Assert a Rule of Specialty Violation, His Claim Must Fail

Even assuming arguendo defendant has standing to assert his specialty claim, it must be denied, especially in light of the narrow scope of review of such claims."[R]eview of the indictment is to be guided by the standard applicable to a defendant's assertion of the doctrine of specialty: 'whether the requested state has objected or would object to prosecution. '" *Sensi*, 879 F. 2d at 895 (citations omitted). At most, "[t]he extraditee's standing to assert the specialty principle is only derivative; the extraditee may object only to breaches to which the surrendering country would have been entitled to object." *Leighnor*, 884 F. 2d at 389 (citing *United States v. Diwan*, 864 F. 2d 715, 721 (11th Cir. 1989) and *United States v. Van Cauwenberghe*, 827 F. 2d 424, 428 (9th Cir. 1987)). Accordingly, in addressing defendant's claim that his extradition violated the rule of specialty, the inquiry must focus on the question of whether the Kingdom of Belgium would consider the extradition to be a breach of the specialty principle. *Leighnor*, 884 F. 2d at 389. Here, the Kingdom of Belgium would have no grounds to object to the extradition because defendant is being prosecuted for the exact charges in the indictment upon which his extradition was based. In fact, in addition to recognizing that the prosecution of defendant does not raise double jeopardy concerns, the Kingdom of Belgium explicitly recognized in its Diplomatic Note that, "[n]or does such trial and offering of proof violate the rule of specialty." See also *Kaiser*, 827 F. Supp. at 835 (D.D.C. 1993) (finding that the "rule of specialty is satisfied" where an individual's extradition was "for matters clearly set forth in the arrest warrant and other documents tendered to the Court"); *Day*, 700 F.3d at 721 (rejecting specialty claim where "defendant is tried for the exact offenses described in his extradition agreement").

Furthermore, neither the principle of specialty nor the manifestation of it in Article 15 lends support to defendant's contention that the evidence pertaining to Overt Acts 23, 24, 25 and 26 is somehow inadmissible to prove the charged offenses in the indictment. The United States Court of Appeals for the District of Columbia Circuit has stressed that the specialty doctrine "has

nothing to do with the 'scope of proof admissible into evidence in the judicial forum of the requisitioning state'". *United States v. Kember*, 685 F.2d 451, 458 (D.C.Cir. 1982) (quoting *United States v. Flores*, 538 F.2d 939, 944 (2d.Cir. 1976)). The Court in *Kember* explained that "the normal procedural and evidentiary rules continued to apply in the case" after extradition. 685 F. 2d at 458; see also *Lopesierra-Gutierrez*, 708 F.3d at 205-206 (holding that "[w]e agree with the other circuits to have considered this question that the doctrine of specialty governs prosecutions, not evidence") (citations omitted). …

* * * *

III. Defendant's Reliance Upon Article 6 of the Treaty To Challenge the Extradition Decision, as a Violation of Domestic Law, Is Misplaced

Finally, defendant argues that the Kingdom of Belgium somehow violated its own domestic law in granting the extradition request, and that the Indictment must be dismissed due to this alleged impropriety. Defendant specifically relies upon Article 6 of the Treaty, which provides: "Notwithstanding the provisions of the present Treaty, the executive authority of the Requested State may refuse extradition for humanitarian reasons pursuant to its domestic law." Defendant further argues that the Kingdom of Belgium violated its "domestic law" and, by implication, Article 6, through its decision to extradite defendant despite an ECHR interim measure, directing the Kingdom of Belgium not to extradite him until the conclusion of ECHR proceedings addressing his challenge to the extradition request. Defendant's baseless allegation should be rejected.

Courts have recognized that, given the substantial deference that must be provided to a foreign country's extradition determination, the courts of that foreign country should decide whether an executive could lawfully authorize an individual's extradition despite an alleged prohibition under domestic law. …

* * * *

Even putting aside the authority stressing that United States courts should abstain from entertaining jurisdictional claims grounded in a foreign country's alleged violation of domestic law, defendant's claim still must fail. On its face, Article 6 merely provides that the Kingdom of Belgium "may" exercise its discretion to refuse extradition under certain circumstances. In no way did this provision somehow require Belgium to act in a particular manner, as defendant alleges. See, *e.g.* , *United States v. Benov*, 447 F.3d 1235, 1246 n.13 (9th Cir. 2006) (recognizing the "use of 'may' language in a treaty indicates [that] a provision constitutes a discretionary exception"); *Salinas Doria*, No. 01 Cr. 21, 2008 WL 4684229, at *6 (explaining that the reference to "may" in a treaty provision "is explicitly permissive and discretionary and confers no rights or obligations of any kind on the extraditing country, let alone on the courts of the requesting country").

* * * *

5. Universal Jurisdiction

Leslie Kiernan, Senior Advisor, delivered remarks on behalf of the United States at the 69th General Assembly, Sixth Committee (Legal) Session on Agenda Item 83: The Scope and Application of the Principle of Universal Jurisdiction on October 15, 2014. The U.S. statement on universal jurisdiction is excerpted below and available at *http://usun.state.gov/briefing/statements/234017.htm*.

* * * *

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

In past years, the Committee has engaged on a number of important issues associated with universal jurisdiction, including its definition and the scope of the principle. We encourage this Committee to continue its work, and continue to believe that it would be fruitful to explore the practical application of universal jurisdiction. For instance, it would be useful to understand whether alternative bases of jurisdiction are relied upon at the same time.

Other topics that could warrant additional consideration in connection with discussion of the application of universal jurisdiction include: how states address competing jurisdictional claims by other states that may have a closer nexus to the underlying criminal act and whether and how national courts have addressed due process challenges.

The United States continues to analyze the contributions of other states and organizations. For instance, we were interested to see it reported that for some states, prosecution based on universal jurisdiction requires the authorization of the Government or a person designated by the government. We would be interested to learn what other conditions or safeguards states have placed on the exercise of universal jurisdiction. The United States believes that appropriate safeguards should be in place to ensure responsible use of universal jurisdiction, where it exists. We also note with interest the ICRC's views on procedural and evidentiary issues that may arise and would be interested in additional analysis of that aspect.

We welcome this group's continued consideration of this issue and the input of more states about their own practice. We look forward to exploring these issues in as practical a manner as possible.

* * * *

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On April 30, 2014, the Department of State released the 2013 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at *www.state.gov/j/ct*. A State Department fact sheet about the 2012 Country Reports, available at *www.state.gov/r/pa/prs/ps/2014/04/225406.htm*, lists the following noteworthy counterterrorism developments in 2013.

* * * *

- The terrorist threat continued to evolve rapidly in 2013, with an increasing number of groups around the world—including both al-Qa'ida (AQ) affiliates and other terrorist organizations—posing a threat to the United States, our allies, and our interests.
- As a result of ongoing worldwide efforts against the organization and leadership losses, AQ's core leadership has been degraded, limiting its ability to conduct attacks and direct its followers. Subsequently, 2013 saw the rise of increasingly aggressive and autonomous AQ affiliates and like-minded groups in the Middle East and Africa who took advantage of the weak governance and instability in the region to broaden and deepen their operations.
- The AQ core's vastly reduced influence became far more evident in 2013. AQ leader Zawahiri was rebuffed in his attempts to mediate a dispute among AQ affiliates operating in Syria, with the Islamic State of Iraq and the Levant publicly dissociating their group from al-Qa'ida. AQ affiliates routinely disobeyed Zawahiri's 2013 tactical guidance to avoid collateral damage, seen in increasingly violent attacks against civilian religious pilgrims in Iraq, hospital staff and convalescing patients in Yemen, and families at a shopping mall in Kenya, for example.
- Terrorist groups engaged in a range of criminal activity to raise needed funds, with kidnapping for ransom remaining the most frequent and profitable source of illicit financing. Private donations from the Gulf also remained a major source of funding for Sunni terrorist groups, particularly for those operating in Syria.
- In 2013, violent extremists increased their use of new media platforms and social media, with mixed results. Social media platforms allowed violent extremist groups to circulate messages more quickly, but confusion and contradictions among the various voices within the movement are growing more common.
- Syria continued to be a major battleground for terrorism on both sides of the conflict and remains a key area of longer-term concern. Thousands of foreign fighters traveled to Syria to join the fight against the Asad regime—with some joining violent extremist groups—while

Iran, Hizballah, and other Shia militias provided a broad range of critical support to the regime. The Syrian conflict also empowered the Islamic State of Iraq and the Levant to expand its cross-border operations in Syria, resulting in a dramatic increase in attacks against Iraqi civilians and government targets in 2013.

- Since 2012, the United States has also seen a resurgence of activity by Iran's Islamic Revolutionary Guard Corps' Qods Force (IRGC-QF), the Iranian Ministry of Intelligence and Security (MOIS), and Tehran's ally Hizballah. On January 23, 2013, the Yemeni Coast Guard interdicted an Iranian dhow carrying weapons and explosives likely destined for Houthi rebels. On February 5, 2013, the Bulgarian government publically implicated Hizballah in the July 2012 Burgas bombing that killed five Israelis and one Bulgarian citizen, and injured 32 others. On March 21, 2013, a Cyprus court found a Hizballah operative guilty of charges stemming from his surveillance activities of Israeli tourist targets in 2012. On September 18, Thailand convicted Atris Hussein, a Hizballah operative detained by Thai authorities in January 2012. And on December 30, 2013, the Bahraini Coast Guard interdicted a speedboat attempting to smuggle arms and Iranian explosives likely destined for armed Shia opposition groups in Bahrain. During an interrogation, the suspects admitted to receiving paramilitary training in Iran.
- "Lone offender" violent extremists also continued to pose a serious threat, as illustrated by the April 15, 2013 attacks near the Boston Marathon finish line, which killed three and injured approximately 264 others.
- The *Statistical Annex to Country Reports on Terrorism 2013* was prepared by the National Consortium for the Study of Terrorism and Responses to Terrorism (START) at the University of Maryland. The Statistical Annex data set includes violent acts carried out by non-state actors that meet all of START's Global Terrorism Database (GTD) inclusion criteria; further information about GTD can be found at *www.start.umd.edu/gtd*.

* * * *

b. UN Security Council

On January 27, 2014, the UN Security Council adopted Resolution 2133, which, among other things, identifies kidnapping for ransom as a source of terrorist financing. Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, commended the Security Council for adopting the resolution, in a statement available at *http://usun.state.gov/briefing/statements/220689.htm*. Ambassador Power stated:

> Over the last 10 years, terrorist organizations have collected well over $120 million in ransom payments, money they use to help fund the salaries, recruitment and training of new terrorists; to acquire weapons and communications gear; and to stage deadly attacks. By identifying and working to counter a key source of funding for terrorist groups, we are taking an important step to undermine the terrorists' business model by removing the financial incentive for them to conduct future kidnappings. We know that hostage takers looking for ransoms distinguish between those governments that pay ransoms and those that do not—and that they make a point of not taking hostages from

those countries that refuse to make concessions.

Extracting ransom through kidnapping is today's most significant terrorist financing threat because it has proven itself a frighteningly successful tactic. Every ransom paid to a terrorist organization encourages future kidnapping operations. Today's landmark resolution is a clear signal of our shared commitment to end kidnapping for ransom and to break a vicious cycle that finances further acts of terrorism.

On September 24, 2014, the UN Security Council adopted resolution 2178 on foreign terrorist fighters ("FTFs"). President Obama chaired the UN Security Council summit focusing on the surge in FTFs. The President's speech at the UN Security Council summit on FTFs is excerpted below and available at *www.whitehouse.gov/the-press-office/2014/09/24/remarks-president-un-security-council-summit-foreign-terrorist-fighters*.

* * * *

In the nearly 70 years of the United Nations, this is only the sixth time that the Security Council has met at a level like this. We convene such sessions to address the most urgent threats to peace and security. And I called this meeting because we must come together—as nations and an international community—to confront the real and growing threat of foreign terrorist fighters.

As I said earlier today, the tactic of terrorism is not new. …

What brings us together today, what is new is the unprecedented flow of fighters in recent years to and from conflict zones, including Afghanistan and the Horn of Africa, Yemen, Libya, and most recently, Syria and Iraq.

Our intelligence agencies estimate that more than 15,000 foreign fighters from more than 80 nations have traveled to Syria in recent years. Many have joined terrorist organizations such as al Qaeda's affiliate, the Nusrah Front, and ISIL, which now threatens people across Syria and Iraq. And I want to acknowledge and thank Prime Minister Abadi of Iraq for being here today.

In the Middle East and elsewhere, these terrorists exacerbate conflicts; they pose an immediate threat to people in these regions; and as we've already seen in several cases, they may try to return to their home countries to carry out deadly attacks. In the face of this threat, many of our nations—working together and through the United Nations—have increased our cooperation. Around the world, foreign terrorist fighters have been arrested, plots have been disrupted and lives have been saved.

Earlier this year at West Point, I called for a new Partnership to help nations build their capacity to meet the evolving threat of terrorism, including foreign terrorist fighters. And preventing these individuals from reaching Syria and then slipping back across our borders is a critical element of our strategy to degrade and ultimately destroy ISIL.

The historic resolution that we just adopted enshrines our commitment to meet this challenge. It is legally binding. It establishes new obligations that nations must meet. Specifically, nations are required to "prevent and suppress the recruiting, organizing, transporting or equipping" of foreign terrorist fighters, as well as the financing of their travel or activities. Nations must "prevent the movement of terrorists or terrorist groups" through their

territory, and ensure that their domestic laws allow for the prosecution of those who attempt to do so.

The resolution we passed today calls on nations to help build the capacity of states on the front lines of this fight—including with the best practices that many of our nations approved yesterday, and which the United States will work to advance through our Counterterrorism Partnerships Fund. This resolution will strengthen cooperation between nations, including sharing more information about the travel and activities of foreign terrorist fighters. And it makes clear that respecting human rights, fundamental freedoms and the rule of law is not optional—it is an essential part of successful counterterrorism efforts. Indeed, history teaches us that the failure to uphold these rights and freedoms can actually fuel violent extremism.

Finally, this resolution recognizes that there is no military solution to the problem of misguided individuals seeking to join terrorist organizations, and it, therefore, calls on nations to work together to counter the violent extremism that can radicalize, recruit, and mobilize individuals to engage in terrorism. Potential recruits must hear the words of former terrorist fighters who have seen the truth—that groups like ISIL betray Islam by killing innocent men, women and children, the majority of whom are Muslim.

* * * *

The words spoken here today must be matched and translated into action, into deeds -- concrete action, within nations and between them, not just in the days ahead, but for years to come. For if there was ever a challenge in our interconnected world that cannot be met by any one nation alone, it is this: terrorists crossing borders and threatening to unleash unspeakable violence. These terrorists believe our countries will be unable to stop them. The safety of our citizens demands that we do. And I'm here today to say that all of you who are committed to this urgent work will find a strong and steady partner in the United States of America.

* * * *

The U.S. Mission to the UN in New York issued a fact sheet on resolution 2178 on FTFs, which is excerpted below and available at *http://usun.state.gov/briefing/statements/232071.htm*.

* * * *

Resolution 2178 requires countries to take certain steps to address the FTF threat, including to prevent suspected FTFs from entering or transiting their territories and to implement legislation to prosecute FTFs. It also calls on states to undertake various steps to improve international cooperation in this field, such as by sharing information on criminal investigations, interdictions and prosecutions. In this resolution, for the first time ever, the Council underscores that Countering Violent Extremism (CVE) is an essential element of an effective response to the FTF phenomenon. Resolution 2178 also focuses existing UN counterterrorism bodies on the FTF threat, providing a framework for long-term monitoring and assistance to countries in their efforts to address this threat.

Adopted under Chapter VII of the UN Charter, this resolution:

1. Reaffirms that Member States must comply with their human rights obligations when fighting terrorism and notes that a failure to do so contributes to radicalization.

2. Defines the term Foreign Terrorist Fighter as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict."

3. Expresses particular concern about the FTFs who have joined the Islamic State in Iraq and the Levant (ISIL), Al-Nusrah Front, and other groups associated with Al-Qaida.

4. Expresses concern over the use of the internet to incite others to commit terrorist acts and underlines the need to prevent terrorists from exploiting technology to incite support for terrorist acts, while at the same time respecting human rights and fundamental freedoms.

5. Notes the work of other multilateral bodies, including INTERPOL and other UN agencies, and the recent adoption by the Global Counterterrorism Forum (GCTF) of recommended good practices to respond to the FTF threat.

6. Demands FTFs disarm and cease all terrorist acts and participation in armed conflict.

7. Calls upon countries to require their airlines to provide advance passenger information to detect the travel of UN-listed terrorists.

Obligations

8. Requires countries to prevent and suppress recruiting, organizing, transporting, and equipping of FTFs, and the financing of FTF travel and activities.

9. Requires countries to have laws that permit the prosecution of:

- Their nationals and others departing their territories who travel or attempt to travel for terrorism purposes;
- The wilful provision or collection of funds by their nationals or in their territories with the intent or knowledge that they will be used to finance travel of FTFs;
- The wilful organization or facilitation by their nationals or in their territories of such travel.

10. Requires countries to prevent the entry or transit of individuals believed to be traveling for terrorism-related purposes.

International Cooperation

11. Calls upon countries to improve international, regional, and sub-regional cooperation to prevent FTF travel, including through increased information-sharing.

12. Highlights the need for countries to comply with their existing obligations regarding cooperation in terrorism-related criminal investigations and proceedings with respect to investigations and proceedings involving FTFs.

13. Encourages INTERPOL to intensify its efforts to respond to the FTF threat.

14. Calls upon countries to help each other build capacity to address the FTF threat and welcomes bilateral assistance to do so.

Countering Violent Extremism in Order to Prevent Terrorism

15. Underscores that Countering Violent Extremism (CVE) is an essential element of responding to the FTF threat.

16. Calls upon States to enhance CVE efforts and take steps to decrease the risk of radicalization to terrorism in their societies, such as engaging relevant local communities, empowering concerned groups of civil society, and adopting tailored approaches to countering

FTF recruitment.

UN Engagement

17. Directs UN counter-terrorism bodies to focus attention on the FTF threat, enabling the international community to assess compliance with this resolution and to target assistance to those countries that need help enforcing its provisions.

18. Requests a report from the UN within 180 days to assess comprehensively the FTF phenomenon and recommend actions to enhance the response to the threat.

* * * *

c. UN General Assembly

On October 7, 2014, at the 69th UN General Assembly Sixth Committee discussion of Agenda Item 107: Measures to Eliminate International Terrorism, Carol Hamilton, Senior Advisor for the United States, delivered remarks on UN counterterrorism efforts. Ms. Hamilton's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/234015.htm*.

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The United States reiterates both its firm condemnation of terrorism in all its forms and manifestations as well as our commitment to the common fight to end terrorism. All acts of terrorism—by whomever committed—are criminal, inhumane and unjustifiable, regardless of motivation. An unwavering and united effort by the international community is required if we are to succeed in preventing these heinous acts. In this respect, we recognize the United Nations' critical role in mobilizing the international community, building capacity, and facilitating technical assistance to Member States in implementation of the United Nations Global Counter-Terrorism Strategy. We note in particular the Security Council's adoption of a number of recent resolutions: Resolution 2133 (on kidnapping for ransom), Resolution 2170 (to counter the Islamic State in Iraq and Levant, Al-Nusrah Front, and other al-Qa'ida-linked groups) and, just a few weeks ago, Resolution 2178 on Foreign Terrorist Fighters, which creates a new policy and legal framework for international action in response to the FTF threat.

With respect in particular to Resolution 2178, we would highlight that the 1267/1989 (Al-Qaida) Sanctions Committee, through its Monitoring Team, has been tasked to develop a comprehensive threat analysis of ISIL and other affiliates of AQ while the CTC, with the support of CTED, has been tasked to help identify gaps in member state capacities and good practices in addressing the FTF phenomenon. Resolution 2178 obligates states to criminalize certain activities related to the FTF threat. We know there is a large and growing number of states that are considering or have recently adopted new laws in this field. We believe it would be fruitful to exchange views with colleagues on implementation of Resolution 2178, including in order to enable those states that wish to obtain technical assistance. Resolution 2178 also highlights the essential role that countering violent extremism must play in our common efforts to address not only the challenges posed by FTFs and ISIL, but by terrorism more broadly, and to prevent their radicalization and recruitment in the first place and effect the rehabilitation and reintegration of

returnees. For these needs, we hope that CTED, based on the Monitoring Team's analysis of the threat, will facilitate the delivery of technical assistance to the most affected countries and UNCCT, along with the CTITF, will conduct the actual capacity building programs.

These resolutions are strong examples of the meaningful role the UN can play to address new challenges that arise in the fight against terrorism. We express our firm support for these UN efforts, as well as those of the Global Counterterrorism Forum and other multilateral bodies, civil society and non-governmental organizations, and regional and sub-regional organizations, aimed at developing practical tools to further the implementation of the UN CT framework. We call for improved coordination among UN entities and with external partners, including the GCTF and its related initiatives and platforms such as the International Institute for Justice and the Rule of Law in Malta and the Global Community Engagement and Resilience Fund, which advance practical implementation of the UN Global Counterterrorism Strategy.

We welcomed the fourth review of the UN Global CT Strategy this past June, particularly its emphasis on the need for greater implementation of the Strategy by states and its call for greater cooperation, coordination and coherence among United Nations entities. We strongly welcome the efforts of the United Nations to facilitate the promotion and protection of human rights and the rule of law while countering terrorism. We also recognize the role that victims of terrorism can play in countering violent extremism. Finally, we stress the need to improve border management and to use financial measures to counter terrorism.

We are pleased to note that our voluntary contributions to the UN Counterterrorism Implementation Task Force are for development of assistance and training. We are also pleased to provide funding support for the UN Center on Counter-Terrorism to deliver training and other practical capacity-building projects. We encourage other interested member states in joining us to help build the capacity of the UNCCT to allow it to provide assistance to member states across a range of issues addressed in the UN Strategy and relevant UNSCRs, including 2178.

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

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

those instruments. But that work will only be completed when those instruments are widely ratified and fully implemented.

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

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

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d. U.S. actions against support for terrorists

(1) Foreign Terrorist Fighters

On September 10, 2014, representatives of the U.S. Department of State and Department of Homeland Security testified before the Homeland Security Subcommittee of the U.S. House of Representatives. The testimony of Hillary Batjer Johnson on behalf of the State Department focused on measures taken to address the problem of foreign fighters and their participation in terrorist activities. Ms. Johnson's testimony before the subcommittee is excerpted below and available at *www.state.gov/j/ct/rls/rm/2014/231462.htm*.

* * * *

We have seen in Syria a trend of foreign fighter travel for the purposes of participating in the conflict—largely driven on an unprecedented scale by global connectivity that is available through the internet and social media. ISIL operates an extremely sophisticated propaganda machine and disseminates timely, high-quality media content on multiple platforms, including on social media. We have seen ISIL use a range of media to attempt to aggrandize its military capabilities, including showcasing the executions of captured soldiers, and evidence of consecutive battlefield victories resulting in territorial gains. More recently, the group's supporters have sustained this momentum on social media by encouraging attacks in the United States and against U.S. interests in retaliation for our airstrikes. ISIL has also used its propaganda campaign to draw foreign fighters to the group, including many from Western countries.

It is difficult to provide a precise figure of the total number of foreign fighters in Syria, though the best available estimates indicate that approximately 12,000 fighters from at least 50 countries—including over 100 U.S. persons—may have traveled to Syria to fight for ISIL or al-Nusrah Front since the beginning of the conflict. These fighters not only exacerbate regional instability, but create real threats to U.S. interests and our allies. We are working closely with countries affected by the foreign fighter problem set to counter the threat these fighters pose. As

we have built a common picture of the threat with our allies, so, too, we continue our efforts to build consensus around joint initiatives and complementary approaches to sustain a broad and comprehensive approach.

Securing U.S. Borders

The Department of State works closely with the Department of Homeland Security (DHS) to support its mission in protecting the United States by promoting effective aviation and border security screening with our foreign partners through enhanced information sharing. For example, an important effort in our counterterrorism work is Homeland Security Presidential Directive Six (HSPD-6), a post-9/11 White House initiative. Through HSPD-6, the State Department works with the Terrorist Screening Center to negotiate the exchange of identities of known or suspected terrorists with foreign partners to enhance our mutual border screening efforts.

The Terrorist Screening Center implements these agreements with foreign partners. These agreements allow partners to namecheck incoming flights to their countries, which helps us deter terrorist travel, creating an extra layer of security for the United States.

HSPD-6 agreements or arrangements are a pre-requisite to participate in the Visa Waiver Program (VWP). To date, we have forty-three such agreements in place which includes VWP partners, and we continue to actively seek out new partners.

The Department of State also works closely with its partners at the Department of Homeland Security to strengthen global aviation security by engaging foreign partners in bolstering aviation screening at last point of departure (LPD) airports with direct flights to the United States to identify and prevent known or suspected terrorists from boarding commercial flights.

Foreign Terrorist Fighters

Additionally, the Department of State is leading interagency efforts to engage with foreign partners to prevent in the first place and, where possible, to interdict foreign extremist travel to Syria. We strongly believe that a whole-of-government approach is the only way to truly address the threat, and we work closely with our interagency colleagues to facilitate comprehensive approaches. This work includes facilitating information exchanges with foreign partners, building partner capacity, and developing shared objectives focused on addressing the foreign fighter threat. Ambassador Robert Bradtke, Senior Advisor for Partner Engagement on Syria Foreign Fighters, leads this work for the State Department and has met with officials from European Union member countries, North Africa, the Gulf, the Balkans, and East Asia and Pacific, to discuss and examine our shared serious concerns about the foreign terrorist fighter threat. Ambassador Bradtke and other Department counterparts have led sustained efforts to urge reform and build capacity for whole-of-government and whole-of-society approaches to counter this threat, notably encouraging information sharing and border security, legal reform and criminal justice, and countering violent extremism.

Important progress has been made, but more work remains. Countries in the Balkans recently have adopted or are considering more comprehensive counterterrorism laws. In the Gulf, countries such as Kuwait, Qatar, and Saudi Arabia have increased penalties related to terrorist financing and several have established the necessary architecture to enforce their counterterrorism laws more effectively, such as Kuwait's newly created Financial Intelligence Unit and Qatar's establishment of a charity abuse review board.

Some of our partners have implemented legal reforms aimed more directly at countering foreign terrorist fighters. For example, traveling overseas to participate in combat has been

newly criminalized in the Balkans, Canada, and Jordan. The United Kingdom and Indonesia have banned participation in groups such as ISIL, while Malaysia has publicly opposed ISIL and its activities.

Countries have taken a variety of steps under existing laws and regulations to inhibit foreign fighter's resources or travel. Canada, New Zealand, Australia, and eight European countries have the authority to revoke the passports of suspected foreign fighters.

The European Council recently called for the accelerated implementation of EU measures in support of Member States to combat foreign fighters, including finalizing an EU Passenger Name Record (PNR) proposal by the end of this year, and increasing cooperation with partner nations such as the United States to strengthen border and aviation security in the region.

In all our efforts with our partners, we stress the importance of—and facilitate implementation of – adhering to a rule of law framework. We are encouraged by these and other reforms to counter the foreign fighter threat. While we have seen progress, our efforts must be sustained and intensified. We will continue to work closely with partners, particularly those in the Middle East, North Africa, and Europe in the coming months to enhance cooperation and build on efforts to date.

Multilateral Initiatives and the Global Counterterrorism Forum

We are also working the foreign terrorist fighter issue actively on the multilateral front. The week of September 24, President Obama will chair a United Nations Security Council (UNSC) Summit on the rising threat posed by foreign terrorist fighters, no matter their religious ideology or country of origin. This rare UNSC leader-level session is the first U.S. -hosted Head of Government-level UNSC session since President Obama led a UNSC Summit on non-proliferation in September 2009, and it presents a unique opportunity to demonstrate the breadth of international consensus regarding the foreign terrorist fighter threat and to build momentum for policy initiatives on this topic at home and abroad. In addition to a briefing from UN Secretary-General Ban Ki-Moon and brief remarks from leaders of all 15 UNSC members, this summit is expected to adopt a U.S. -drafted UNSC Resolution during the session.

That same week, Secretary Kerry and Turkish Foreign Minister Cavusoglu will co-chair a Global Counterterrorism Forum (GCTF) ministerial meeting, where GCTF members will adopt the first-ever set of global good practices to address the foreign terrorist fighter threat (FTF) and launch a working group dedicated to working with GCTF members and non-members alike to mobilize resources and expertise to advance their implementation. The good practices cover the four central aspects of the phenomenon: (1) radicalizing to violent extremism; (2) recruitment and facilitation; (3) travel and fighting; and, (4) return and reintegration. They are also intended to shape bilateral or multilateral technical or other capacity-building assistance that is provided in this area. This effort will allow our practitioners and other experts to continue to share expertise and broaden skills in addressing the FTF challenge.

Conclusion

We remain deeply supportive of DHS' efforts to protect the U.S. homeland and make every effort to support its work through diplomatic engagement.

The State Department is involved in an array of activities to counter terrorism and the phenomenon of foreign terrorist fighters, such as capacity building, countering terrorist finance, and countering violent extremism, my State Department colleagues would be happy to brief Congress about these lines of effort at another time.

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

See Chapter 16.A.4.b.

(3) Foreign terrorist organizations

(i) New designations

In 2014, the Department of State announced the Secretary of State's designation of three additional organizations and their associated aliases as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act: Ansar Bayt al-Maqdis (79 Fed. Reg. 19,958 (Apr. 10, 2014)), see also April 9, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/04/224566.htm*; Al-Nusrah Front (79 Fed. Reg. 27, 972 (May 15, 2014)); Mujahidin Shura Council in the Environs of Jerusalem (MSC) (79 Fed. Reg. 49,368 (Aug. 20, 2014)); See Chapter 16.A.4.b. for a discussion of the simultaneous designation of these entities pursuant to Executive Order 13224.

The Department amended the designation of al-Qa'ida in Iraq ("AQI") to include multiple new aliases—including Islamic State of Iraq and the Levant ("ISIL"), Islamic State of Iraq and Syria ("ISIS"), Daesh, and others—and to remove the alias of Al-Nusrah Front ("ANF") (which was designated separately on the same day) because that organization was found to no longer be a part of al-Qa'ida in Iraq. 79 Fed. Reg. 27,972 (May 15, 2014). A May 14, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/05/226067.htm*, explains the amendment:

> These adjustments do not represent a change in policy. Both ISIL and ANF have been designated domestically for several months. In December 2012, the Department of State amended the FTO and E.O. 13224 designations of AQI to include ANF as an alias. Since that amendment occurred, differences over management and tactics have led to an increase in violence between the two groups. Tension peaked in early 2014, when al-Qa'ida (AQ) leader, Ayman al-Zawahiri, released a statement dismissing ISIL from AQ. Therefore, we have amended the AQI designation to better reflect the change in status of both ISIL and ANF. We review our designations regularly and, as needed, make adjustments to ensure we remain current with nomenclature and other changes.

U.S. financial institutions are required to block funds of designated FTOs or their agents within their possession or control; representatives and members of designated FTOs, if they are aliens, are inadmissible to, and in some cases removable from, the United States; and U.S. persons or persons subject to U.S. jurisdiction are subject to criminal prohibitions on knowingly providing "material support or resources" to a

designated FTO. 18 U.S.C. § 2339B. See *www.state.gov/j/ct/rls/other/des/123085.htm* for background on the applicable sanctions and other legal consequences of designation as an FTO.

(ii) Reviews of FTO designations

During 2014, the Secretary of State continued to review designations of entities as FTOs consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. See *Digest 2005* at 113–16 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures. The Secretary reviewed each FTO individually and determined that the circumstances that were the basis for the designations of the following FTOs have not changed in such a manner as to warrant revocation of the designations and the national security of the United States did not warrant revocation: Lashkar I Jhangvi ("LJ") (79 Fed. Reg. 7274 (Feb. 6, 2014)), see also February 6, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/02/221398.htm;* Irish Republican Army (79 Fed. Reg. 23,041 (Apr. 25, 2014)); Harakat ul-Jihad-i-Islami/Bangladesh (79 Fed. Reg. 25,170 (May 2, 2014)); al-Qa'ida in the Islamic Maghreb (79 Fed. Reg. 27,030 (May 12, 2014)); Lashkar-e-Tayyiba (79 Fed. Reg. 36,366 (June 26, 2014)); Shining Path (79 Fed. Reg. 46,297 (Aug. 7, 2014)); Harakat ul-Mujahidin (79 Fed. Reg. 46,499 (Aug. 8, 2014)); Asbat al-Ansar (79 Fed. Reg. 47,513 (Aug. 13, 2014)); Basque Fatherland and Liberty (79 Fed. Reg. 65,474 (Nov. 4, 2014)); National Liberation Army (79 Fed. Reg. 65,474 (Nov. 4, 2014)); Palestinian Islamic Jihad (79 Fed. Reg. 75,227 (Dec. 17, 2014)).

On July 1, 2014, the Secretary determined that the circumstances that were the basis for the designation of the United Self-Defense Forces of Colombia as an FTO have changed in such a manner as to warrant revocation of the designation. 79 Fed. Reg. 41,349 (July 15, 2014).

(4) Rewards for Justice Program

On March 15, 2014, the State Department announced reward offers under the Rewards for Justice Program for information on three leaders of the al-Shabaab terrorist organization, based in Somalia. See March 15, 2014 media note, available at *www.state.gov/r/pa/prs/ps/2014/03/223518.htm*. As stated in the media note, the Department authorized rewards of up to $3 million each for information leading to the arrest or conviction of Abdikadir Mohamed Abdikadir, Jafar, and Yasin Kilwe. For background on the Rewards for Justice program and its enhancements under the USA PATRIOT Act, see the Rewards for Justice website, *www.rewardsforjustice.net*, and Digest *2001* at 932-34. Excerpts of the March 15, 2014 media note regarding the three al-Shabaab members appear below.

* * * *

Since 2006, al-Shabaab has killed thousands of civilians, aid workers, and peacekeepers in Somalia, Uganda, and Kenya. Al-Shabaab claimed responsibility for the July 11, 2010 suicide bombings in Kampala, Uganda, which killed more than 70 people, including one American citizen. Al-Shabaab also claimed responsibility for the September 21-24, 2013, terrorist attack against the Westgate shopping mall in Nairobi that left more than 60 people dead and nearly 200 wounded.

Al-Shabaab's terrorist activities pose a threat to the stability of East Africa and to the national security interests of the United States. The U.S. Secretary of State named al-Shabaab a Foreign Terrorist Organization on March 18, 2008. In February 2012, al-Shabaab and the al-Qaida terrorist network jointly announced they had formed an alliance.

Abdikadir, better known as Ikrima, was born in 1979 in Kenya to Somali parents. Ikrima reportedly has medium-length hair and has worn a thick moustache. He is missing three fingers on his left hand. He has coordinated the recruitment of Kenyan youth into al-Shabaab and commanded a force of al-Shabaab's Kenyan fighters in Somalia.

Jafar, also known as Amar, is an al-Shabaab facilitator and has served as Ikrima's deputy, and is reportedly missing one eye.

Yasin Kilwe is al-Shabaab's emir for Puntland in northern Somalia. Kilwe was officially appointed al-Shabaab's leader in the region by Al-Shabaab emir Ahmed Abdi aw-Godane. Kilwe pledged his allegiance to al-Shabaab and al-Qaida in February 2012.

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On April 2, 2014, the State Department announced reward offers for information on key leaders of another terrorist organization, the Revolutionary People's Liberation Party/Front ("DHKP/C"). See April 2, 2014 State Department media note available at *www.state.gov/r/pa/prs/ps/2014/04/224316.htm*. The Department authorized rewards of up to $3 million each for information leading to the location of three individuals: Musa Asoglu, Zerrin Sari, and Seher Demir Sen. The media note provides the following background on the terrorist organization and these three key members:

> DHKP/C was created in 1994 when its predecessor group, Devrimci Sol or Dev Sol, splintered. The group has targeted U.S. interests, including U.S. military and diplomatic personnel and facilities, NATO personnel and facilities, and Turkish targets since the 1990s. The U.S. Department of State designated DHKP/C a Foreign Terrorist Organization on October 8, 1997. In February 2013, a suicide bomber affiliated with the group attacked the U.S. Embassy in Ankara, killing a Turkish security guard.
>
> Musa Asoglu is a member of DHKP/C's central committee, the group's top decision-making body, and is believed to lead the group's financial affairs and fundraising activities in Europe. Asoglu joined DHKP/C in the 1990s while a

resident of the Netherlands. He reportedly inherited leadership of the group after its founding leader, Dursun Karatas, died in 2008.

Zerrin Sari is the widow of DHKP/C founder Karatas and a member of DHKP/C's central committee. Sari is believed to currently reside in Belgium, the Netherlands, or Germany.

Seher Demir Sen participated in Dev Sol in the 1980s and joined DHKP/C after it formed in 1994. She currently serves on DHKP/C's central committee. Sen was last known to be residing in Greece, but may have left the country due to targeted Greek counterterrorism and law enforcement activity against DHKP/C. Her current whereabouts are unconfirmed.

On October 14, 2014, the State Department announced rewards under the Rewards for Justice program for information on key leaders of the Al-Qaida in the Arabian Peninsula ("AQAP") terrorist organization. The October 14, 2014 media note making the announcement is available at *www.state.gov/r/pa/prs/ps/2014/10/232932.htm*. The Department authorized rewards of up to $10 million for information leading to the location of Nasir al-Wahisi and up to $5 million each for information leading to the locations of Qasim al-Rimi, Othman al-Ghamdi, Ibrahim Hassan Tali al-Asiri, Shawki Ali Ahmed Al-Badani, Jalal Bala'idi, Ibrahim al-Rubaysh, and Ibrahim al-Banna. Further background on AQAP and these eight individuals can be found in the excerpts below from the October 14, 2014 media note.

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AQAP was formed in January 2009 by Yemeni and Saudi terrorists under the leadership of Nasir al-Wahishi, who had headed AQAP's predecessor group Al-Qa'ida in Yemen.

AQAP has launched numerous high-profile terrorist attacks against the Yemeni Government, and U.S. and other foreign interests. In March 2009, an AQAP suicide bomber killed four South Korean tourists and their Yemeni guide. A few months later, AQAP dispatched Umar Farouk Abdulmutallab, who attempted to detonate an explosive device aboard Northwest Airlines Flight 253 over the continental United States on December 25, 2009. In October 2010, AQAP claimed responsibility for a foiled plot to send explosive-laden packages to the United States via cargo plane. To spread its extremist propaganda, AQAP launched an English-language magazine called Inspire in 2010 and the Arabic-language al-Madad News Agency in 2011. AQAP, operating under the alias Ansar al-Sharia, carried out a May 2012 suicide bombing in Sana'a that killed more than 100 people. In 2013, more than 20 U.S. embassies were temporarily closed in response to a threat associated with AQAP.

On January 19, 2010, the Secretary of State designated AQAP as a Foreign Terrorist Organization.

Nasir al-Wahishi is AQAP's top leader and is responsible for approving AQAP targets, recruiting new members, allocating resources, and directing AQAP operatives to conduct attacks. In 2013, Al-Qa'ida leader Ayman al-Zawahiri named him as his deputy.

Qasim al-Rimi is a senior AQAP military commander who has played an important role in recruiting AQAP operatives.

Othman al-Ghamdi has helped raise funds and stockpile weapons for the group.

Ibrahim Hassan Tali al-Asiri is AQAP's primary bomb maker who gained notoriety for recruiting his younger brother for a failed suicide bomb attack against Saudi Prince Muhammed bin Nayif in August 2009.

Shawki Ali Ahmed Al-Badani is an AQAP leader and operative who played a key role in a plan for a major attack that led the United States to close more than 20 diplomatic posts in the Middle East and Africa in the summer of 2013.

Jalal Bala'idi is an AQAP regional emir who was involved in 2013 with planning bomb attacks on various Western diplomatic facilities and personnel.

Ibrahim al-Rubaysh is a senior AQAP Sharia official and advisor who provides the justification for the group's attacks and participates in attack planning.

Ibrahim al-Banna is a founding member of AQAP and has served as the group's chief of security.

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2. Narcotics

a. Majors list process

(1) International Narcotics Control Strategy Report

On March 4, 2013, the Department of State submitted the 2013 International Narcotics Control Strategy Report ("INCSR"), an annual report submitted to Congress in accordance with § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report describes the efforts of key countries to attack all aspects of the international drug trade in calendar year 2012. Volume 1 of the report covers drug and chemical control activities and Volume 2 covers money laundering and financial crimes. The report is available at *www.state.gov/j/inl/rls/nrcrpt/2013/*.

(2) Major drug transit or illicit drug producing countries

On September 15, 2014, President Obama issued Presidential Determination 2014-15, "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2015." 79 Fed. Reg. 56,625 (Sept. 22, 2014). In this annual determination, the President named Afghanistan, The Bahamas, Belize, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. A country's presence on the "Majors List" is not necessarily an adverse reflection of its government's counternarcotics efforts or level of cooperation with the United States. No new countries were added to the list in 2014. The President designated Bolivia, Burma, and Venezuela as countries that have failed demonstrably to adhere to their international

obligations in fighting narcotrafficking. Simultaneously, the President determined that support for programs to aid Burma and Venezuela is vital to the national interests of the United States, thus ensuring that such U.S. assistance would not be restricted during fiscal year 2015 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424.

b. Interdiction assistance

During 2013 President Obama again certified, with respect to Colombia (Daily Comp. Pres. Docs. , 2013 DCPD No. 00564, p. 1, Aug. 9, 2013) and Brazil (Daily Comp. Pres. Docs. , 2013 DCPD No. No 00696, p. 1, Oct. 10, 2013), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Obama made his determinations pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4, following a thorough interagency review. For background on § 1012, see *Digest 2008* at 114.

3. Trafficking in Persons

a. Trafficking in Persons report

On June 20, 2014, the Department of State released the 2014 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 ("TVPA"), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covers the period April 2013 through March 2014 and evaluates the anti-trafficking efforts of countries around the world. Through the report, the Department determines the ranking of countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 based on an assessment of their efforts with regard to the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The 2014 report lists 23 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. For details on the Department of State's methodology for designating states in the report, see *Digest 2008* at 115–17. The report is available at *www.state.gov/j/tip/rls/tiprpt/2014/index.htm*. Chapter 6.C.3.b. discusses the determinations relating to child soldiers.

In a briefing upon the release of the 2014 report, available at *www.state.gov/j/tip/rls/rm/2014/228067.htm*, Luis CdeBaca, Ambassador-at-Large for the State Department's Office To Monitor and Combat Trafficking in Persons, explained some of the findings in the 2014 report. Secretary Kerry also delivered remarks upon

release of the report, which are available at *www.state.gov/secretary/remarks/2014/06/228083.htm*.

b. Presidential determination

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

On September 18, 2014, President Obama issued a memorandum for the Secretary of State, "Presidential Determination With Respect to Foreign Governments' Efforts Regarding Trafficking in Persons." 79 Fed. Reg. 57,699 (Sept. 26, 2014). The President's memorandum conveys determinations concerning the 23 countries that the 2014 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a. *supra* for discussion of the 2014 report.

The Trafficking Victims Protection Act further requires that the President's notification be accompanied by a certification by the Secretary of State regarding certain types of foreign assistance ("covered assistance") that "no [such covered] assistance is intended to be received or used by any agency or official who has participated in, facilitated, or condoned a severe form of trafficking in persons." Secretary Kerry signed the required certification as to all 23 countries place on the Tier 3 in the 2014 Report on August 28, 2014. Prior to obligating or expending covered assistance, relevant bureaus in the State Department are required to take appropriate steps to ensure that all assistance is provided in accordance with the Secretary's certification.

4. Money Laundering

On July 22, 2014, the Department of the Treasury, Financial Crimes Enforcement Network ("FinCEN") issued notice of its finding under § 311 of the USA PATRIOT Act, Pub. L. 107-56, that FBME Bank Ltd. is a financial institution operating outside the United States that is of primary money laundering concern. 79 Fed. Reg. 42,639 (July 22, 2014). Based on this finding, FinCEN also issued a notice of proposed rulemaking under § 311. 79 Fed. Reg. 42,486 (July 22, 2014). The rule proposed would impose the fifth special measure (31 U.S.C. 5318A(b)(5)) against FBME. The fifth special measure prohibits or conditions the opening or maintaining of correspondent or payable-through accounts for FBME. Excerpts below from the notice of finding explain the determination with regard to FBME (with footnotes omitted).

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III. The Extent To Which FBME Has Been Used To Facilitate or Promote Money Laundering In or Through Cyprus and Tanzania

1. FBME Facilitates Money Laundering, Terrorist Financing, Transnational Organized Crime, Fraud Schemes, Sanctions Evasion, Weapons Proliferation, Corruption by Politically-Exposed Persons, and Other Financial Crimes

FBME facilitated a substantial volume of money laundering through the Bank for many years. FBME is used by its customers to facilitate money laundering, terrorist financing, transnational organized crime, fraud, sanctions evasion, and other illicit activity internationally and through the U.S. financial system. FBME has systemic failures in its AML controls that attract high-risk shell companies, that is, companies formed for the sole purpose of holding property or funds and that do not engage in any legitimate business activity. FBME performs a significant volume of transactions and activities that have little or no transparency and often no apparent legitimate business purpose.

Through relationships developed by FBME's management since at least 2006, as well its large shell company customer base, FBME facilitates the activities of international terrorist financiers, organized crime figures, and money launderers. For example, since at least early 2011, the head of an international narcotics trafficking and money laundering network has used shell companies' accounts at FBME to engage in financial activity. In late 2012, the head of the same international narcotics trafficking and money laundering network continued to express interest in conducting financial transactions through accounts with FBME in Cyprus. Separately, in 2008, an FBME customer received a deposit of hundreds of thousands of dollars from a financier for Lebanese Hezbollah. FBME also facilitates financial activity for transnational organized crime. As of 2008, a financial advisor for a major transnational organized crime figure who banked entirely at FBME in Cyprus maintained a relationship with the owners of FBME.

FBME facilitated transactions for entities that perpetrate fraud and cybercrime against victims from around the world, including in the United States. For example, in 2009, FBME facilitated the transfer of over $100,000 to an FBME account involved in a High Yield Investment Program ("HYIP") fraud against a U.S. person. In July 2012, the FBME customer operating the alleged HYIP was indicted in the United States District Court for the Northern District of Ohio for wire fraud and money laundering related to the HYIP fraud. FBME has processed payments for cybercrime networks. In September 2010, FBME facilitated the unauthorized transfer of over $100,000 to an FBME account from a Michigan-based company that was the victim of a phishing attack. Several FBME accounts have been the recipients of the proceeds of cybercriminal activity against U.S.victims. For example, in October 2012, an FBME account holder operating as a shell company was the intended beneficiary of over $600,000 in wire transfers generated from a fraud scheme, the majority of which came from a victim in California.

FBME's offshore banking business allows sanctioned entities to circumvent sanctions imposed by the International Emergency Economic Powers Act ("IEEPA"). …For example, at least one FBME customer is a front company for a U.S.-sanctioned Syrian entity, the Scientific Studies and Research Center ("SSRC"), which has been designated as a proliferator of weapons of mass destruction. The SSRC front company used its FBME account to process transactions through the U.S. financial system. This SSRC front company also shared a Tortola, British Virgin Islands ("BVI") address with at least 111 other shell companies, including at least one other additional FBME customer that is subject to international sanctions.

FBME solicits and is recognized by its high-risk customers for its ease of use. FBME advertises the Bank to its potential customer base as willing to facilitate the evasion of AML regulations. Separately, FBME is recognized for the ease of its account creation. In September 2013, FBME's offshore bank account services were featured prominently on a Web site that facilitates the formation of offshore entities. FBME is also popular with online gamblers, particularly U.S. gamblers that seek to engage in unlawful internet gambling. One Web site that encourages the opening of offshore bank accounts to gamble online notes that FBME in Cyprus is "[a]nother Europe-based bank [we've] found particularly easy to deal with."

In October 2011, the Department of Justice ("DOJ") filed civil forfeiture complaints against approximately $70. 8 million in real and personal property alleged to be the proceeds of foreign corruption offenses perpetrated by the President of Equatorial Guinea, Teodoro Obiang's son and his associates and laundered through the United States. Subsequently, between December 2011 and July 2012, the Treasury of Equatorial Guinea wired over $47 million to several Cypriot banks and entities in a pattern of transactions that was identified as being consistent with the allegations in the DOJ complaint. This included $7. 2 million wired to a British shell company using an FBME account.

2. FBME's Weak AML Controls Encourage Use of the Bank by Shell Companies and Allow Its Customers To Perform a Significant Volume of Obscured Transactions and Activities Through the U.S. Financial System

FBME accesses the U.S. financial system through both direct and indirect correspondent accounts. In 2009, one U.S. financial institution terminated its banking relationship with FMBE based on money laundering concerns. The volume of suspicious wire activity conducted by FBME customers through the U.S. financial system, however, remains significant. In just the year from April 2013 through April 2014, FBME conducted at least $387 million in wire transfers through the U.S. financial system that exhibited indicators of high-risk money laundering typologies, including widespread shell company activity, short-term "surge" wire activity, structuring, and high-risk business customers.

FBME has a significant number of shell company customers nominally based in Cyprus and in other high-risk jurisdictions. Wire transfers related to suspected shell company activities accounted for hundreds of millions of dollars of FBME's financial activity between 2006 and 2014. …

FBME customers, including its many shell company customers, have frequently used FBME's Cyprus address to conduct collectively tens of millions of dollars of transactions. From July 2007 to February 2013, at least 71 entities used FBME's Cyprus address to conduct transactions through the U.S. financial system. Although there may be rare occasions when use of the bank's address as a bank customer's address of record is legitimate, such a practice is highly unusual and indicative of the bank's potential complicity in its customers' illicit activities.

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5. Organized Crime

a. Transnational Organized Crime Rewards Program

As discussed in *Digest 2013* at 51, the U.S. government expanded its rewards program in 2013 to extend to information about individuals involved in transnational organized

crime. The Transnational Organized Crime ("TOC")(Rewards Program was the result and is managed by the U.S. Department of State's Bureau of International Narcotics and Law Enforcement Affairs in coordination with U.S. federal law enforcement agencies.

On April 29, 2014, the State Department announced the offer of a reward of up to $5 million through the TOC Rewards Program for information leading to the arrest and/or conviction of Chinese weapons proliferator Li Fangwei, also known as Karl Lee. See April 29, 2014 media note, available at *www.state.gov/r/pa/prs/ps/2014/04/225338.htm*. The media note provided background on Li Fangwei:

> Li Fangwei previously was sanctioned by the United States for his alleged role as a principal supplier to Iran's ballistic missile program. According to the Indictment, he controls a large network of front companies and allegedly uses this network to move millions of dollars through U.S. -based financial institutions to conduct business in violation of the International Emergency Economic Powers Act (IEEPA) and the Weapons of Mass Destruction Proliferators Sanctions Regulations, which prohibit such financial transactions. Li Fangwei is also charged with conspiring to commit wire fraud and bank fraud, a money laundering conspiracy, and two separate counts of wire fraud in connection with such illicit transactions.
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> …
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> Today's announcement is taken in coordination with other U.S. agencies taking action against Li Fangwei. The U.S. Department of Justice unsealed an indictment against Li Fangwei on charges including conspiracy to commit money laundering, bank fraud, and wire fraud. The U.S. Department of the Treasury's Office of Foreign Assets Control also added eight of Li Fangwei's front companies to its List of Specially Designated Nationals and Blocked Persons, and the U.S. Department of Commerce announced today the addition of nine of his China-based suppliers to its Entity List.
>
> More information about Li Fangwei is available on the Transnational Organized Crime Rewards Program website at *www.state.gov/tocrewards*. …

On November 18, 2014, the State Department announced TOC Rewards Program offers for information leading to the arrest and/or conviction of alleged Romanian Internet fraud conspirators Nicolae Posescu and Dumitru Daniel Bosogioiu. See November 18, 2014 media note, available at *www.state.gov/r/pa/prs/ps/2014/11/234168.htm*.

b. Sanctions Program

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

c. United Nations

On October 9, 2014, William R. Brownfield, Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, addressed the Third Committee of the UN General Assembly. His remarks focus on the related challenges of narcotics and transnational organized crime. Secretary Brownfield's remarks are available in full at *www.state.gov/j/inl/rls/rm/2014/232824.htm*, and excerpted below.

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Our starting point is the international legal framework: the three drug control conventions, the UN Convention against Transnational Organized Crime, and the UN Convention against Corruption. These treaties provide a resilient framework for establishing common definitions of illicit behavior; ensuring compatibility of legal standards and criminal justice responses; and promoting stronger cross-border cooperation. The authors of these conventions wisely left each treaty flexible in order to help governments address new and emerging threats, like wildlife trafficking and cybercrime. As threats and our responses evolve, the international community should show tolerance as governments try new policies within their borders to address specific national concerns, provided they promote the aims of the conventions.

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The current international framework is designed to help national governments advance the core objectives of protecting the health of citizens and the safety of communities. Translating these aspirations into effective action will be our charge at the UN General Assembly Special Session on Drugs in 2016.

The UNGASS is a rare opportunity for stake-holders to reflect on the drug issue. We look forward to an open, inclusive debate that includes civil society, the private sector and relevant UN agencies. Member States, through the UN Commission on Narcotic Drugs, have established an effective plan to prepare for the UNGASS. The United States urges the UN General Assembly to adopt this plan without amendment.

We also have a responsibility to work across borders to dismantle, disrupt, and eliminate transnational criminal enterprises. All links in the criminal justice continuum—police, courts, and corrections—must be addressed. Sovereign governments bear the bulk of this burden. But we also have a responsibility to help each other. The UN Office on Drugs and Crime is an

important partner in these efforts through its work implementing technical assistance projects around the world.

Civil society also plays a critical role—as first-line responders, advocates and assistance providers. Next year, we look forward to the Thirteenth UN Congress on Crime Prevention and Criminal Justice. This Congress will be a valuable venue at which Member States and civil society exchange research, experience, and perspectives.

Drugs, crime and corruption are global issues that require global responses. The international frameworks are an essential element. They are force multipliers, forging operational cooperation and helping us learn from each other. Only though collective effort can we advance our goal of making our citizens and communities safe.

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The Seventh Session of the Conference of the Parties to the UN Convention Against Transnational Organized Crime convened in Vienna in October 2014. The U.S. opening statement at the conference, delivered by Deputy Assistant Secretary of State M. Brooke Darby on October 6, 2014, is excerpted below and available at *www.state.gov/j/inl/rls/rm/2014/232590.htm*.

* * * *

Mr. Chair, this year marks the fourteenth anniversary of the signing of the UNTOC in New York. At its core, the UNTOC helps facilitate important cooperation among States Parties in serious criminal cases, and has been invaluable for the United States to provide assistance in cases involving emerging crimes. I am pleased to report that since the United States became a party, we have successfully used the UNTOC as the basis for international cooperation over 250 times with more than 55 different countries, including over 150 times during the past two years alone. These instances include requests for bank and corporate records, computer documents, DNA evidence, witness interviews, surveillance, and testimony for use in court. The UNTOC has also proven valuable in our efforts to pursue the extradition of persons charged with serious criminal offenses in the United States. Our use of the UNTOC, in combination with our bilateral treaties, has led to the return of nearly 30 fugitives to face prosecution in the United States.

We now have over a decade of experience utilizing the Convention and its Protocols. This week, we come together to consider an important question: How can we do better? How can we break down barriers, pursue more cases, respond faster, identify best practices, and eliminate safe havens for criminals and their enterprises?

First and foremost, we must provide more effective assistance to each other. In this context, we should recognize the important work of the UN Office on Drugs and Crime. From 2013 to 2014, the United States pledged over $65 million to UNODC for its assistance programs, including $27.2 million for projects to combat transnational crime, trafficking, and related threats. We encourage more partners to support UNODC programs that advance implementation

of the UNTOC and its Protocols. In addition, consistent with Article 30 of the Convention, the United States has established a wide range of bilateral and multilateral agreements with other Member States to provide material, logistical, and training assistance and to enhance international cooperation against transnational crime. During Fiscal Years 2012 and 2013, the U.S. Department of State and the U.S. Agency for International Development have allocated more than $1.4 billion in funding to support technical assistance programs around the world focused on transnational crime, drug interdiction, law enforcement reform, financial crimes, intellectual property theft, cybercrime, trafficking in persons, migrant smuggling, and other challenges addressed by the Convention and its Protocols.

In addition to building the capacity of our national institutions, we must also recognize the important role played by actors outside the public sector. We will fail to decimate transnational organized crime without the full participation of civil society. Input from civil society is necessary to identify creative solutions, encourage debate, provide an external view regarding our own performance, and deliver critical services that augment scarce or shrinking government resources. Non-governmental organizations play a special role, both as first-line responders to victims of crime and as advocates on behalf of victims to help governments perform better. The media can shed light on instances of corruption and criminality. The private sector can also help prevent and respond to the criminal exploitation of commercial industries and financial systems. While States Parties have a unique level of responsibility under the Convention—and thus must always play a leading role on decisions within this Conference—we can only benefit from more cooperation and dialogue with civil society.

* * * *

In this context, our focus should remain on pursuing meaningful and effective implementation of the Convention within existing resources and mandates. The UNTOC provides a strong framework for expanding cooperation in a wide variety of practical ways, including through the Working Groups established by this Conference.

Mr. Chair, the United States is proud of our work together with our partners during the history of this Convention. Today, we are ready to begin work to find ways for the UNTOC to serve as an even more useful framework for preventing and responding to organized crime. Thank you for your leadership of this important body, and we look forward to another two years of progress.

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6. Piracy

In June 2014, The United States completed a government-wide Counter Piracy and Maritime Security Action Plan. As described in a June 20, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/06/228108.htm*:

> The plan affirms the U.S. commitment to repress piracy and related maritime crimes, strengthen regional governance and rule of law for the safety and security of mariners, preserve freedom of the seas, and promote free flow of commerce through lawful economic activity. The Counter Piracy and Maritime Security Action Plan focuses on three core areas: prevention of attacks, response to acts of maritime crime, and enhancing maritime security and governance; and provides specific frameworks for the Horn of Africa and Gulf of Guinea. These frameworks establish a tailored and specific methodology for the focus regions, and provide guidance on how the United States will respond to the regional threats associated with the varying environments.
>
> Under the plan, the U.S. Government will work toward the following objectives:
>
> • Reduce the vulnerability of the maritime domain to piracy and related maritime crimes;
>
> • Prevent pirate attacks and other related maritime crimes against U.S. vessels, persons, and interests, as well as those of our allies and partners;
>
> • Interrupt and terminate acts of piracy, consistent with international law and the rights and responsibilities of other States;
>
> • Ensure that those who commit acts of piracy are held accountable for their actions by facilitating the prosecution of suspected pirates, and ensure that persons committing related maritime crimes are similarly held accountable by regional, flag, victim, or littoral States or, in appropriate cases, the United States;
>
> • Preserve the freedom of the seas, including all the rights, freedoms, and uses of the sea recognized in international law;
>
> • Protect ocean commerce and transportation;
>
> • Continue to lead and support international efforts to combat piracy and other related maritime crimes and urge other States to take decisive action both individually and through international efforts;
>
> • Build the capacity and political will of regional states to combat piracy and other related maritime crimes, focusing on creating institutional capacity for governance and the rule of law; and
>
> • Strengthen national law to better enable successful prosecution of all members of piracy-related criminal enterprises, including those involved in financing, negotiating, or otherwise facilitating acts of piracy or other related maritime crimes.

The plan is available at *www.whitehouse.gov/sites/default/files/docs/united_states_counter_piracy_and_maritime_security_action_plan_2014.pdf*.

C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. Expansion of the War Crimes Rewards Program

On January 15, 2013, President Obama signed into law the Department of State Rewards Program Update and Technical Corrections Act of 2012, S. 2318. Under the updated War Crimes Rewards Program, the Department of State may offer and pay cash rewards for information leading to the arrest, transfer, or conviction of foreign nationals accused of crimes against humanity, genocide, or war crimes by any international, mixed, or hybrid criminal tribunal. The original program offered rewards for information only about those indicted by the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone. On April 3, 2013, Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, participated in a special briefing about the expanded War Crimes Reward Program, announcing specific individuals for whom rewards were being offered under the program. Ambassador Rapp's remarks are excerpted below and are available in full at *www.state.gov/j/gcj/us_releases/remarks/2013/207031.htm*. Secretary Kerry also announced the reward offers and described the expanded War Crimes Reward Program on April 3 in a contribution to the Huffington Post, which is available at *www.state.gov/r/pa/prs/ps/2013/04/207033.htm*.

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

Accountability is a key pillar of the United States Atrocity Prevention Initiative and our national security strategy, which states that the end of impunity and the promotion of justice are not just moral imperatives; they're stabilizing forces in international affairs. We act today so that

there can be justice for the innocent men, women, and children who have been subjected to mass murder, to rape, to amputation, enslavement, and other atrocities.

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

In the past two years alone, we've made 14 payments at an average of about 400,000 per person, with the largest payment being $2 million. The actual amount depends on a range of factors, including the risk, the informant, the value of the information, and the level of the alleged perpetrator. To date, with the assistance of the War Crimes Reward Programs, no indictee remains at the International Criminal Tribunal for the former Yugoslavia. 161 persons were charged; all of them have been brought to justice. In addition, out of the 92 individuals indicted by the Rwanda tribunal, only nine have yet to be apprehended. And these nine individuals are still subject to rewards of up to $5 million for information leading to their capture.

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

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

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

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2. International Criminal Court

a. Overview

On December 15, 2014, Ambassador Rapp delivered a statement on behalf of the U.S. observer delegation at the general debate of the Thirteenth Session of the annual Assembly of States Parties ("ASP") to the International Criminal Court ("ICC") in New York City. Ambassador Rapp's remarks at the general debate are excerpted below and available at *www.state.gov/j/gcj/us_releases/remarks/242658.htm*.

* * * *

As the Ambassador-at-Large for Global Criminal Justice at the Department of State, I am pleased to address the Assembly of States Parties and our fellow observers on behalf of the United States of America. I would like to speak briefly about some of the work the United States has undertaken this year, together with many of you, in the common cause of justice.

Our work together has often taken place against a backdrop of commemoration. On several occasions in 2014, our governments have come together to reflect on the slaughter that devastated Rwanda twenty years ago. Our reflections have been solemn, but they have also given us a chance to see that there are areas in which we have made progress in the two decades since this tragedy—commitments we have deepened, practices we have adapted, ideas we have changed.

We also recognize that no nation is perfect, ours included. As Secretary of State John Kerry suggested on Tuesday, it demonstrates strength "…to recognize and wrestle with our own history, acknowledge mistakes, and correct course."

I'd like to begin by focusing on one area in which my government, like many of yours, has put a strong emphasis: taking strides to prevent and punish sexual violence more effectively, particularly in the context of armed conflict. …In particular, as Secretary Kerry said, "we will not, we should not, we cannot tolerate peace agreements that actually provide amnesty for rape."

…For our part, the United States is focused on deploying a wide range of tools, including new support to specialized and innovative judicial mechanisms that support access to justice for conflict-related sexual violence, and a new commitment announced in September of $12 million to help international organizations and NGOs prevent and respond to gender-based violence from the earliest stages of a humanitarian response.

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…Attaining accountability is no less vital an element of our response to such conflict and violence, and judicial institutions at every level are under strain as well. Faced with these strains, the United States continues to place a premium on what the Court has called "positive complementarity"—an effort to support countries in their own domestic efforts to strengthen the rule of law and pursue accountability for atrocity crimes in national, regional, and hybrid courts.

We have worked closely with many of you in support of such solutions, and I will briefly discuss a few of them here.

In the Democratic Republic of the Congo, where persistent impunity has fueled a devastating series of conflicts, the United States has worked for many years to assist the Congolese to bolster the capacity of their military justice institutions. The recent conviction in domestic courts of Jerome Kakwavu, an army general, for rape and other crimes and the upcoming ICC trial of Bosco Ntaganda help reinforce a needed signal that all those responsible for crimes involving sexual violence should be held accountable, no matter what rank they hold. Given the scope of the accountability challenge in the DRC, we continue to advocate for the establishment of mixed chambers that could help address more of the cases that cry out for justice.

In the Central African Republic, we applaud the commitment of the transitional authorities to pursue justice, through a referral to the ICC, as well as through the establishment of a special investigative unit and a mixed Special Criminal Court in its national system, under the terms of the agreement reached by the UN peacekeeping mission and the interim national authorities. Special courts that feature international participation within the context of national systems offer a particularly effective way to build domestic capacity and independence.

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For reasons that have been much discussed, the United States has not accepted the Court's jurisdiction. Nonetheless, in this context of global challenges, the United States has worked with the ICC to identify practical ways to advance our mutual goals, on a case-by-case basis and consistent with U.S. policy and laws. We have expressed our support for each of the situations in which ICC investigations and prosecutions are underway; and we have offered financial rewards for the apprehension of several of the fugitives at large in the ICC's current cases. As the safety of witnesses remains in many cases a grave vulnerability for the work of the ICC, we have continued to work with the Court to respond positively to requests for assistance relating to witness protection. While the Court has increasingly made use of its authority to deter and punish efforts to tamper with or intimidate witnesses, we encourage all states to do what they can to protect the vulnerable when they risk their lives and those of their families by testifying.

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I would also briefly highlight, as my government has consistently done since the 2010 Kampala review conference, the issue of the crime of aggression. We have previously praised the wisdom of that gathering in deciding to provide additional time for consideration by subjecting the activation of the Court's jurisdiction over this crime to a decision to be taken no earlier than 2017. That date, once distant, is now fast approaching, and it is becoming ever more vital for the States Parties and others to address the issues posed by the aggression amendments. In particular, we urge the States Parties to consider steps that might be taken to mitigate the risk that these amendments will work at cross purposes with legitimate efforts to prevent and punish the very atrocity crimes that have inspired our common efforts and provided the Court's raison d'être.

Finally, we remain concerned about the manner in which the decisions regarding Palestinian participation in this Assembly are being reported in some quarters. We recognize that these are only procedural decisions, and that they are without prejudice to decisions taken for any other purpose, including decisions of other organizations or any organs of the Court. The

longstanding position of the United States on Palestinian status is well known and I will not repeat it here.

Next year, like this one, will be a year of commemorations. We continue to believe that one of the best ways of honoring the memory of victims and survivors – whether they be the men and women liberated from concentration camps at the end of the Second World War, the 1.5 million Armenians massacred or marched to their deaths in the final days of the Ottoman Empire, or the men and boys who were murdered at Srebrenica – is to learn and apply the lessons of past calamities. The United States will remain committed to the cause of preventing such atrocities and promoting accountability, and we will continue to work with the other states and partners assembled here to support the dogged work—of strengthening institutions, collecting evidence, and bringing the truth to light—needed to ensure that we live up to this commitment, even in the face of an ever more challenging world.

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b. Syria: UN Security Council Vote on Referral to ICC

On May 22, 2014, Ambassador Samantha Power, U.S. Permanent Representative to the UN, delivered remarks after an unsuccessful attempt at the UN Security Council to pass a resolution referring the situation in Syria to the ICC. Russia and China both vetoed the resolution. Ambassador Power's remarks, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/226438.htm*.

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Today is about accountability for crimes so extensive, so deadly, that they have few equals in modern history. Today is about accountability for Syria. But it is also about accountability for this Security Council.

It is this Council's responsibility to stop atrocities if we can and—at a minimum—to ensure that the perpetrators of atrocities are held accountable. It was toward that minimum that we sought to make progress today. My government applauds the vast majority of members of this Council who voted to support—and the some 64 countries who joined us in co-sponsoring—this effort to refer these atrocities to the International Criminal Court.

Sadly, because of the decision by the Russian Federation to back the Syrian regime no matter what it does, the Syrian people will not see justice today. They will see crime, but not punishment.

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A judicial process does more than hold perpetrators accountable. It also allows victims to speak. The vetoes today have prevented the victims of atrocities from testifying at The Hague for now. But nonetheless it is important for us here today to hear the kind of testimony we might have heard if Russia and China had not raised their hands to oppose accountability for war crimes and crimes against humanity.

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In the past, when extraordinary crimes have been carried out, the International Criminal Court has been able to act. Why is it that the people of Uganda, Darfur, Libya, the Central African Republic, the Democratic Republic of Congo, Cote d'Ivoire, Mali, and Kenya deserve international, impartial justice, but the Syrian people do not? Why should the International Criminal Court pursue accountability for atrocities in Africa but none in Syria where the worst horrors of our time are being perpetrated? For those who have asked the Security Council this very reasonable question, today you have your answer: the Russian and Chinese vetoes.

Our grandchildren will ask us years from now how we could have failed to bring justice to people living in hell on earth. …

Today is therefore about accountability, not just for the victims of Assad's regime, …but for the members of this Security Council. Month after month, and year after year, we have each spoken about the importance of justice and the need for accountability in Syria. Victims and survivors have begged for action and cried for justice. The international community has supported *ad hoc* efforts to collect evidence, to record testimony. We've launched commissions of inquiry to find facts, and we've held meeting after meeting. But we have not, before today, brought forward a resolution to refer the situation in Syria to the International Criminal Court. We have not done so because we were afraid that it would be vetoed.

But the victims of the Assad regimes' industrial killing machine and the victims of terrorist attacks deserve more than to have more dead counted. They deserve to have each of us, the members of this Security Council, counted and held to account. They deserve to have history record those who stood with them, and those who were willing to raise their hands to deny them a chance at justice. While there may be no ICC accountability today for the horrific crimes being carried out against the Syrian people, there should be accountability for those members of this Council that have prevented accountability.

Now, the representatives from Syria, and perhaps Russia, may suggest that the resolution voted on today was biased. And I agree—it was biased in the direction of establishing facts; tilted, as well, in the direction of peace—the peace that comes from holding individuals—not whole groups, not "Allawites," not "Sunni," not "Kurds," but individuals—accountable.

The outcome of today's vote, disappointing as it is, will not end our pursuit of justice. My government will continue to work with so many other governments and organizations to encourage and facilitate the further gathering of evidence. …

* * * *

c. Democratic Republic of the Congo

On March 7, 2014, the U.S. Department of State issued a press statement on the verdict in the trial of Germain Katanga at the ICC. The statement, available at *www.state.gov/r/pa/prs/ps/2014/03/223152.htm*, follows:

> Today, the Trial Chamber of the International Criminal Court (ICC) convicted Germain Katanga, the commander of the *Force de Résistance Patriotique en*

Ituri (FRPI) militia, for his responsibility for war crimes and crimes against humanity during a brutal February 2003 attack on Bogoro village in the Ituri Province of the Democratic Republic of the Congo (DRC).

Past impunity for perpetrators in the DRC has fueled a destabilizing cycle of conflict and human rights abuses, and those who are responsible for atrocities in the DRC must be held to account. In that regard, the ICC's DRC cases represent a significant step toward delivering justice for victims in the DRC. The United States reiterates its call for the apprehension of Sylvestre Mudacumura, another leader of an abusive rebel militia in the DRC who is subject to an arrest warrant by the ICC for war crimes. The Department of State continues to offer a reward of up to $5 million for information leading to his arrest.

Strong and effective national courts also have a vital role to play in ending impunity in DRC. We continue to support the Congolese government's efforts to hold perpetrators accountable through its domestic institutions, including through the creation of the proposed mixed chambers.

d. Darfur

On June 17, 2014, Peter Lord, U.S. Acting Minister Counselor for Political Affairs, addressed a UN Security Council briefing by the ICC Prosecutor on the situation in Darfur. Peter Lord's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/227684.htm*.

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The continued work of the ICC in investigating ongoing war crimes and crimes against humanity in Darfur is made more difficult by the alarming levels of violence and the persistent failure of the Government of Sudan to abide by its obligations under Security Council resolution 1593 to cooperate fully with the ICC.

While the people of Darfur continue to await justice, the architects of the campaign of terror who bear the greatest responsibility for atrocities in Darfur go free. The consequences of this impunity are clear. Although the world first became aware of crimes in Darfur a decade ago, the government continues to use apparently indiscriminate aerial bombardments with deadly consequences for civilians. Violence in Darfur continues to escalate as paramilitary Rapid Support Force soldiers kill, loot, burn, and rape. This year, over 322,000 Darfuris have been forced from their homes, worsening a humanitarian crisis that has been compounded by humanitarian groups' lack of access.

Unsurprisingly, the violence has spread beyond Darfur's borders. We are outraged by reports of ongoing indiscriminate attacks, as well as targeted attacks against civilians, hospitals, and schools, in South Kordofan and Blue Nile states. These attacks have resulted in over 100,000 new displacements since May, interrupting the planting season.

The Government of Sudan has also not honored its commitments to justice and accountability under the Doha Document for Peace in Darfur. We have yet to see any credible, independent investigations into violations of international humanitarian law or violations of human rights, much less any cases for such acts prosecuted in the Special Courts for Darfur. Instead, we continue to see protracted assaults against civilians, peacekeepers, and humanitarian aid workers. If Sudan is to enjoy a peaceful, stable, and prosperous future, the government cannot be indifferent to the lives of its people.

But it is not just the Government of Sudan that has failed to live up to its commitments. We note the decisions issued by the ICC's Pre-Trial Chamber with respect to non-cooperation in the Darfur situation. As the report by the Office of the Prosecutor notes, President Bashir has traveled internationally on at least six occasions in as many months.

We note that African people have not always welcomed his visits. Last year, public protests and actions to compel President Bashir's arrest caused him to depart one country before he was able to make an appearance and activists in another country filed petitions to demand President Bashir's apprehension and transfer to The Hague. The Security Council should take a cue from these groups and do more to follow up on implementation of Resolution 1593, as inaction only emboldens perpetrators in Sudan and elsewhere.

In closing, the United States continues to believe that working to ensure justice and accountability for war crimes, crimes against humanity, and genocide is not just a moral obligation, but is integral to ensuring a lasting and durable peace in Sudan. We will continue to support Prosecutor Bensouda and the ICC's efforts to bring to justice those most responsible for serious crimes in Darfur.

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On December 12, 2014, Ambassador David Pressman, U.S. Alternate Representative to the UN for Special Political Affairs, addressed a UN Security Council briefing by the ICC Prosecutor on the situation in Darfur. Ambassador Pressman's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/234985.htm*.

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This year marks a truly sad milestone. It has been ten years since the Security Council first condemned reports of large-scale attacks on civilians, sexual violence, and forced displacement in Darfur, urged the government to seek a peaceful, political resolution to the conflict and bring perpetrators of such crimes to justice. When the Sudanese government failed to do this, this Council took the historic step to refer the situation in Darfur to the International Criminal Court in March of 2005.

The ICC has sought to bring justice to the victims of Darfur, and we continue to believe it is essential to pursue accountability for those most responsible for genocide, war crimes and crimes against humanity there.

In the decade that has passed since the Security Council first addressed Darfur, the international community has made enormous strides to bring those responsible for atrocity crimes to justice in other parts of the world. From Charles Taylor in Liberia, to the most senior surviving members of the Khmer

Rouge regime, to Congolese warlord Thomas Lubanga, the world has shown that it will combat impunity for atrocities perpetrated against civilians.

Yet, the progress that has occurred elsewhere in the world has cruelly bypassed Darfur. The same crimes that the Commission of Inquiry uncovered and the Security Council denounced – involving widespread killing of civilians, torture, kidnapping, enforced disappearances, rape, pillaging, forced displacement, and destruction of villages – have been committed and continue to be committed by government forces, rebel groups, and government-aligned militia. Indeed, the Rapid Support Forces, which are now active in Darfur, employ the same tactics as the Janjaweed and are, as the prosecutor notes, funded, trained, equipped, and administered by the Government of Sudan's National Intelligence Security Service and commanded by the Government of Sudan's armed forces during military operations.

Further, the scorched-earth tactics the Sudanese government has pursued in Darfur were precursors to conflicts both in Blue Nile states and South Kordofan, where the Rapid Support Forces have also terrorized civilians.

The ICC's task is not an easy one. The government of Sudan's lack of cooperation and its disregard for the Security Council's decision to refer the situation in Darfur to the ICC pursuant to Resolution 1593 is so profound that the prosecutor's report recounts that a cooperation request with respect to Abdallah Banda was simply returned to the court by the Government of Sudan, the envelope unopened.

As Prosecutor Bensouda's report indicates, recent developments remain deeply concerning. We are particularly concerned about recent reports of mass rape in Tabit, North Darfur, which have not yet been fully investigated. The limited interviews of villagers in Tabit to investigate this alleged mass rape was done in the presence of the Government of Sudan's military intelligence and soldiers, some of whom were recording the interviews. This does not count as an investigation – it is only intimidation.

UNAMID has a responsibility to investigate. It has a mandate to investigate. And the government of Sudan has an obligation to stop interfering. We again call upon the Sudanese government to remove immediately all obstacles to UNAMID's full and proper discharge of its mandate, including to its freedom of movement in areas where it is operating in accordance with the mandate this Council has given it.

For its part, UNAMID has played a critical role in monitoring, investigating, and reporting on the facts on the ground, and must remain on the ground – without obstruction – in order to fulfil its role protecting civilians.

In this regard, though, it is important to note, as other colleagues have, that on October 29, the Secretary-General informed the Security Council of the results of a review of UNAMID reporting, following allegations of UNAMID underreporting that had been brought to the attention of the ICC Prosecutor and to which she referred in her briefing today. The review found that in nearly one-third, approximately one-third of the incidents that were the subject of the allegations, UNAMID did not provide a full accounting of the facts, and curiously, the details that were omitted were usually details that identified the Government of Sudan or government-proxies as perpetrators. The review team recommended that the practice of the mission's "censoring itself in its reporting to Headquarters …needs to be addressed immediately."

These findings should be deeply concerning to every member of this Council. The Security Council was recently briefed by the head investigator and the United States urges immediate action to address the abuses uncovered in this investigation. Accordingly, we welcome the Secretary-General's commitment to take all necessary steps to ensure that UNAMID's reporting is full, accurate, and timely, and that the mission's engagement with the public is open, forthcoming, and not manipulated.

Justice cannot alone bring back the lives lost or undo the damage caused by killings, rape, and destruction of homes and livelihoods. But it serves as an important foundation for healing so that survivors can rebuild their lives, fully participate in the restoration of their communities, and lay a foundation for the rule of law. We cannot abandon the people of Darfur to a government complicit in and indifferent to their suffering. We must continue to find ways to provide some measure of justice to the people who have waited far too long to see the crimes against them punished and we continue to call on

the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the International Criminal Court as required by UN Security Council Resolution 1593.

Prosecutor, your words today were clear, candid, and your warnings concerning. You have spoken of the danger of investigations going into hibernation due to continued lack of cooperation, obstruction, intimidation, all amidst ongoing attacks on civilians. The danger of these cases going into hibernation must be a wake-up call. You have spoken of the lack of progress; that, simply, virtually nothing is happening to advance justice for the people of Darfur. This is a travesty. If these cases are in danger of going into hibernation, we must collectively and urgently wake from our slumber.

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e. Libya

In 2011, the UN Security Council adopted resolution 1970, referring the situation in Libya to the ICC. See *Digest 2011* at 91-93. On May 13, 2014, the United States participated in a Security Council meeting on the Libya referral. Mark Simonoff, Minister Counselor for Legal Affairs for the U. S Mission to the UN, delivered remarks on behalf of the United States. His remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/226019.htm*.

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Three years ago, with the adoption of Resolution 1970, this Council called for accountability in Libya. Today, we see real steps towards accountability in Libya both at the international and domestic levels. We welcome reports of collaboration between Libya and the Office of the Prosecutor in connection with ongoing investigations. And, we note that Libya and the Office of the Prosecutor have signed an MOU, which we hope will facilitate collaboration going forward.

Cooperation is key. We know, of course, that the admissibility proceedings in the cases against Saif Al-Islam Qadhafi and Abdullah Al-Senussi are ongoing. These proceedings have presented novel and important questions—both for the Court and for the Libyan government. As the proceedings continue in the Libya situation, we continue to urge Libya to cooperate with the ICC and to take steps to ensure that perpetrators of the worst crimes are held to account.

In addition to the Court's proceedings, we know that Libya still faces many challenges to support justice and accountability. The government will only benefit from continuing to work with the international community to bolster its own, domestic capacity in the justice system, and to ensure that both high profile former regime figures and the thousands of conflict-related detainees are only held in accordance with applicable international legal obligations. All detainees should be transferred to government-controlled facilities promptly, and must be treated humanely.

Within the context of a transitional justice strategy, the Libyan authorities may need to prioritize prosecutions that will focus on those who bear the greatest responsibility for the crimes. Beyond prosecutions, we encourage Libya to explore other accountability measures, such as those envisioned in Libya's transitional justice law.

Additionally, we underscore the importance of Libya conducting domestic investigations and prosecutions in a manner consistent with Libya's international obligations. In addition, prosecutions that respect the rights of defendants – including those who were members of the former regime—and that provide them proper fair trial guarantees, will contribute to strengthening public confidence in the judiciary and the rule of law in Libya.

As we look at the bigger picture, the United States remains very concerned by the rising instability in Libya. This instability threatens to undermine the revolution for which Libyans fought so dearly, and to jeopardize Libya's transition to a democratic and prosperous State in which all Libyans can participate. Together, we must be clear about what is at risk.

The United States will continue to support Libya in its efforts to ensure security and protect all of its citizens and democratic institutions. We also applaud the seating of Libya's constitution-drafting assembly. We remain committed to supporting the Libyan government and institutions through this difficult phase.

Finally, we look forward to the ongoing work and partnership with the United Nations, Libya, and Libya's international partners, and to explore appropriate ways we can advance critical initiatives for peaceful democratic transition and vital national reconciliation efforts, including assistance pledged at this year's Rome Ministerial.

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On November 11, 2014, Ambassador A. Elizabeth Jones, Special Advisor, delivered remarks at a UN Security Council briefing by ICC Prosecutor Fatou Bensouda on the situation in Libya. Ambassador Jones's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/233943.htm*.

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When this Council decided in 2011 to refer the situation in Libya to the ICC, it stressed the importance of accountability. Even with Libya's increasingly complex and unstable security situation, the call for accountability remains necessary.

Like Prosecutor Bensouda, we are alarmed by the growing number of atrocity crimes in Libya. These abuses and violations are laid out not only in the Prosecutor's report, but also in the Secretary General's September report to this Council and in a range of reports from civil society organizations and other observers on the ground. The United States condemns the recent surge in politically motivated killings, kidnappings, and other abuses, many of which appear calculated to silence and intimidate a wide range of actors, from politicians and journalists to human rights defenders and civil society organizations. Assassinations, violence, and the intimidation of judges, lawyers, and the judicial police resulted in the closure of courts in Benghazi, Sirte, and Derna, and the spread of coercion throughout the justice system.

Nevertheless, cooperation with the ICC remains critical. We welcome Libya's continued coordination with the ICC's Prosecutor and Registry, including with their memorandum of understanding and their approach to burden-sharing. We encourage Libya to continue to prioritize prosecutions that focus on those who bear the greatest responsibility for their crimes and to explore other accountability measures, such as those envisioned in Libya's transitional justice law.

Libya and this Council have an interest in ensuring that the alleged perpetrators of atrocity crimes in Libya – including the ex-regime officials who are already the subject of ICC proceedings – are held to account, and that this is done in a way consistent with the rights of the defendants and Libya's international obligations.

The United States continues to call on all parties to accept an immediate and comprehensive ceasefire that would allow for the political process to proceed, and to engage constructively in the UN-led political dialogue to resolve the ongoing crisis.

We are deeply concerned about the explosions near the meeting between Prime Minister Al Thinni and SRSG Leon this past Sunday, November 9th. While the circumstances of that event are unclear, we emphasize that the political process must continue despite the challenging circumstances in Libya, since only a political solution can pave the way for the country's democratic transition. We support SRSG Leon's continued commitment to achieving this goal through political consensus.

We urge neighboring countries to support the Libyan government through sustained and constructive engagement. We also support the implementation of this Council's Resolution 2174, particularly its measures to address threats to Libya's peace and stability or security. But Libya's ability to navigate its many challenges – and to secure justice for the worst crimes against Libyan civilians – ultimately depends on the willingness of all parties to the conflict to put Libya's future above their own narrow political and economic interests.

In conclusion, let me reiterate our thanks to Prosecutor Bensouda and her office for the work they have done to advance the cause of justice for the people of Libya.

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f. UN General Assembly

On October 31, 2014, Carol Hamilton, U.S. Senior Advisor, delivered remarks at a UN General Assembly meeting on the Report of the International Criminal Court. The remarks, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/234014.htm*.

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Strengthening accountability for those responsible for mass atrocities remains a priority for the United States. As President Obama's National Security Strategy lays out, "the United States has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs." To those ends, the United States is committed to working with the international community in a common effort not only to help prevent atrocities wherever it is possible, but also to ensure accountability for the perpetrators of the worst crimes in the world.

The framers of the Rome Statute charged the ICC with pursuing only those accused of bearing the greatest responsibility for the most serious crimes, and only when states are not willing or able genuinely to investigate or prosecute such crimes in the Court's jurisdiction. Much in the same way, the United States supports an approach of "positive complementarity."

Given the importance of local ownership, the responsibilities that states have for protecting their own populations, and the limited capacity of any international body in this regard, we place a premium on supporting countries in their own domestic efforts to establish the rule of law and pursue accountability for atrocity crimes. From the Democratic Republic of the Congo's domestic efforts to begin holding abusive soldiers and armed group members accountable, to Senegal's unique work with the African Union and the Chadian government to prosecute those responsible for alleged crimes committed during the Hissène Habré administration, the United States continues to support efforts to build fair, impartial, and capable national justice systems, as well as hybrid tribunals where appropriate.

At the same time, more work should be done to strengthen accountability mechanisms at the international level. The United States has long been a supporter of such mechanisms, ranging from the ad hoc tribunals established by the UN Security Council in the 1990s to many of the unique hybrid arrangements that emerged in the following years. And although the United States is not a party to the Rome Statute, we recognize that the ICC can play an important role in a multilateral system that aims to ensure accountability and end impunity.

The United States continues to work with the ICC to identify practical ways in which we can work to advance our mutual goals, on a case-by-case basis and consistent with U.S. policy and laws. In the past year, after we witnessed the shocking atrocities that have taken place in the Central African Republic, the United States expressed its support for the decision of the Office of the Prosecutor – made at the request of the interim government – to open a new investigation into the situation there. Accountability remains a critical element of the international community's response to the crisis in the CAR, and the United States supports the coordinated efforts of the UN, the interim government, regional and international partners, and civil society to begin to address the destabilizing impact of impunity for these horrible crimes. The United States also continues to offer rewards for information leading to the arrest of several of the individuals facing ICC arrest warrants for alleged atrocity crimes, including Sylvestre Mudacumura and Joseph Kony.

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Finally, we would note the importance for the international community of grappling with the crime of aggression. The United States continues to have many concerns about the related amendments adopted in Kampala, including the risk of these amendments working at cross-purposes with efforts to prevent or punish genocide, crimes against humanity, and war crimes. As we have consistently said, the States Parties were wise to create breathing space by subjecting the Court's jurisdiction to a decision to be taken after January 1, 2017. The international community should use that breathing space to ensure that efforts to ensure accountability for atrocity crimes can be consolidated and that measures regarding the amendments can be properly considered. It remains our view that States should not move forward with ratifications pending the resolution of such issues.

Mr. President, the international community continues to face a daunting challenge in the long-standing and ongoing systematic, widespread and

gross violations of human rights in the Democratic People's Republic of Koreasuch crimes are held accountable. Although the international community has made progress on both fronts, much work remains. None of us can bear this burden alone, and our success will continue to depend in large part on our ability to work together.

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On December 18th, 2014 the UN General Assembly adopted a resolution expressing grave concern at the findings of the Commission of Inquiry into the human rights situation in North Korea. The resolution condemns the "the long-standing and ongoing systematic, widespread and gross violations of human rights in the Democratic People's Republic of Korea." U.N. Doc. A/RES/69/188. The vote on the resolution was 116 in favor, 20 against, with 53 abstaining. The resolution also encourages the Security Council to "take appropriate action to ensure accountability, including through consideration of referral of the situation in the Democratic People's Republic of Korea to the International Criminal Court and consideration of the scope for effective targeted sanctions against those who appear to be most responsible." On December 22, 2014, Ambassador Power delivered remarks on the Commission's report and the resolution, highlighting the need for accountability. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/235494.htm*.

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A major impetus for the Security Council taking up this issue was the comprehensive report issued in February 2014 by the UN Human Rights Council Commission of Inquiry. The Commission of Inquiry conducted more than 200 confidential interviews with victims, eyewitnesses, and former officials, and held public hearings in which more than 80 witnesses gave testimony. Witness accounts were corroborated by other forms of evidence, such as satellite imagery confirming the locations of prison camps.

North Korea denied the Commission access to the country, consistent with its policy of routinely denying access to independent human rights and humanitarian groups, including the Red Cross and UN special rapporteurs. And despite repeated requests, the DPRK refused to cooperate with the inquiry.

The main finding of the Commission's thorough and objective report is that "systematic, widespread and gross human rights violations have been and are being committed by the Democratic People's Republic of Korea." The Commission found that the evidence it gathered provided reasonable grounds to determine that, "crimes against humanity have been committed in the Democratic People's Republic of Korea, pursuant to policies established at the highest level of the State."

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The Security Council should demand the DPRK change its atrocious practices, which demonstrate a fundamental disregard for human rights and constitute a threat to international peace and security.

We should take this on for three reasons. First, the DPRK's response to the Commission of Inquiry's report—and even to the prospect of today's session—shows that it is sensitive to criticism of its human rights record. Just look at all the different strategies North Korea has tried

in the past several months to distract attention from the report, to delegitimize its findings, and to avoid scrutiny of its human rights record.

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The second argument for exerting additional pressure is that when regimes warn of deadly reprisals against countries that condemn their atrocities, as the North Koreans have done, that is precisely the moment when we need stand up and not back down. Dictators who see threats are an effective tool for silencing the international community tend to be emboldened and not placated. And that holds true not only for the North Korean regime, but for human rights violators around the world who are watching how the Security Council responds to the DPRK's threats.

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Third, the international community does not need to choose between focusing on North Korea's proliferation of nuclear weapons and focusing on its widespread and ongoing abuses against its own people. That is a false choice. We must do both. As we have seen throughout history, the way countries treat their own citizens—particularly those countries that systematically commit atrocities against their own people—tends to align closely with the way they treat other countries and the norms of our shared international system.

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Knowing the utter improbability of North Korea making those and a long list of other necessary changes, it is incumbent on the Security Council to consider the Commission of Inquiry's recommendation that the situation in North Korea be referred to the International Criminal Court and to consider other appropriate action on accountability—as 116 Member States have urged the Council to do.

In the meantime, the United States will support the efforts of the Office of the High Commissioner for Human Rights to establish a field-based office to continue documenting the DPRK's human rights violations, as mandated by the Human Rights Council, as well as support the work of the Special Rapporteur. Both should brief the Council on new developments in future sessions on this issue.

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

On June 5, 2014, Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative to the United Nations, delivered remarks at a Security Council Meeting on the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the Mechanism for International Criminal Tribunals ("MICT"). Ambassador DeLaurentis's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/227171.htm*.

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…[T]he United States has strongly supported the work of the International Criminal Tribunals for the Former Yugoslavia and Rwanda since their inception. These two courts have tried more than 200 defendants accused of genocide, war crimes, and crimes against humanity, including top political and military leaders. This has been a complex and unprecedented undertaking; yet the tribunals have demonstrated a commitment to fairness, impartiality, and independence. Today we see—as demonstrated by events in Syria, South Sudan, the Central African Republic, and elsewhere—that mass atrocities still pose a challenge to the global community. And we also see that the record of the ICTY and ICTR provides a warning to leaders that the choices they make and the orders they give can have serious personal consequences.

With the work of the tribunals now nearing completion, the United States commends the efforts of the Presidents and Prosecutors of both tribunals to transfer the remaining functions to the Mechanism for International Criminal Tribunals. At the same time, we understand the need for flexibility and recognize that the exact closure dates will depend on the completion of ongoing and soon-to-begin trials and appeals.

Turning to the ICTY, we note with satisfaction that the tribunal continues to focus on the completion of all trials and appeals, having rendered four appellate judgments between November 2013 and May 2014. We are pleased that the trial of Ratko Mladic is moving forward as forecast, and that a judgment in the case of Radovan Karadzic is expected next year. These two men are accused as architects of the Srebrenica genocide, the worst crime committed on European soil since World War II. Completing their trials will help to close the book on one of the most painful chapters in the history of the former Yugoslavia. We urge all governments in the region to continue working towards reconciliation, to avoid statements that inflame tensions, and to continue to bring war criminals to justice in local courts.

Regarding the ICTR, we are pleased that the tribunal has wrapped up its workload of trials and continues to complete appeals. The Mechanism in Arusha opened in 2012 and has smoothly taken over most prosecution and judicial responsibilities. The United States remains concerned, however, that nine ICTR fugitives remain at large. These alleged mass murderers must be brought to trial, and the United States urges all UN members, especially those in the region, to cooperate with the tribunal in the apprehension of these nine men. The United States continues to offer monetary rewards for information leading to their arrest, whether those individuals will be prosecuted in the mechanism or in Rwandan courts. We are working very closely with the ICTR tracking team, as well as the Rwandan government and INTERPOL, to form an international task force later this year, with a view to increasing collaboration in the search for these fugitives. We also call on regional governments to work with the tribunal on the relocation of several persons who have been acquitted by the ICTR or served their sentences but whose return to Rwanda is problematic.

We see the historic contributions these two tribunals have made to international criminal justice. They have brought to justice some of the most vicious criminals in the history of humankind. They have also assembled an historical record that will be publicly accessible and that will protect the truth from those who might, in the future, attempt to deny or distort it. They demonstrate that the world does not forget. Political and military leaders perpetrating atrocities today should ponder this lesson carefully.

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On October 13, 2014, at the 69th UN General Assembly, Carol Hamilton, Senior Adviser to the U.S. Mission to the UN in New York, delivered remarks on the ICTR, ICTY, and MICT. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/233406.htm*.

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This year, the world marked the 20th anniversary of the Rwandan genocide. In supporting the creation and work of the ICTR, the international community came together to assist Rwanda in its recovery efforts. Today, the work of the ICTR's trial chamber is complete, and the tribunal continues to work hard to pass along its duties to national courts and to the Mechanism. This year, the tribunal transferred one case to the Rwandan courts for trial, and sent a significant portion of its archives to the Mechanism. By the end of this year, the court's appeals work is scheduled to be completed in all but one case. The tribunal has also added to its already substantial legacy by preparing a manual of best practices for the investigation and prosecution of sexual and gender-based violence, so that the world can continue its landmark work in prosecuting these unspeakable crimes.

The work of the ICTY is just as impressive. Only 9 cases remain, and the tribunal has worked hard to expedite those proceedings without sacrificing due process and the rights of the accused. President Meron wisely precluded delays by welcoming two additional judges to the tribunal, thereby reducing the chance that the judges' workload would instead delay the conclusion of the proceedings. In addition to transferring some of its functions to the Mechanism, the tribunal has also provided information and expertise to national courts in order to facilitate the domestic prosecutions of crimes committed during the wars in the former Yugoslavia, so that the important work begun by the ICTY will continue after the tribunal has completed its operations.

The United States also commends the continuing efforts of the tribunals over the past several years to wind down their operations and transfer their remaining workload to the Mechanism, as the tribunals progress ever closer to the completion of their historic work.

The contribution of the ad hoc tribunals cannot be overstated. These tribunals have made immeasurable contributions to the development of international law in ensuring accountability for genocide, from recognizing rape as a crime against humanity to compiling data on how to prosecute war crimes and crimes against humanity. Indeed, it is difficult to imagine modern international law today without the contributions of the ICTR and the ICTY. The very existence of these tribunals represents the commitment of the international community to keep moving forward, to keep improving our responses to atrocities, and to keep evolving as a human race until these abominable crimes are a relic of the past. The ad hoc tribunals and the work they have done have not only brought justice to communities torn asunder; they have brought us one step closer to the day when we can look forward and say with certainty, "Never again."

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4. Khmer Rouge Tribunal ("ECCC")

In 2014, the United States continued to support the work of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), also known as the Khmer Rouge Tribunal. On December 4, 2014, Secretary of State John Kerry signed a certification that the Government of Cambodia has provided, or otherwise secured, funding for the national side of such tribunal. Secretary Kerry provided the certification pursuant to Section 7043(c)(4) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2014 (Division K, Pub. L. 113-76) (SFOAA).

On August 7, 2014, the Trial Chamber of the ECCC delivered verdicts against two surviving leaders of the Khmer Rouge, finding them guilty of crimes against humanity and sentencing them to life imprisonment. Secretary Kerry issued a press statement on the verdicts, excerpted below and available at *www.state.gov/secretary/remarks/2014/08/230378.htm*. Ambassador Power also issued a statement on the verdicts, available at *http://usun.state.gov/briefing/statements/230414.htm*.

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More than 30 years after the Khmer Rouge slaughtered some 1.7 million people, Cambodians have received a small measure of justice and a reminder that justice may not be swift, but justice is resolute. Today's verdict against two of the most senior surviving members of the Khmer Rouge is a milestone for the Cambodian people who have suffered some of the worst horrors of the 20th century.

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The effort to try those most responsible for these horrific crimes was long overdue and absolutely vital.

I'll never forget the inspiring story of the photojournalist Dith Pran, whose survival during those bloody years was a triumph of the human spirit. He once said, "The dead are crying out for justice." And believe me: through the ECCC, the international community is working together to make sure that those cries are finally heard.

The United States will continue to support the efforts of the ECCC to secure justice and shed light on the darkest chapter of Cambodian history. Today's verdict is a historic, if long delayed, step along the path for Cambodia. We must now help Cambodia's people see the job through as they usher in a new era of justice, accountability, and reconciliation.

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Cross References

Visa and information sharing agreements, **Chapter 1.C.5.**
Certain Limited Exemptions for those providing support for Tier III Groups, **Chapter 1.C.6.**
Kuwait's reservation to the Terrorism Financing Convention, **Chapter 4.A.3.**
ILC's work on the obligation to extradite or prosecute, **Chapter 7.D.2.**
Maritime security and law enforcement, **Chapter 12.A.5.**
Wildlife trafficking, **Chapter 13.C.**
Arab Bank v. Linde *(involving allegations of support for FTOs),* **Chapter 15.3.a.**
Terrorism sanctions, **Chapter 16.A.4.**
Lord's Resistance Army, **Chapter 17.B.3.**
Use of force issues related to counterterrorism, **Chapter 18.A.1.**
Detainee criminal prosecutions, **Chapter 18.C.3.**
Implementation of UNSCR 1540, **Chapter 19.C.**

CHAPTER 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

1. U.S. Objections to Palestinian Authority Efforts to Accede to Treaties

On April 2, 2014, the Palestinian Authority tendered instruments of accession by the "State of Palestine" to twenty multilateral treaties. For those treaties to which the United States is a party, the United States communicated objections to the purported accessions on the basis that the United States does not recognize the "State of Palestine" as an independent state and therefore considers the Palestinian Authority ineligible to become a party to multilateral treaties for which accession is limited to sovereign States. The U.S. objections further indicate that the United States does not consider itself to be in a treaty relationship with the "State of Palestine" under those treaties.

The U.S. objection sent to the United Nations with respect to the Vienna Convention on Diplomatic Relations, done at Vienna, 18 April 1961, is excerpted below. Nearly identical objections were sent regarding the following: Convention Respecting the Laws and Customs of War on Land, with Annexed Regulations, done at The Hague, 18 October 1907; Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949; UN Convention on the Prevention and Punishment of the Crime of Genocide, done at Paris, 9 December 1948; Vienna Convention on Consular Relations of 24 April 1963; International Convention on the Elimination of All Forms of Racial Discrimination, done at New York, 7 March 1966; International Covenant on Civil and Political Rights, done at New York, 16 December

1966; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, 10 December 1984; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, done at New York, 25 May 2000; UN Convention Against Corruption, done at New York, 31 October 2003. Copies of the objection notes are available at *www.state.gov/s/l/c8183.htm*. The UN related the Palestinian Authority reaction to the U.S. objections in notifications available on the UN website. See, *e.g.*, communication relating to the VCDR, available at *https://treaties.un.org/doc/Publication/CN/2014/CN.342.2014-Eng.pdf*.

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The United States Mission to the United Nations presents its compliments to the United Nations and has the honor to refer to the Secretary-General's depositary notification C.N.176.2014, dated April 9, 2014, regarding the purported accession of the "State of Palestine" to the Vienna Convention on Diplomatic Relations, done at Vienna April 18, 1961.

The Government of the United States of America does not believe the "State of Palestine" qualifies as a sovereign State and does not recognize it as such. Accession to the Convention is limited to sovereign States. Therefore, the Government of the United States of America believes that the "State of Palestine" is not qualified to accede to the Convention and affirms that it will not consider itself to be in a treaty relationship with the "State of Palestine" under the Convention.

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2. Purported "Treaty" between Georgia's Abkhazia Region and the Russian Federation

On November 24, 2014, the State Department issued a press statement on the signing of a "treaty" between the Abkhazia region of Georgia and the Russian Federation. See press statement, available at *www.state.gov/r/pa/prs/ps/2014/11/234367.htm*. The press statement refers to the longstanding position of the United States that Abkhazia and South Ossetia are integral parts of Georgia. Accordingly, the press statement says, "the United States will not recognize the legitimacy of any so-called "treaty" between Georgia's Abkhazia region and the Russian Federation."

3. Objection to Reservation by Kuwait

On July 21, 2014, the U.S. Mission to the UN sent a diplomatic note to the United Nations, in its capacity as depositary for the International Convention for the Suppression of the Financing of Terrorism, conveying its objection to a reservation made by the Government of Kuwait to the Convention. The body of the diplomatic note is set forth below.

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* * * *

The United States Mission to the United nations presents its compliments to the United Nations in its capacity as depositary for the International Convention for the Suppression of the Financing of Terrorism, with Annex ("Convention"), and refers to the reservation made by the Government of Kuwait upon ratification of the International Convention for the Suppression of the Financing of Terrorism, with Annex (1999) (the Convention), on July 11, 2013.

The Government of the United States of America, after careful review, considers the declaration made by Kuwait to be a reservation that seeks to limit the scope of the Convention on a unilateral basis. The reservation is contrary to the object and purpose of the Convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place and who carries them out.

The Government of the United States also considers the reservation to be contrary to the terms of Article 6 of the Convention, which provides: "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

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

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

The United States Mission avails itself of this opportunity to renew to the United Nations the assurances of its highest consideration.

* * * *

4. ILC Draft Articles on the Effects of Armed Conflict on Treaties

On October 23, 3014, the United States provided a statement on the work of the International Law Commission ("ILC") and the special rapporteur on the draft articles and commentaries on the effects of armed conflict on treaties. John Arbogast, Counselor for Legal Affairs for the U.S. Mission to the UN, delivered the statement, which reiterated U.S. support for the principle of continuity of treaty obligations during armed conflict when reasonable, taking into account military necessities. The U.S. statement noted that the draft articles "provide practical guidance to States by identifying factors relevant to determining whether a treaty should remain in effect in the event of an armed conflict." U.S. statement, available at *https://papersmart.unmeetings.org/media2/4654072/us-en-84.pdf*. The U.S. statement

expressed concerns, however, about the definition of "armed conflict" in draft article 2(b). The United States favored making clear that armed conflict referred to the conflicts covered by common articles 2 and 3 of the 1949 Geneva Conventions. Finally, the U.S. statement conveyed the U.S. view that the draft articles should be used as a resource and not transformed into a convention.

5. ILC's Work on Provisional Application of Treaties

The United States submitted its response to the ILC's request for information regarding U.S. practice relating to the provisional application of treaties in 2014. The U.S. response, excerpted below, and available at *www.state.gov/s/l/c8183.htm*, provides examples of practice and statements by the United States related to the questions posed by the ILC on the topic of provisional application.

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I. GENERAL EXAMPLES OF U.S. PRACTICE

Provisional application is discussed extensively in the following two documents, in which the President transmitted international agreements to the Senate for its advice and consent to ratification:

1. Message from the President of the United States Transmitting the Treaty on Conventional Armed Forces in Europe (CFE), with Protocols on Existing Types (with Annex), Aircraft Reclassification, Reduction, Helicopter Recategorization, Information Exchange (with Annex), Inspection, the Joint Consultative Group, and Provisional Application, Nov. 19, 1990, available at 1990 U.S.T. Lexis 227, see also 2441 UNTS 285.
2. Message from the President of the United States Transmitting the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe (CFE) of November 19, 1990, May 31, 1996 ("the Flank Document"), available at *http://www.gpo.gov/fdsys/pkg/CDOC-105tdoc5/pdf/CDOC-105tdoc5.pdf*.

II. INITIATING PROVISIONAL APPLICATION

A. Selected Statements Regarding Initiating Provisional Application

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

In an Exchange of Notes regarding Provisional Application of the US-Ukraine Mutual Legal Assistance Treaty, available at 1998 U.S.T. LEXIS 203, the United States and Ukraine agreed "that until such time as the Treaty enters into force through an exchange of instruments of ratification as provided for under Article 20(2) of the Treaty, [the United States and Ukraine] apply the terms of the Treaty to the extent possible under the respective domestic laws of the United States . . . and Ukraine." *Id.*

In hearings regarding the U.S.-Ukraine MLAT, a member of the Senate Foreign Relations Committee asked about provisional application in the following exchange:

Question. The United States and Ukraine exchanged diplomatic notes in September 1999 in which the two nations agreed to provisionally apply this MLAT.

- What was the reason or reasons for the United States proposing this provisional application?
- Did you consult with the Committee on Foreign Relations prior to doing so?
- What is the purported authority for the Executive to undertake such an agreement?

Answer. The United States exchanged notes with Ukraine on September 30, 1999 to apply the treaty provisionally, to the extent possible under the respective domestic laws of the United States and Ukraine. This was done at the request of the U.S. law enforcement community because of the urgent need to establish interim formal law enforcement relations to help with pending investigations, including investigations relating to corruption and fraud. After the notes were exchanged, the Justice Department sought and received evidence from Ukraine under this interim arrangement to advance its money laundering investigation of former Ukrainian Prime Minister Pavlo Lazarenko, leading to Lazarenko's indictment in the U.S. District Court for the Northern District of California on May 18, 2000.

In the wake of the dissolution of the Soviet Union and related developments, the Executive Branch advised the Committee in 1994 of the need to have effective mutual assistance relations and our consequent intention to utilize executive agreements and provisional application in some cases because of urgent law enforcement needs. This decision followed a series of meetings held by FBI Director Freeh in 1994 with law enforcement officials in Eastern Europe and the former Soviet Union. The United States and Latvia brought the U.S.-Latvia MLAT into force provisionally through an exchange of notes on June 13, 1997, and the treaty was approved by the Senate on October 21, 1998.

The provisional application of the Ukraine MLAT is an interim executive agreement that will terminate by its own terms when the MLAT enters into force. As noted above, the agreement by its express terms is limited to that which can be done under existing legal authority. Often assistance can be provided through administrative cooperation, which the Department of Justice and FBI routinely undertake even in the absence of an international agreement. To the extent that measures of compulsion are required, however, the primary relevant legal authority is Title 28, United States Code, Section 1782, which authorizes U.S. authorities to obtain assistance for proceedings in foreign tribunals, including criminal investigations conducted before formal accusation. The agreement's forfeiture-related provisions could be implemented as necessary under the forfeiture provisions of Title 18, 19 and 21. To the extent that authority does not exist to implement a particular request from Ukraine, assistance would need to be denied on a case-by-case basis.

Consideration of Pending Treaties: Hearings Before the S. Comm. on Foreign Relations, 106th Cong. (2000) (responses submitted by Samuel Witten, Assistant Legal Adviser for Law Enforcement and Intelligence, Department of State, and Bruce C. Swartz, Deputy Assistant Attorney General, Criminal Division, Department of Justice, to additional questions submitted by Senator Joseph R. Biden, Jr.), available at *http://www.gpo.gov/fdsys/pkg/CHRG-106shrg66882/pdf/CHRG-106shrg66882.pdf*.

2. Maritime Boundary Treaties

In hearings regarding potential ratification of three maritime boundary treaties, a member of the Senate Foreign Relations Committee asked about provisional application in the following exchange:

> ***Question***: What are the precedents for 'provisional application' of treaties and what criteria do you use in deciding when that approach is appropriate? Is it necessary to have an explicit provision in a treaty regarding its provisional application or can the parties simply agree outside of the treaty to do so?
>
> ***Answer***: A provisional maritime boundary might be established by an executive agreement separate from a treaty—as is the case in the current situation with Mexico. A provisional maritime boundary might be established by a provision on 'provisional application' in a treaty – such a provision itself constitutes a binding international agreement and can only be included in a treaty signed by the United States if the obligations undertaken in accordance with 'provisional application' are obligations within the President's competence under U.S. law. It is also possible for the President to determine, as a matter of policy and without reaching agreement with other Parties, that the United States will 'provisionally apply' a treaty signed by the United States so long as the obligations undertaken are all within the competence of the President under U.S. law. The primary factor for determining the appropriateness of provisional application relates to the immediate need to settle quickly matters in the interest of the United States which are within the President's domestic law competence.

Three Treaties Establishing Maritime Boundaries Between the United States and Mexico, Venezuela and Cuba: Hearing Before the S. Comm. on Foreign Relations, 99th Cong. (1980) (responses of Mark B. Feldman, Deputy Legal Adviser, Department of State to questions submitted by Sen. Jacob K. Javits), and see 74 Am. J. of Int'l Law 917 (1980), quoting *Digest of United States Practice in International Law* (1980), Ch. 5, Sec. 1, Provisional Application.

B. Selected Instruments Establishing Provisional Application

The following list of examples of operative language illustrates a range of provisions establishing provisional application that appear in agreements that the United States has signed or been a party to. This list does not purport to address all of the options for establishing provisional application, but only to identify some that have been used in the past:

1. Provisional application generally

a. The *US-Ethiopia Air Transport Agreement*, May 17, 2005, TIAS 06-721.1, available at *http://www.state.gov/documents/organization/185585.pdf*) provided that "[t]his Agreement and its Annexes shall apply provisionally upon signature and shall enter into force on the date on which both parties have informed each other through an exchange of diplomatic notes that their necessary internal procedures for entry into force of the Agreement have been completed." (Art. 17.)

b. The *Protocol Additional to the US-IAEA Agreement for the Application of Safeguards in the United States of America*, June 12, 1998, 1988 U.S.T. Lexis 214, available at *http://www.gpo.gov/fdsys/pkg/CDOC-107tdoc7/pdf/CDOC-107tdoc7.pdf*, provided that "[t]he United States may, at any date before this Protocol enters into force, declare that it will apply this Protocol provisionally." (Art. 17 (b) and (c).)

c. The *US-Guatemala Air Transport Agreement*, May 8, 1997, TIAS 01-97, (available at *http://www.state.gov/documents/organization/114296.pdf*), provided that "[t]he competent aeronautical authorities of the United States of America and the Republic of

Guatemala shall permit operations on a provisional basis to the designated airlines of each Party in accordance with the terms of the Agreement upon signature." (Art. 17.)

d. The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, Aug. 4, 1995, 2167 UNTS 3, provided that "[t]his Agreement shall be applied provisionally by a State or entity which consents to its provisional application by so notifying the depositary in writing. Such provisional application shall become effective from the date of receipt of the notification." (Art. 41 (1).)

e. The *Convention on Early Notification of a Nuclear Accident*, Sept. 26, 1986, 1439 UNTS 275, provided that "[a] State may, upon signature or at any later date before this Convention enters into force for it, declare that it will apply this Convention provisionally." (Art. 13.)

f. The *International Dairy Arrangement of the General Agreement on Tariffs and Trade*, Apr. 12, 1979, 1186 UNTS 54, provided that "[a]ny government may deposit with the Director-General to the Contracting Parties to the GATT a declaration of provisional application of this Arrangement. Any government depositing such a declaration shall provisionally apply this Arrangement and be provisionally regarded as participating in this Arrangement." (Art. VIII (2).)

2. Provisional application subject to domestic law

a. *The Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea*, July 28, 1994, 1836 UNTS 3, provided that:

> 1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by: (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing; (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement; (c) States and entities which consent to its provisional application by so notifying the depositary in writing; (d) States which accede to this Agreement.
>
> 2. All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations, with effect from 16 November 1994 or the date of signature, notification of consent or accession, if later.

(Art. 7(1)-(2).)

b. The *US-Denmark Agreement On Enhancing Cooperation in Preventing and Combating Serious Crime*, Oct. 14, 2010, TIAS 11-505 (available at *http://www.state.gov/documents/organization/169476.pdf*), provided that "[t]he Parties shall provisionally apply this Agreement, with the exception of Articles 7 through 9, from the date of signature to the extent consistent with their domestic law." (Art. 23 (1).)

c. The *US-Czech Republic Agreement On Enhancing Cooperation in Preventing and Combating Serious Crime*, Nov. 12, 2008, TIAS 10-0091 (available at *http://www.state.gov/documents/organization/143684.pdf*), provided that "[t]he Parties shall provisionally apply this Agreement from the date of signature to the extent consistent with their domestic law." (Art. 26.)

d. *Arrangement on Provisional Application of the Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project*, Nov. 21, 2006, TIAS 07-016 (available at *http://www.state.gov/documents/organization/88464.pdf*), provided that "[t]he Parties to this Arrangement therefore undertake, to the fullest extent possible consistent with their domestic laws and regulations, to abide by the terms of the ITER Agreement until it enters into force." (Art. 4.)

e. The *Agreement on an International Energy Program*, Nov. 18, 1974, 1040 UNTS 271, provided that "this Agreement shall be applied provisionally by all Signatory States, to the extent possible not inconsistent with their legislation, as from 18th November 1974 following the first meeting of the Governing Board." (Art. 68.)

f. The *Protocol for Provisional Application of the General Agreement on Tariffs and Trade*, Oct. 30, 1947, 55 UNTS 308, provided that a number of named governments "undertake, provided that this Protocol shall have been signed on behalf of all [such] Governments not later than November 15, 1947, to apply provisionally on and after January 1, 1948: (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation." (Art. 1.)

3. Provisional application of part of an agreement

a. The *US-Russia Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, with Protocol*, Apr. 8, 2010, TIAS 11-205 (available at *http://www.state.gov/documents/organization/202693.pdf*), provided that "[u]ntil entry into force of the Treaty, the provisions of the Treaty and this Protocol, listed in this Part [not included here], shall apply provisionally from the date of signature of the Treaty." (Protocol Part VIII, Sect. 1.)

b. The *International Telecommunication Convention, with Annexes, and Final Protocol to the Convention*, Nov. 6, 1982, 1531 UNTS 2, 1982 U.S.T. LEXIS 222, provided in Additional Protocol VII on temporary arrangements that "[t]he Plenipotentiary Conference of the International Telecommunication Union (Nairobi, 1982) has agreed to the provisional application of the following arrangements until the entry into force of the International Telecommunication Convention (Nairobi, 1982): (1.) The Administrative Council, which shall be composed of forty-one Members, elected by the Conference in the manner prescribed in that Convention, may meet immediately after its election and perform the duties assigned to it under the Convention. (2.) The Chairman and Vice-Chairman to be elected by the Administrative Council during its first session shall remain in office until the election of their successors at the opening of the annual Administrative Council session of 1984."

4. Provisional application with eligibility requirements

a. The *Food Assistance Convention*, Apr. 25, 2012, TIAS 13-101 (available at *https://treaties.un.org/doc/source/signature/2012/CTC_XIX-48.pdf*), provided that "[a]ny State referred to in Article 12, or the European Union, that intends to ratify, accept, or approve this Convention or accede thereto, or any State or Separate Customs Territory deemed eligible under Article 13(2) for accession by a decision of the Committee but has not yet deposited its instrument, may at any time deposit a notification of provisional application of this Convention with the Depositary. The Convention shall apply provisionally for that State, Separate Customs Territory, or the European Union from the date of deposit of its notification." (Art. 14.)

b. The *Food Aid Convention*, Apr. 13, 1999, 2073 UNTS 135, provided that "[a]ny signatory Government may deposit with the depositary a declaration of provisional application of

this Convention. Any such Government shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto," (Art. XXII(c)), and "[a]ny Government acceding to this Convention under paragraph (a) of [Article XXIII], or whose accession has been agreed by the Committee under paragraph (b) of [Article XXIII], may deposit with the depositary a declaration of provisional application of this Convention pending the deposit of its instrument of accession. Any such Government shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto." (Art. XXIII.)

b. *The International Natural Rubber Agreement*, 1994, Feb. 17, 1995, 1964 UNTS 3, provided that "[a] signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will fully apply this Agreement provisionally, either when it enters into force in accordance with article 61 or, if it is already in force, at a specified date … [and] Notwithstanding the provisions of paragraph 1 of this article, a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations. However, such Government shall meet all its financial obligations to this Agreement. The provisional membership of a Government which notifies in this manner shall not exceed 12 months from the provisional entry into force of this Agreement, unless the Council decides otherwise pursuant to paragraph 2 of article 59." (Art. 60.)

c. The *International Sugar Agreement*, Oct. 7, 1977, 1064 UNTS 219, provided that "[a] signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the Secretary-General of the United Nations that it will apply this Agreement provisionally either when it enters into force in accordance with article 75 or, if it is already in force, at a specified date." (Art. 74 (1).)

5. Provisional application with exceptions

a. The *US-Cape Verde Millennium Challenge Compact*, Feb. 10, 2012, TIAS 12-1130.1 (available at *http://www.state.gov/documents/organization/203908.pdf*), provided that "[u]pon signature of this Compact, and until this Compact has entered into force in accordance with Section 7.3, the Parties shall provisionally apply the terms of this Compact; provided that, no MCC Funding, other than Compact Implementation Funding, shall be made available or disbursed before this Compact enters into force." (Section 7.5.)

6. Provisional application with time limits

a. The *Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe* of November 19, 1990, May 31, 1996, U.S. Senate Treaty Doc. 105-5, Apr. 7, 1997 (available at *http://www.gpo.gov/fdsys/pkg/CDOC-105tdoc5/pdf/CDOC-105tdoc5.pdf*), provided that "Section II, paragraphs 2 and 3, Section IV and Section V of this Document are hereby provisionally applied as of 31 May 1996 through 15 December 1996. If this Document does not enter into force by 15 December 1996, then it shall be reviewed by the States Parties." (Section VI (1).)

An annex to the Document extended the provisional application as follows:

> "The Representatives of the States Parties to the Treaty on Conventional Armed Forces in Europe, at their session of the Joint Consultative Group on 1 December 1996, have adopted the following: (1) The provisional application of Section II, paragraphs 2 and 3,

Section IV and Section V of the "Document agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990" at the First Conference to Review the Operation of the Treaty on Conventional Armed Forces in Europe and the Concluding Act of the Negotiation on Personnel Strength (hereinafter referred to as the Document), as set out in Section VI of the Document, is hereby extended until 15 May 1997. The Document shall enter into force upon receipt by the Depositary of notification of confirmation of approval by all States Parties. If the Document does not enter into force by 15 May 1997, then it shall be reviewed by the States Parties." (First paragraph.)

7. Provisional application by certain states

a. The *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, with Annexes*, June 17, 1994, 1994 U.S.T. Lexis 212, provided that "[p]ending entry into force of this Convention, the African country Parties, in cooperation with other members of the international community, as appropriate, shall, to the extent possible, provisionally apply those provisions of the Convention relating to the preparation of national, subregional and regional action programmes." (Art. 7.)

8. Other provisional application provisions

a. The *Convention on the Organization for Economic Co-Operation and Development*, Dec. 14, 1960, 888 UNTS 179, allows members to apply decisions of the OECD provisionally, as follows: "No decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures. The other Members may agree that such a decision shall apply provisionally to them." (Art. 6.)

III. TERMINATING PROVISIONAL APPLICATION

A. Selected Instruments Terminating Provisional Application

1. Termination upon entry into force of the agreement:

a. The *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994*, 1836 UNTS 3, provided that "[p]rovisional application shall terminate upon the date of entry into force of this Agreement. In any event, provisional application shall terminate on 16 November 1998 if at that date the requirement in article 6, paragraph 1, of consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1(a) of resolution II has not been fulfilled." (Art. 7(3).)

b. The *Agreement relating to the International Telecommunications Satellite Organization*, Aug. 20, 1971, 1220 UNTS 22, provided that "[p]rovisional application shall terminate [for several reasons, including]: (i) Upon deposit of an instrument of ratification, acceptance or approval of this Agreement by that Government …" (Art. XX.)

c. The *Agreement on an International Energy Program*, Nov. 18, 1974, 1040 UNTS 272, provided that "[p]rovisional application of the Agreement shall continue until [any of three events, including]: the Agreement enters into force for the State concerned in accordance with Article 67, …." (Art. 68.)

2. Termination for any reason:

a. The *US-Germany Agreement to Facilitate Interchange of Patent Rights and Technical Information for Defense Purposes*, Jan. 4, 1956, 268 UNTS 143, provided that "provisional application may be terminated by one month's notice by either Contracting Government." (Art. IX.)

b. The *US-Marshall Islands Agreement concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea*, Aug. 13, 2004, TIAS 04-1124, provided that "[e]ither Party may discontinue provisional application at any time … [and] [e]ach Party shall notify the other Party immediately of any constraints or limitations on provisional application, of any changes to such constraints or limitations, and upon discontinuation of provisional application." (Art. 17(2).)

3. Termination upon determination not to ratify the agreement:

a. The *Agreement relating to the International Telecommunications Satellite Organization "Intelsat"*, Aug. 20, 1971, 1220 UNTS 22, provided that "[p]rovisional application shall terminate [for several reasons, including]: … (iii) Upon notification by that Government, before expiration of the period mentioned in subparagraph (ii) of this paragraph, of its decision not to ratify, accept or approve this Agreement." (Art. XX.)

b. The *Agreement on an International Energy Program*, Nov. 18, 1974, 1040 UNTS 272, provided that "[p]rovisional application of the Agreement shall continue until [any of three events, including]: … 60 days after the Government of the Kingdom of Belgium receives notification that the State concerned will not consent to be bound by the Agreement, …." (Art. 68.)

4. Termination after specific time period:

a. The *Agreement relating to the International Telecommunications Satellite Organization "Intelsat"*, Aug. 20, 1971, 1220 UNTS 22, provided that "[p]rovisional application shall terminate [for several reasons, including]: … (ii) Upon expiration of two years from the date on which this Agreement enters into force without having been ratified, accepted or approved by that Government; …" (Art. XX.)

b. The *Agreement on an International Energy Program*, Nov. 18, 1974, 1040 UNTS 272, provided that "[p]rovisional application of the Agreement shall continue until [any of three events, including]: … the time limit for notification of consent by the State concerned referred to in Article 67 expires." (Art. 68.)

c. The *US-Cuba Maritime Boundary Agreement*, Dec. 16, 1977, TIAS 12-208.1, has been the subject of a series of diplomatic note exchanges provisionally applying the agreement for successive two-year periods pursuant to language such as the following, from a 2011-12 exchange of notes: "The Ministry, representing the Government of the Republic of Cuba, has the honor to propose that the terms of the Maritime Boundary Agreement of December 16, 1977 continue to be applied on a provisional basis beginning January 1, 2012, for a period of two years, pending its permanent entry into force on the date of the exchange of instruments of ratification."

5. Termination of prior provisionally applied agreement:

a. The *US-Guatemala Air Transport Agreement*, May 8, 1997, TIAS 01-97 (available at *http://www.state.gov/documents/organization/114296.pdf*), provided that "[p]rovisional application of the Air Transport Agreement between the Government of the United States of America and the Government of the Republic of Guatemala, signed at Guatemala, July 16, 1992, shall terminate upon signature of this Agreement." (Art. 17.)

6. Termination pursuant to general withdrawal provision applicable to the underlying agreement:

a. The *Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System*, Aug. 20, 1964, 514 UNTS 26, provided that: "Any Government which signs this Agreement subject to a reservation as to approval may, so long as

this Agreement is open for signature, declare that it applies this Agreement provisionally and shall thereupon be considered a Party to this Agreement. Such provisional application shall terminate: (i) upon approval of this Agreement by that Government, or (ii) upon withdrawal by that Government in accordance with Article XI of this Agreement." (Art. XII.)

IV. LEGAL EFFECT OF PROVISIONAL APPLICATION

A. Selected U.S. Practice

1. Provisional Application of Maritime Boundary Treaties

In hearings regarding potential ratification of three maritime boundary treaties, a member of the Senate Foreign Relations Committee asked about provisional application in the following exchange:

> ***Question***: What is the domestic legal status of a treaty applied provisionally? How is provisional application related to the obligation of treaty partners not to take any action prior to final ratification to defeat the 'object and purpose' of the agreement?
>
> ***Answer***: A treaty applied provisionally has the same legal status as any agreement of the United States concluded by the President on his own authority. The American Law Institute, in a draft commentary on provisional application of treaties for the United States, stated: 'If consent of the Senate or Congress is required for the conclusion of an agreement but has not yet been obtained, agreement by the United States for provisional effect must normally rest on the President's authority.' (Tentative Draft No. 1, Foreign Relations Law of the United States (Revised), p. 117.)
>
> A provisional application of a treaty, even though it might commit the nation to a particular course, does so temporarily and does not represent the final commitment of the nation. As such, it is closely tied to the negotiation process. While the President may not, through provisional application of treaties, change existing law, treaties applied provisionally within the President's authority have full effect under domestic law pending a decision with respect to ratification.
>
> The provisional application is terminated if the United States or its treaty partner informs the other of its intention not to become a party to the agreement. The treaty enters into force definitively if the Senate approves and the President formally ratifies the treaty. If the United States enters into a commitment with its treaty partner to apply a treaty provisionally pending ratification, the legal effect is the same as an executive agreement to apply the treaty provisionally. If there is no commitment to another state, but simply a unilateral policy decision by the President to apply the treaty provisionally, the President's power must be derived entirely from his domestic law authority. A unilateral provisional application would present a question of domestic Constitutional law separate from the President's treaty or agreement power.
>
> There is no direct relationship between provisional application and the obligation of treaty partners not to take actions prior to ratification that would defeat the object and purpose of the treaty. Provisional application means that treaty terms are applied temporarily pending final ratification. The obligation not to defeat the object and purpose of the treaty prior to ratification could, in theory, necessitate pre-ratification application of provisions, if any, where non-application from the date of signature would defeat the object and purpose of the treaty. Such provisions are rare. In the majority of cases the obligation not to defeat the object and purposes of the treaty means a duty to refrain from taking steps that would render impossible future application of the treaty when ratified.

Three Treaties Establishing Maritime Boundaries Between the United States and Mexico, Venezuela and Cuba: Hearing Before the S. Comm. on Foreign Relations, 99th Cong. (1980) (responses of Mark B. Feldman, Deputy Legal Adviser, Department of State to questions submitted by Sen. Jacob K. Javits), see 74 Am. J. of Int'l Law 917 (1980), quoting *Digest of United States Practice in International Law* (1980), Ch. 5, Sec. 1, Provisional Application

2. Provisional Application of the Food Aid Convention, 1974

As described in the *Digest of United States Practice in International Law*, 1974, at 234-37, the International Wheat Council sought the United States' position regarding, *inter alia*, the legal significance of provisional application of the Food Aid Convention. Key excerpts from the response are set forth below (emphasis added):

> *It is very difficult, if not impossible, to perceive any valid basis for considering the effect of the deposit of a declaration of provisional application as being limited to "moral implications."* There does not appear to be any basis for such an interpretation either in the provisions of the Convention itself or in generally recognized treaty law and practice.
>
> … The expression "provisional application" is the subject to Article 25 of the Vienna Convention on the Law of Treaties which, although not yet in force, is the most recent consensus of the world community on the law of treaties. That Article is as follows: [quotes Article 25] *It will be observed that the above-quoted Article 25 makes no distinction between the effect of a treaty being provisionally applied and a treaty deemed to be fully in force other than to recognize the right, unless the treaty otherwise provides, of a state to notify the other states between which the treaty is being applied provisionally of its intention not to become a party to the treaty.*
>
> … In Article 2, paragraph 1(g) of the Vienna Convention on the Law of Treaties the word "party" is defined as meaning "a state which has consented to be bound by the treaty and for which the treaty is in force." *It appears that under the provisions of the Food Aid Convention, 1971 [governments and international organizations that] deposited declarations of provisional application are on the same level as to rights and obligations as Governments which deposit instruments of ratification or accession … [noting minor exceptions]*.

3. U.S. Court Application of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade

The following decisions from U.S. courts address the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, Apr. 21, 1951, 3 U.S.T. 588. They offer examples of legal effect being given to provisionally-applied agreements or provisions of agreements.

a. *Michelin Tire Corp. v. United States*, 2 C.I.T. 143, 146-147 (Ct. Int'l Trade 1981), *vacated on other grounds* 9 C.I.T. 38, 39 (Ct. Int'l Trade 1985)

> The Court also finds that the determination did not violate the terms of GATT. Concededly, Article VI [of the GATT] requires an injury determination which was not made in this case. However, the Protocol of Provisional Application provides that the United States, among others, undertook to apply Article VI "to the fullest extent not inconsistent with existing legislation." This provision allowed the continued effectiveness of inconsistent legislation if it was mandatory in nature. The countervailing duty law under which this determination was made was mandatory and therefore even though it did not require an injury determination it remained effective. Although plaintiff seeks to characterize the Secretary's application of the law as discretionary, this was not proven to

be the case. The investigation, whatever its flaws, did find the existence of bounties and grants and, under the law, the Secretary had no discretion to do other than order the assessment of countervailing duties.

b. *Footwear Distribs. & Retailers of Am. v. United States*, 18 C.I.T. 391, 394, 399, 407-07 (Ct. Int'l Trade 1994)

On 12 September 1974 the U.S. Department of the Treasury issued a countervailing duty order (T.D. 74-233, 39 FR 32903) regarding non-rubber footwear from Brazil. Pursuant to this order countervailing duties were imposed, as of that date, under Section 303 of the Tariff Act of 1930 which had been covered by the existing legislation clause under the GATT Protocol of Provisional Application, and therefore no injury determination was made. In accordance with the U.S. law and practice then in effect, suspension of liquidation was not ordered and duties in the amounts determined in the countervailing duty order were collected upon entry.

… When the United States acceded to GATT in 1947, this section [of U.S. law] was not in harmony with article VI:6(a) of the General Agreement, which requires that the effect of a subsidy be to cause, or threaten to cause, material injury to an established domestic industry, or to retard materially the establishment of one. Hence, section 303 was "grandfathered" by the GATT Protocol of Provisional Application requiring that the parties thereto undertake to apply article VI "to the fullest extent not inconsistent with existing legislation."

* * * *

B. LITIGATION INVOLVING TREATY LAW ISSUES

As discussed in *Digest 2013* at 91-98, the United States filed its brief in the U.S. Supreme Court in 2013 in *Bond v. United States*, No. 12-158. The petitioner, Carol Anne Bond, was convicted of using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1). Closely tracking the language of the Chemical Weapons Convention, Section 229 criminalizes "knowingly" "possess[ing]" or "us[ing]" a "chemical weapon." Petitioner had used two toxic chemicals to attempt to harm another woman who had become pregnant as a result of an affair with petitioner's husband. For further background on the case and excerpts from U.S. briefs filed previously on appeal, see *Digest 2012* at 97-100 and *Digest 2011* at 111-17.

The Supreme Court issued its decision in the case on June 2, 2014. 134 S.Ct. 2077 (2014). The majority opinion of the Court avoids the question of the scope of the Treaty Power under the Constitution, instead employing statutory analysis to find that Section 229 was not intended to address actions like petitioner's, that are more properly a subject of the police power of the states.

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* * * *

The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here.

* * * *

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a "police power." *United States v. Lopez*, 514 U.S. 549, 567, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The Federal Government, by contrast, has no such authority and "can exercise only the powers granted to it," *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819), including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, U.S. Const., Art. I, § 8, cl. 18.
…

* * * *

The Government replies that this Court has never held that a statute implementing a valid treaty exceeds Congress's enumerated powers. To do so here, the Government says, would contravene another deliberate choice of the Framers: to avoid placing subject matter limitations on the National Government's power to make treaties. And it might also undermine confidence in the United States as an international treaty partner.

Notwithstanding this debate, it is "a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*); see also *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Bond argues that section 229 does not cover her conduct. So we consider that argument first.

* * * *

Fortunately, we have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.

* * * *

We do not find any such clear indication [that Congress meant to reach purely local crimes] in section 229. "Chemical weapon" is the key term that defines the statute's reach, and it is defined extremely broadly. But that general definition does not constitute a clear statement that Congress meant the statute to reach local criminal conduct.

In fact, a fair reading of section 229 suggests that it does not have as expansive a scope as might at first appear. To begin, as a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a "chemical weapon." Saying that a person "used a chemical weapon" conveys a very different idea than saying the person "used a chemical in a way that caused some harm." The natural meaning of "chemical weapon" takes account of both the particular chemicals that the defendant used and the circumstances in which she used them.

When used in the manner here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare. The substances that Bond used bear little resemblance to the deadly toxins that are "of particular danger to the objectives of the Convention." Why We Need a Chemical Weapons Convention and an OPCW, in Kenyon & Feakes 17 …. More to the point, the use of something as a "weapon" typically connotes "[a]n instrument of offensive or defensive combat," Webster's Third New International Dictionary 2589 (2002), or "[a]n instrument of attack or defense in combat, as a gun, missile, or sword," American Heritage Dictionary 2022 (3d ed. 1992). But no speaker in natural parlance would describe Bond's feud-driven act of spreading irritating chemicals on Haynes's door knob and mailbox as "combat." …

In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition. …

* * * *

In light of all of this, it is fully appropriate to apply the background assumption that Congress normally preserves "the constitutional balance between the National Government and the States." *Bond I*, 564 U.S., at ——, 131 S.Ct., at 2364. That assumption is grounded in the very structure of the Constitution. And as we explained when this case was first before us, maintaining that constitutional balance is not merely an end unto itself. Rather, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Ibid*.

* * * *

It is also clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond. Pennsylvania has several statutes that would likely cover her assault. See 18 Pa. Cons.Stat. §§ 2701 (2012) (simple assault), 2705 (reckless endangerment), 2709 (harassment). And state authorities regularly enforce these laws in poisoning cases. …

* * * *

As we have explained, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Bass*, 404 U.S., at 349, 92 S.Ct. 515. There is no clear indication of a contrary approach here. Section 229 implements the Convention, but Bond's crime could hardly be more unlike the uses of mustard gas on the Western Front or nerve agents in the Iran–Iraq war that form the core concerns of that treaty. See Kenyon & Feakes 6. …

* * * *

In sum, the global need to prevent chemical warfare does not require the Federal Government … to treat a local assault with a chemical irritant as the deployment of a chemical weapon. There is no reason to suppose that Congress—in implementing the Convention on Chemical Weapons—thought otherwise.

The Convention provides for implementation by each ratifying nation "in accordance with its constitutional processes." Art. VII(1), 1974 U.N.T.S. 331. As James Madison explained, the constitutional process in our "compound republic" keeps power "divided between two distinct governments." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961). If section 229 reached Bond's conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.

* * * *

Cross References

Extradition treaty with Chile, **Chapter 3.A.1.**
ILC's work on subsequent agreements and subsequent practice in relation to interpretation of treaties, **Chapter 7.D.2.**
ILC's work on provisional application of treaties, **Chapter 7.D.3.**
Transmittal of tax treaties to U.S. Senate, **Chapter 11.E.1.**
United States-Micronesia maritime boundary treaty, **Chapter 12.A.1.**
Ratification of fisheries conventions and amendment, **Chapter 13.B.2.**
Cultural Property MOUs with China, Bulgaria, and Honduras, **Chapter 14.A.**
Litigation involving alleged NPT breach, **Chapter 19.B.2.C.**

CHAPTER 5

Foreign Relations

A. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Statute ("ATS"), also referred to as the Alien Tort Claims Act ("ATCA"), was enacted as part of the First Judiciary Act in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." In 2004 the Supreme Court held that the ATS is "in terms only jurisdictional" but that, in enacting the ATS in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

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

The following entries discuss 2014 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

2. Extraterritorial Reach of ATS post- *Kiobel*

In 2013, the U. S. Supreme Court dismissed ATS claims in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2013* at 111-17 and *Digest 2011* at 129-36. The majority of the Court reasoned that the

principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Several courts applied the *Kiobel* decision in 2014.

a. Apartheid litigation

In 2014, the district court again considered the claims brought against corporate defendants for allegedly aiding and abetting violations of customary international law committed by the South African government during the apartheid era. As discussed in *Digest 2013* at 117-19, the U.S. Court of Appeals for the Second Circuit directed the parties in a 2013 opinion to return to the district court for a determination in light of the Supreme Court's decision in *Kiobel*. *Balintulo et al. v. Daimler AG, Ford Motor Co., and IBM Corp.*, 727 F.3d 174 (2d. Cir. 2013). The United States had submitted a statement of interest, as well as multiple amicus briefs at earlier stages in the long-running litigation. See *Digest 2009* at 140-44; *Digest 2008* at 236-38; and *Digest 2005* at 400-11. For further background on the case, see *Digest 2007* at 226-27 and *Digest 2004* at 354-61.

The district court determined first, in April 2014, that the *Kiobel* decision did not preclude corporate liability as a rule. *In re South African Apartheid Litigation* (*Ntsebeza, et al. v. Ford Motor Co., and Int'l. Business Machines Corp.*), Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524 (S.D.N.Y. 2014). However, in August 2014 the court dismissed all claims in accordance with *Kiobel*'s application to the ATS of principles underlying the presumption against extraterritoriality. Excerpts follow from the opinion of the district court dismissing the case (with footnotes and citations to the record omitted).

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* * * *

Despite plaintiffs' tenacious effort to revive this litigation, the bar set by the Supreme Court in *Kiobel II*, and raised by the Second Circuit in *Balintulo*, is too high to overcome. Defendants argue, and plaintiffs cannot plausibly deny, that while the newly proposed allegations are substantially more detailed and specific, the theories of the American corporations' liability are "essentially the same as those in plaintiffs' existing complaints."

Plaintiffs argue that "the two U.S. corporations were integral to the creation, maintenance, and enforcement of the apartheid regime—and its attendant international law violations" because "[c]ritical policy-level decisions were made in the United States, and the provision of expertise, management, technology, and equipment essential to the alleged abuses came from the United States." Although now supported with detailed facts, this theory of liability was already rejected by the Second Circuit in *Balintulo* as establishing vicarious liability at most, and therefore being insufficient to overcome *Kiobel II*'s presumption against extraterritoriality. The *Balintulo* court also rejected plaintiffs' effort to tie the international law

violations to the "affirmative steps" defendants "took ... in this country to circumvent the sanctions regime."

Plaintiffs urge this Court to reject *Balintulo* and follow a recent Fourth Circuit case, *Al–Shimari v. CACI Premier Technology, Inc.* …[*]

Even apart from my obligation to follow *Balintulo* as controlling law in the Circuit and as the law of the case, the facts in Al–Shimari are clearly different than the facts in this case and involve much greater contact with the United States government, military, citizens, and territory. Here, any alleged violation of international law norms was inflicted by the South African subsidiaries over whom the American defendant corporations may have exercised authority and control. While corporations are typically liable in tort for the actions of their putative agents, the underlying tort must itself be actionable. However, plaintiffs have no valid cause of action against the South African subsidiaries under Kiobel II because all of the subsidiaries' conduct undisputedly occurred abroad. Thus, even the Al–Shimari court implicitly accepted Balintulo's conclusion that ATS jurisdiction does not extend "to claims involving foreign conduct by [foreign] subsidiaries of American corporations." As we have now made clear, *Kiobel* forecloses the plaintiffs' claims because the plaintiffs have failed to allege that any relevant conduct occurred in the United States. The plaintiffs resist this obvious impact of the *Kiobel* holding on their claims. The Supreme Court's decision, they argue, does not preclude suits under the ATS based on foreign conduct when the defendants are American nationals, or where the defendants' conduct affronts significant American interests identified by the plaintiffs. Curiously, this interpretation of *Kiobel* arrives at precisely the conclusion reached by Justice Breyer, who, writing for himself and three colleagues, only concurred in the judgment of the Court affirming our decision to dismiss all remaining claims brought under the ATS. *See Kiobel*, 133 S.Ct. at 1671 (Breyer, J., concurring). The plaintiffs' argument, however, seeks to evade the bright-line clarity of the Court's actual holding—clarity that ensures that the defendants can obtain their desired relief without resort to mandamus. We briefly highlight why the plaintiffs' arguments lack merit.

a.

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

We disagree. The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States. *Kiobel*, 133 S.Ct. at 1662, 1668– 69. The majority framed the question presented in these terms no fewer than three times; it repeated the same language, focusing solely on the location of the relevant "conduct" or "violation," at least eight more times in other parts of

[*] Editor's note: the *Al-Shimari* case is discussed in section B.2.b., *infra*.

its eight-page opinion; and it affirmed our judgment dismissing the plaintiffs' claims because "all the relevant conduct took place outside the United States," *id.* at 1669. Lower courts are bound by that rule and they are without authority to "reinterpret" the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants. *See Agostini v. Felton*, 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Accordingly, if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.

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

b.

The plaintiffs also assert that "the *Kiobel* presumption is displaced here" because of the compelling American interests in supporting the struggle against apartheid in South Africa. These case-specific policy arguments miss the mark. The canon against extraterritorial application is "a presumption about *a statute's meaning*." *Morrison*, 130 S.Ct. at 2877 (emphasis supplied). Its "wisdom," the Supreme Court has explained, is that, "[*r*]*ather than guess anew in each case*, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 2881 (emphasis supplied). For that reason, the presumption against extraterritoriality applies to the *statute*, or at least the part of the ATS that "carries with it an opportunity to develop common law," *Sosa*, 542 U.S. at 731 n. 19, 124 S.Ct. 2739, and "allows federal courts to recognize certain causes of action," *Kiobel*, 133 S.Ct. at 1664. In order "to rebut the presumption, the ATS [*i.e., the statute*] would need to evince a clear indication of extraterritoriality." *Id.* at 1665 (quotation marks omitted). Applying this approach in *Kiobel*, the Supreme Court held as a matter of statutory interpretation that the implicit authority to engage in common-law development under the ATS does not include the power to recognize causes of action based solely on conduct occurring within the territory of another sovereign. In *all* cases, therefore the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign. In other words, a common-law cause of action brought under the ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should.

* * * *

b. Al-Shimari v. CACI

On June 30, 2014, the U.S. Court of Appeals for the Fourth Circuit applied the reasoning in *Kiobel* to remand to the district court for further proceedings ATS claims against military contractors by plaintiffs alleging they were abused and tortured while detained at Abu Ghraib prison in Iraq. *Al-Shimari v. CACI*, 758 F.3d 516 (4th Cir. 2014). See *Digest*

2012 at 619-29 for discussion of, and excerpts from, the *amicus* brief filed by the United States in the Fourth Circuit in a previous appeal in the case in 2012. Excerpts below (with footnotes omitted) from the opinion explain why the court deemed these claims to sufficiently "touch and concern" the United States under *Kiobel.*

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* * * *

The "touch and concern" language set forth in the majority opinion [in *Kiobel*] contemplates that courts will apply a fact-based analysis to determine whether particular ATS claims displace the presumption against extraterritorial application. …

In the present case, the plaintiffs argue that based on *Kiobel*, the ATS provides jurisdiction for claims that "touch and concern" United States territory with "sufficient force to displace" the presumption. *See id.* (majority opinion). The plaintiffs contend that their claims' substantial connections to United States territory are sufficient to rebut the presumption.

In response, the defendants argue that, under the decision in *Kiobel*, the ATS does not under any circumstances reach tortious conduct occurring abroad. The defendants maintain that the sole material consideration before us is the fact that the plaintiffs' claims allege extraterritorial tortious conduct, which subjects their claims to the same fatal outcome as those in *Kiobel.* We disagree with the defendants' argument, which essentially advances the view expressed by Justices Alito and Thomas in their separate opinion in *Kiobel.*

Because five justices, including Justice Kennedy, joined in the majority's rationale applying the presumption against extraterritorial application, the presumption is part of the calculus that we apply here. However, the clear implication of the Court's "touch and concern" language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory. Under the "touch and concern" language, a fact-based analysis is required in such cases to determine whether courts may exercise jurisdiction over certain ATS claims. Accordingly, the presumption against extraterritorial application bars the exercise of subject matter jurisdiction over the plaintiffs' ATS claims unless the "relevant conduct" alleged in the claims "touch[es] and concern[s] the territory of the United States with sufficient force to displace the presumption...." 133 S.Ct. at 1669.

In *Kiobel*, the Court's observation that all the "relevant conduct" occurred abroad reflected those claims' extremely attenuated connection to United States territory, which amounted to "mere corporate presence." Indeed, the only facts relating to the territory of the United States were the foreign corporations' public relations office in New York City and their listings on the New York Stock Exchange. Because the petitioners in *Kiobel* were unable to point to any "relevant conduct" in their claims that occurred in the territory of the United States, the presumption was conclusive when applied to the facts presented.

In the present case, however, the issue is not as easily resolved. The plaintiffs' claims reflect extensive "relevant conduct" in United States territory, in contrast to the "mere presence" of foreign corporations that was deemed insufficient in *Kiobel.* When a claim's substantial ties to United States territory include the performance of a contract executed by a United States corporation with the United States government, a more nuanced analysis is required to determine whether the presumption has been displaced. In such cases, it is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory.

Here, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia. The alleged torture occurred at a military facility operated by United States government personnel.

In addition, the employees who allegedly participated in the acts of torture were hired by CACI in the United States to fulfill the terms of a contract that CACI executed with the United States Department of the Interior. The contract between CACI and the Department of the Interior was issued by a government office in Arizona, and CACI was authorized to collect payments by mailing invoices to government accounting offices in Colorado. Under the terms of the contract, CACI interrogators were required to obtain security clearances from the United States Department of Defense.

Finally, the allegations are not confined to the assertion that CACI's employees participated directly in acts of torture committed at the Abu Ghraib prison. The plaintiffs also allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.

These ties to the territory of the United States are far greater than those considered recently by the Second Circuit in *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir.2013). In that case, the Second Circuit declined to extend ATS jurisdiction to claims involving foreign conduct by South African subsidiaries of American corporations. *See id.* at 189–94. The plaintiffs in *Balintulo* alleged that those corporations "s[old] cars and computers to the South African government, thus facilitating the apartheid regime's innumerable race-based depredations and injustices, including rape, torture, and extrajudicial killings." *Id.* at 179–80. Interpreting the holding of *Kiobel* to stand for the proposition that "claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States," *id.* at 189 (citing *Kiobel*, 133 S.Ct. at 1662, 1668–69), the Second Circuit construed the Court's "touch and concern" language as impacting the exercise of jurisdiction only "when *some* of the relevant conduct occurs in the United States." *Id.* at 191 (footnote omitted) (emphasis in original); *see also Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 746 F.3d 42, 45–46, 49–50 (2d Cir.2014) (applying *Kiobel* to foreclose jurisdiction over ATS claims filed by a Bangladeshi plaintiff who allegedly was detained and tortured by the Bangladesh National Police at the direction of his Bangladeshi business partner).

Although the "touch and concern" language in *Kiobel* may be explained in greater detail in future Supreme Court decisions, we conclude that this language provides current guidance to federal courts when ATS claims involve substantial ties to United States territory. We have such a case before us now, and we cannot decline to consider the Supreme Court's guidance simply because it does not state a precise formula for our analysis.

Applying this guidance, we conclude that the ATS claims' connection to the territory of the United States and CACI's relevant conduct in the United States require a different result than that reached in *Kiobel.* In its decision in *Morrison,* the Supreme Court emphasized that although the presumption is no "timid sentinel," its proper application "often[ ] is not self-evidently dispositive" and "requires further analysis." 561 U.S. at 266, 130 S.Ct. 2869. We have undertaken that analysis here, employing the "touch and concern" inquiry articulated in *Kiobel,* by considering a broader range of facts than the location where the plaintiffs actually sustained their injuries.

Indeed, we observe that mechanically applying the presumption to bar these ATS claims would not advance the purposes of the presumption. A basic premise of the presumption against extraterritorial application is that United States courts must be wary of "international discord" resulting from "unintended clashes between our laws and those of other nations." *Kiobel,* 133 S.Ct. at 1664 (citation omitted). In the present case, however, the plaintiffs seek to enforce the customary law of nations through a jurisdictional vehicle provided under United States law, the ATS, rather than a federal statute that itself details conduct to be regulated or enforced. Thus, any substantive norm enforced through an ATS claim necessarily is recognized by other nations as being actionable. Moreover, this case does not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad, given that the defendants are United States citizens. *Cf. Sexual Minorities Uganda v. Lively,* 960 F.Supp.2d 304, 322–24 (D.Mass.2013) (holding that *Kiobel* did not bar ATS claims against an American citizen, in part because "[t]his is not a case where a foreign national is being hailed into an unfamiliar court to defend himself").

We likewise note that further litigation of these ATS claims will not require "unwarranted judicial interference in the conduct of foreign policy." *Kiobel,* 133 S.Ct. at 1664. The political branches already have indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals.

The plaintiffs do not appear to have access to federal courts under the Torture Victim Protection Act of 1991 (TVPA), presumably because they did not suffer injury "under actual or apparent authority, or color of law, of any *foreign* nation...." Pub.L. No. 102–256, 106 Stat. 73, note following 28 U.S.C. § 1350 (emphasis added). Nevertheless, the TVPA's broad prohibition against torture reflects Congress's recognition of a "distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Kiobel,* 133 S.Ct. at 1671 (Breyer, J., concurring in the judgment). This conclusion is reinforced by the fact that Congress has authorized the imposition of severe criminal penalties for acts of torture committed by United States nationals abroad. *See* 18 U.S.C. § 2340A. The Supreme Court certainly was aware of these civil and criminal statutes when it articulated its "touch and concern" language in *Kiobel. See Kiobel,* 133 S.Ct. at 1669 (Kennedy, J., concurring) (predicting that "[o]ther cases may arise with allegations of serious violations of international law principles protecting persons" that are "covered neither by the TVPA nor by the reasoning and holding of today's case").

We conclude that the plaintiffs' ATS claims "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application based on: (1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it; and (5) the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad. Accordingly, we hold that the district court erred in concluding that it lacked subject matter jurisdiction under the ATS, and we vacate the district court's judgment dismissing

the plaintiffs' ATS claims on that basis.

* * * *

B. ACT OF STATE, POLITICAL QUESTION, AND PREEMPTION DOCTRINES

1. *Al-Shimari v. CACI*

As discussed in section A.2.b., *supra*, the U.S. Court of Appeals for the Fourth Circuit remanded ATS claims to the district court for further proceedings in *Al-Shimari v. CACI*, 758 F.3d 516 (4th Cir. 2014). In addition to considering whether the claims sufficiently "touch and concern" the United States, the Court of Appeals also considered whether the political question doctrine precludes further adjudication. Excerpts below (with footnotes omitted), include the court's reasoning that the fact-based political question doctrine requires further inquiry at the district court level before a determination could be made.

* * * *

Our decision regarding the ATS answers only the first issue of subject matter jurisdiction presented in this appeal. We also must consider whether the record before us adequately supports a finding that litigation of the plaintiffs' ATS claims and common law tort claims will avoid any "political questions" that would place those claims outside the jurisdiction of the federal courts.

The political question doctrine is a "function of the separation of powers," and prevents federal courts from deciding issues that the Constitution assigns to the political branches, or that the judiciary is ill-equipped to address. *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *see also Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir.1991) (stating that the constitutional separation of powers "requires that we examine the relationship between the judiciary and the coordinate branches of the federal government cognizant of the limits upon judicial power"). The Supreme Court has defined a political question by reference to whether a case presents any of the following attributes: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217, 82 S.Ct. 691.

* * * *

We first observe that CACI's position asserting the presence of a political question was resolved by the district court in the plaintiffs' favor much earlier in this litigation. In March 2009, before any discovery had been conducted, CACI challenged the court's subject matter jurisdiction on political question grounds, based on the allegations in the complaint.

At that time, the district court analyzed the six factors set forth by the Supreme Court in *Baker* solely by reference to the plaintiffs' complaint, and rejected CACI's jurisdictional challenge. …

* * * *

Although CACI appealed the district court's ruling on numerous bases, including justiciability, our conclusion that we lacked jurisdiction over the interlocutory appeal under the collateral order doctrine returned the case to the district court without a decision whether the case presented a political question. *See Al Shimari,* 679 F.3d at 224. On remand, the district court dismissed the plaintiffs' ATS claims for lack of jurisdiction under *Kiobel,* and also dismissed the plaintiffs' remaining common law tort claims under Federal Rule of Civil Procedure 12(b)(6).

In this appeal, CACI renews its political question challenge, contending that the treatment and interrogation of detainees during war is a key component of national defense considerations that are committed to the political branches of government. CACI also asserts that there are no judicially discoverable standards for deciding intentional tort claims in the context of a war zone, and that CACI interrogators were performing a "common mission" with the military and were acting under direct military command and control. CACI further maintains that most of the alleged forms of abuse at issue "were approved by the Secretary of Defense and incorporated into rules of engagement by military commanders at Abu Ghraib."

CACI's arguments are based on constitutional considerations and factual assertions that are intertwined in many respects. We begin our consideration of these arguments by recognizing that "most military decisions" are matters "solely within the purview of the executive branch," *Taylor,* 658 F.3d at 407 n. 9, and that the Constitution delegates authority over military matters to both the executive and legislative branches of government. *See Burn Pit,* 744 F.3d at 334; *Lebron v. Rumsfeld,* 670 F.3d 540, 548 (4th Cir.2012).

Nevertheless, the fact that a military contractor was acting pursuant to "orders of the military does not, in and of itself, insulate the claim from judicial review." *Taylor,* 658 F.3d at 411. Accordingly, before declaring such a case "to be nonjusticiable, a court must undertake 'a discriminating analysis' that includes the litigation's 'susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.' " *Lane v. Halliburton,* 529 F.3d 548, 559 (5th Cir.2008) (quoting *Baker,* 369 U.S. at 211–12, 82 S.Ct. 691). Such an analysis involves a "delicate exercise in constitutional interpretation." *Baker,* 369 U.S. at 211, 82 S.Ct. 691.

Importantly, in the present case, more than five years have elapsed since the district court rendered its initial determination of justiciability. During the intervening period, this Court has formulated a test for considering whether litigation involving the actions of certain types of government contractors is justiciable under the political question doctrine. *See Taylor,* 658 F.3d at 411.

In our decision in *Taylor,* we adapted the Supreme Court's analysis in *Baker* to a particular subset of lawsuits, namely, those brought against government contractors who perform services for the military. *See Burn Pit,* 744 F.3d at 334 (observing that *Taylor* "adapted *Baker* to the government contractor context through a new two-factor test"). The factual record in *Taylor* involved a soldier who was performing work on an electrical box at a military base in Iraq, and was electrocuted when an employee of a government contractor activated a nearby generator despite an instruction from military personnel not to do so. *Taylor,* 658 F.3d at 404. When the soldier sued the military contractor for negligence, the government contractor claimed that the case presented a nonjusticiable political question. *Id.*

In analyzing the justiciability of the soldier's negligence claim, we recognized the need to "carefully assess the relationship" between the military and the contractor, and to "gauge the degree to which national defense interests may be implicated in a judicial assessment" of the claim. *Id.* at 409–10. We distilled the six *Baker* factors into two critical components: (1) whether the government contractor was under the "plenary" or "direct" control of the military; and (2) whether national defense interests were "closely intertwined" with military decisions governing the contractor's conduct, such that a decision on the merits of the claim "would require the judiciary to question actual, sensitive judgments made by the military." *Id.* at 411 (quotation omitted). We noted that an affirmative answer to either of these questions will signal the presence of a nonjusticiable political question. *See Burn Pit,* 744 F.3d at 335 (stating that under *Taylor,* a formal "*Baker* style analysis" is not necessary, and that "if a case satisfies either factor [articulated in *Taylor*], it is nonjusticiable under the political question doctrine").

We further explained in *Taylor* that, in conducting this two-part inquiry, a court must "'look beyond the complaint, and consider how [the plaintiffs] might prove [their] claim[s] *and* how [the contractor] would defend.' " *Taylor,* 658 F.3d at 409 (quoting *Lane,* 529 F.3d at 565) (original brackets omitted) (alterations added) (emphasis in original). This determination requires consideration of the facts alleged in the complaint, facts developed through discovery or otherwise made a part of the record in the case, and the legal theories on which the parties will rely to prove their case.

In *Taylor,* we stated that "if a military contractor operates under the plenary control of the military, the contractor's decisions may be considered as de facto military decisions." 658 F.3d at 410. Based on the factual record presented in that case, we concluded that the military did not exercise "direct control" over the contractor because the record showed that responsibility for the manner in which the job was performed was delegated to the contractor. *Id.* at 411. In drawing this conclusion, we relied on the parties' contract, which recited that "[t]he contractor shall be responsible for the safety of employees and base camp residents during all contractor operations," and that "the contractor shall have exclusive supervisory authority and responsibility over employees." *Id.* at 411.

We contrasted these facts with those reviewed in *Carmichael v. Kellogg, Brown & Root Services, Inc.,* 572 F.3d 1271, 1275–79 (11th Cir.2009), a case in which the plaintiff had sued a military contractor for negligence resulting from injuries sustained when the plaintiff's husband, a sergeant in the United States Army, was thrown from a vehicle in a military convoy that was driven by the contractor's employee. In deciding whether the case presented a political question, the Eleventh Circuit observed that there was no indication in the record that the contractor had any role in making decisions regarding the movement of the military convoy vehicle. *Id.* at 1282. Thus, the court held that the case was nonjusticiable, "[b]ecause the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, [and]

it would be impossible to make any determination regarding [either party's] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny." *Id.* at 1282–83. Because the facts in *Taylor* did not manifest such "direct control" over the contractor's performance of its duties, we resolved this factor in the plaintiff's favor. 658 F.3d at 411.

Since our decision in *Taylor,* we have clarified that the critical issue with respect to the question of "plenary" or "direct" control is not whether the military "exercised some level of oversight" over a contractor's activities. *Burn Pit,* 744 F.3d at 339. Instead, a court must inquire whether the military clearly "chose *how* to carry out these tasks," rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed. *Id.* (emphasis added); *see also Harris v. Kellogg Brown & Root Servs., Inc.,* 724 F.3d 458, 467 (3d Cir.2013) (stating that plenary control does not exist when the military "merely provides the contractor with general guidelines that can be satisfied at the contractor's discretion" because "contractor actions taken within that discretion do not necessarily implicate unreviewable military decisions"); *McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331, 1359–61 (11th Cir.2007) (holding that a contract for aviation services in Afghanistan did not manifest sufficient military control to present a political question because the contractor retained authority over the type of plane, flight path, and safety of the flight).

The second *Taylor* factor concerns whether "a decision on the merits ... would require the judiciary to question actual, sensitive judgments made by the military." *Taylor,* 658 F.3d at 412 (internal quotation marks omitted). In analyzing this factor, a court must focus on the manner in which the plaintiffs might attempt to prove their claims, and how the defendants are likely to defend against those claims. *See id.* at 409. Addressing this issue in *Taylor,* we held that a political question was presented because a military contractor's contributory negligence defense to the plaintiff's common law negligence claim "would invariably require the Court to decide whether the Marines made a reasonable decision in seeking to install the wiring box," and would oblige the court to evaluate the reasonableness of military decisions. *Id.* at 411–12.

By contrast, in *Burn Pit* we analyzed a military contractor's "proximate causation" defense, in which the contractor maintained that the plaintiff's alleged injuries were caused by military decisions and conduct. 744 F.3d at 340. After examining the record that the district court considered, we concluded that the contractor's causation defense would require an examination of the reasonableness of military decisions only if the case ultimately proceeded under the law of a state having a proportional-liability system that assigns liability based on fault. *Id.* at 340–41; *see also Harris,* 724 F.3d at 463 (holding that the contractor's assertion that the military was a proximate cause of the alleged injury did not present a political question under a joint-and-several liability regime, and that even if proportional liability applied, the plaintiffs could proceed on any damages claim that did not implicate proportional liability); *Lane,* 529 F.3d at 565–67 (concluding that the assertion of a causation defense to fraud and negligence claims did not necessarily implicate a political question).

In the present case, however, we do not have a factual record developed by the district court like the records considered in *Taylor* and in *Burn Pit.* And, from our review of the record before us, we are unable to determine whether a political question exists at this stage of the litigation.

With respect to the first *Taylor* factor, the evidence in the record is inconclusive regarding the extent to which military personnel actually exercised control over CACI employees in their performance of their interrogation functions. CACI argues that military control is

evidenced by the contract's stipulation that CACI would provide services "as directed by military authority." CACI also cites a deposition in which a military officer stated that [redacted] According to that officer, [redacted] Finally, a military contracting officer declared that [redacted]

The plaintiffs argue in response that there was an absence of "direct control" by the military over the manner in which CACI's contract was to be performed, and that the contract language reflects a broad grant of discretion to CACI. *See Taylor*, 658 F.3d at 411. In support of their position, the plaintiffs point to the contract's statement that "[t]he Contractor is responsible for providing supervision for all contractor personnel," and that CACI was required to "supervise, coordinate, and monitor all aspects of interrogation activities." The plaintiffs also note that the military officer upon whose testimony CACI relies [redacted] Additionally, the record lacks any evidence whether any of the alleged acts of abuse by CACI personnel ever were ordered, authorized, or approved by the United States military or by other governmental authority.

This limited record suggests that, at least for required interrogations, CACI interrogators may have been under the direct control of the military if they submitted and executed interrogation plans approved by the military, and if those interrogation plans detailed particular methods for treating detainees. However, based on the minimal evidence before us, we are unable to determine whether the actual content of any interrogation plans subjected the CACI interrogators to such direct control. We also are unable to determine the extent to which the military controlled the conduct of the CACI interrogators outside the context of required interrogations, which is particularly concerning given the plaintiffs' allegations that "Most of the abuse" occurred at night, and that the abuse was intended to "soften up" the detainees for later interrogations.

* * * *

2. *Villoldo v. Castro Ruz v. Computershare*

On June 30, 2014, the United States filed a statement of interest in an action by a plaintiff seeking to enforce a judgment against Cuba by attaching securities and accounts, registered to individuals who listed Cuban addresses, that are maintained by Computershare Ltd. in the United States. *Villoldo et al. v. Castro Ruz et al. v. Computershare Ltd.*, No. 4:13-mc-94014-TSH (D. D. Mass). The plaintiffs sought to execute on a $2.8 billion judgment they obtained for alleged acts of torture by the Cuban government. The federal district court ordered the attachment before the United States became involved in the case. The U.S. brief argues that the assets at issue are not subject to attachment because they have not been demonstrated to be assets owned by the Cuban government. Excerpts from the section of the U.S. brief relating to the impropriety of attaching the assets appear in Chapter 10. Excerpted below (with footnotes omitted) is the section of the brief arguing that the act of state doctrine is not applicable in this case. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*. The United States filed a brief that also argued the inapplicability of the act of state doctrine in a case brought by the same plaintiffs seeking to attach assets held by the Comptroller of New York in his capacity as custodian

of unclaimed funds under New York's Abandoned Property Law. That brief is also available at *www.state.gov/s/l/c8183.htm*.

* * * *

Although the Court's Turnover Order does not cite the Act of State doctrine as the basis for its application of Cuban law, the plaintiffs, in their most recent filing, argue that the doctrine should apply in this case. See Pls.' Reply at 6. These arguments reflect a misunderstanding of the doctrine, which, by its terms, applies only to acts of a sovereign affecting property within its own territory. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." (emphasis added)); *Hilton v. Kerry*, --- F.3d ---, 2014 WL 2611146, at *4 n.4 (1st Cir. 2014) (same). The requirement that the act must occur and be operative in the sovereign's own territory is an essential element of the doctrine. Here, where the property allegedly affected by an official act of Cuba is in the United States, the doctrine is simply inapplicable.

Plaintiffs attempt to argue that an "extraterritorial exception" somehow creates an exception to the requirement that the act of state be in the territory of the state. This is simply not the case. The "extraterritorial exception" is an exception to the rule that an act of state must be given effect and holds that, when inconsistent with the policy and law of the United States, "our courts will *not* give 'extraterritorial effect' to a confiscatory decree of a foreign state, even where directed against its own nationals.'" *Tchacosh Co., Ltd. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1336 (9th Cir. 1985) (emphasis added) (quoting *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972)); see also *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 658 F.2d 903 (2d Cir. 1981). In simple terms, the exception allows courts to examine an act of state's effects on property in the United States; the court need not follow the Act of State doctrine when the exception applies. Most courts, in the face of foreign confiscatory laws purporting to affect property in the United States, have declined on policy grounds to give effect to the act of state; in rare circumstances unlike those presented here,… courts have found that giving effect to certain such laws furthers U.S. policy. But the exception does not in any way require or suggest that the act of state must be given effect; in fact, just the opposite—the extraterritorial exception frees the court from the constraints of the Act of State doctrine.

Here, as a threshold matter, and for reasons explained above, choice-of-law rules dictate what substantive law should be applied, and thus the Act of State doctrine and extraterritorial exception are irrelevant. Likewise, plaintiffs' contention that "the Cuban laws at issue are not confiscatory," but instead are criminal laws that impose a forfeiture penalty for non-compliance, Pls.' Reply at 6-7 (emphasis added), underscores that the penal law rule would bar the Court from giving effect to the Cuban laws. …

In any event, plaintiffs' contention that reliance on Cuban law for the turnover of the assets in the United States is appropriate because (1) such transfer is consistent with U.S. policy, and (2) the previous owners have not objected, is meritless. See Pls.' Reply at 11-16.12 Even if these factors were relevant, it is the executive's determination of policy interests, not plaintiffs' views, that should control. See *Rubin*, 709 F.3d at 57; *Heiser*, 885 F. Supp. 2d at 441. As noted above, the United States has a strong interest in preserving the President's ability to use blocked

assets as a tool of U.S. foreign policy. Moreover, it would be contrary to U.S. policy interests to interpret and apply Cuban law such that it automatically transfers assets owned in the United States by private parties to the Government of Cuba without a license and without compensation, and then allow those assets to be used to satisfy Cuba's legal obligation to other private parties—with one set of Cuba's victims effectively paying Cuba's debt to other victims. Similarly, it would not be consistent with U.S. policy interests to permit attachment of property subject to U.S. regulatory controls based on application of a Cuban penal law for the confiscation of property. Lastly, the failure of the record account holders to object, or otherwise to assert an interest in these assets during the period in which they have been blocked, should not be viewed as consent. The Government has serious concerns as to whether the notice protocol utilized here was adequate to provide account holders with actual notice. In any event, the absence of objections by the account holders cannot substitute for a sound legal basis establishing Cuban government ownership of the property.

* * * *

3. *Kellogg Brown & Root Servs., Inc., v. Harris*

In December 2014, the United States submitted an amicus brief in the U.S. Supreme Court in the wrongful death suit brought against a military contractor based on its wartime activities in Iraq. *Kellogg Brown & Root Servs., Inc., ("KBR") v. Harris*, No. 13-817. The estate of a soldier who was electrocuted in a facility where KBR performed the electrical work during the war in Iraq brought the wrongful death suit, which was dismissed by a federal district court as barred by both the political question doctrine and preemption due to the foreign battlefield and military context. The U.S. Court of Appeals for the Third Circuit reversed and remanded, rejecting KBR's argument that the claims were preempted by the federal interests in the combatant-activities exception to the Federal Tort Claims Act ("FTCA"). KBR petitioned for certiorari. The U.S. brief opposes granting certiorari in this case but expresses disagreement with aspects of the preemption analysis by the court of appeals. More specifically, the U.S. brief asserts that the court of appeals "applied an imprecise and unduly narrow understanding of preemption." The U.S. brief endorses the lower court's determination that the claims are not barred by the political question doctrine. Excerpts follow (with most footnotes omitted) from the U.S. amicus brief.[**]

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[**] Editor's note: On January 20, 2015, the Supreme Court denied the petition for certiorari.

A. Although This Case Is Justiciable At This Stage Of The Litigation, Respondents' Claims Are Preempted

1. The court of appeals correctly held that respondents' claims are not barred by the political-question doctrine at this stage of the litigation.

a. The political-question doctrine is "primarily a function of separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as relevant here, "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217. To determine whether "one of these formulations" is applicable, the court must engage in a "discriminating inquiry into the precise facts and posture of the particular case." *Ibid*.

The Constitution confers on the Legislative and Executive Branches broad authority over the military. See U.S. Const. Art. I, § 8, Cls. 11-16; *id*. Art. II, § 2, Cl. 1. Although not "every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, military affairs feature prominently among the areas in which the political-question doctrine traditionally has been implicated. In *Gilligan v. Morgan*, 413 U.S. 1 (1973), for example, this Court held that the political-question doctrine barred a suit seeking injunctive relief based on allegations that the National Guard used excessive force in responding to Vietnam war protesters at Kent State University, because "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Id*. at 5, 10. Indeed, the Court found it "difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches," and "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id*. at 10.

The basic principle, therefore, is that where resolving a legal claim would require an evaluation of quintessentially military judgments, such as operational decision-making in foreign theaters of war, the claim is nonjusticiable under the political-question doctrine. Courts of appeals have steadfastly applied that principle in cases seeking review of military judgments. See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982, 984 (9th Cir. 2007); *Aktepe v. United States*, 105 F.3d 1400, 1403-1404 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998); *Tiffany v. United States*, 931 F.2d 271, 275, 277-278 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992).

b. In this case, respondents do not assert that petitioner was negligent for engaging in conduct ordered or approved by the military. Rather, they argue that within general parameters set by the military, petitioner acted negligently and that petitioner breached its contracts with the military. See Pet. App. 16 ("[Respondents] argue only that [petitioner] failed to satisfy the contractual standards."). Evaluating that claim would not necessarily require a factfinder to "scrutiniz[e] sensitive military decisions" (Pet. 15). Accordingly, if the claims were not otherwise barred (but see pp. 11-17, infra), the district court could treat military standards and orders as a given, such that the trier of fact could not question the wisdom of military judgments. Under such an approach, a jury could conclude that petitioner failed to act reasonably within the

parameters established by the military, such as the terms of the pertinent contracts. Or petitioner could prevail by demonstrating that it acted in a reasonably prudent manner given the military's parameters and the circumstances present in the theater of war at the time. Either way, while we believe respondents' claims are preempted, adjudication of those claims would not violate the constitutionally grounded political-question doctrine because it would not require searching judicial inquiry into the soundness of judgments made by the military itself.

The analysis of the decision below is consistent with that general approach. The court of appeals recognized that a claim that a contractor that adhered to military standards or orders should nevertheless be held liable under state law would pose a nonjusticiable political question because "review of the contractor's actions [would] necessarily include[] review of the military order directing the action[s]." Pet. App. 11. At the same time, the court correctly held that petitioner's assertion of a particular defense—such as contributory negligence—could render a claim nonjusticiable because, depending on the requirements for proving the defense or calculating damages, it might require an assessment of whether and to what extent the military should be regarded as having been at fault. See *id*. at 29, 35-36. The court correctly held, however, that determining whether such an assessment will be necessary for respondents to succeed on their claims must await further developments in the litigation, including identification of the applicable rules of liability.

c. Petitioner contends (Pet. 21) that adjudicating respondents' claims "would unquestionably require courts to review the Army's strategic judgments about placing soldiers in harm's way, such as its decisions concerning the acceptable level of risk in troop housing and the allocation of scarce resources." That is incorrect. Rather, the lawfulness and wisdom of the military's judgments must be taken as given, and the actions of petitioner must be evaluated in light of those judgments, such as the military's decision to house troops in Iraqi buildings. The United States shares petitioner's concern with the application of state tort law to regulate important contractor functions in an active war zone. That concern, however, is more appropriately addressed through preemption, not the political-question doctrine. Still, the deference owed to the political Branches on military matters, as reflected in the political-question doctrine, does reinforce the conclusion that respondents' claims here are preempted in the absence of affirmative authorization by Congress for state tort law to enter that field.

2. The court of appeals erred in holding that respondents' state-law tort claims are not preempted.

a. This Court has long recognized that even absent a federal statute, a federal-law rule of decision must govern certain questions involving "uniquely federal interests," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964), such as where "the authority and duties of the United States as sovereign are intimately involved" or where "the interstate or international nature of the controversy makes it inappropriate for state law to control," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). For example, this Court has held that a federal rule of decision displaces state law with respect to "[t]he rights and duties of the United States on commercial paper which it issues," *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943), "the priority of liens stemming from federal lending programs," *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), and "the scope of the act of state doctrine," *Sabbatino*, 376 U.S. at 427. Those fields "are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

This Court applied those preemption principles in *Boyle* to hold that in certain circumstances state-law claims against federal procurement contractors are preempted. 487 U.S. at 512. *Boyle* held generally that "displacement of state law" is appropriate if "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law," or if "the application of state law would frustrate specific objectives of federal legislation." *Id*. at 507 (internal quotation marks and citations omitted; brackets in original). The Court further held that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption." *Ibid*.

Applying that framework, the Court concluded that application of state tort law to particular design features of military equipment would conflict with the federal policy embodied in the discretionary-function exception of the FTCA, which exempts from the FTCA's waiver of sovereign immunity "[a]ny claim * * * based upon the exercise or performance * * * [of] a discretionary function," 28 U.S.C. 2680(a). The "selection of the appropriate design for military equipment," the Court explained, "is assuredly a discretionary function within the meaning of this provision," because it involves "judgment as to the balancing of many technical, military, and even social considerations." *Boyle*, 487 U.S. at 511. Although the FTCA does not apply to actions of contractors, 28 U.S.C. 2671, the Court concluded that it would "make[] little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Boyle*, 487 U.S. at 512. Such liability "would produce the same effect sought to be avoided by the FTCA exemption" in that the "financial burden of judgments against the contractors would be passed through, substantially if not totally, to the United States itself." *Id*. at 511-512.

b. The decision below correctly recognized that the general preemption framework set forth in *Boyle* and its antecedents governs this case. See Pet. App. 37- 45. It also correctly held, consistent with the holdings of three other circuits, that the FTCA's combatant-activities exception codifies federal interests that would be frustrated if state-law tort liability applied without limitation to battlefield contractors under the military's auspices. See *In re KBR, Inc., Burn Pit Litig*., 744 F.3d 326, 348 (4th Cir. 2014), petition for cert. pending, No. 13-1241 (filed Apr. 11, 2014) (*Burn Pit*); *Saleh v. Titan Corp*., 580 F.3d 1, 5-7 (D.C. Cir. 2009), cert. denied, 131 S. Ct. 3055 (2011); *Koohi v. United States*, 976 F.2d 1328, 1336-1337 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993). The military's effectiveness would be degraded if its contractors were subject to the tort law of multiple States for actions occurring in the course of performing their contractual duties arising out of combat operations.

But the decision below articulated a preemption standard that is both imprecise and too narrow. Adopting a test first articulated by the D.C. Circuit in *Saleh*, the court held that a battlefield contractor is shielded from state-law tort liability if the contractor was "integrated into combatant activities over which the military retains command authority." Pet. App. 42 (quoting *Saleh*, 580 F.3d at 9).

That standard appears to rest on a misunderstanding about the role of private contractors in active war zones and to reflect an unduly narrow conception of the federal interests embodied in the FTCA's combatant-activities exception. Under domestic and international law, civilian contractors engaged in authorized activity are not "combatants." Rather, they are civilians accompanying the force. They cannot lawfully engage in combat functions or combat operations, which are uniquely sovereign functions. See *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, DoD Instruction 3020.4.1, para. 6.1.1 (Oct. 3, 2005); *id*. para. 6.1.5; *Policy*

& Procedures for Determining Workforce Mix, DoD Instruction 1100.22, Encl. 4, para. 1.c(1)(b) (Apr. 12, 2010); 73 Fed. Reg. 16,764-16,765 (Mar. 31, 2008); Army Reg. 715-9, para. 3-3(d) (1999).

At the same time, however, the FTCA's combatant-activities exception does not apply only when the challenged act was itself a "combatant activity" or the alleged tortfeasor was itself engaged in a "combatant activity." The statute instead bars claims "*arising out of* the combatant activities of the military * * * during time of war," 28 U.S.C. 2680(j) (emphasis added), and therefore applies not only to claims challenging the lawfulness of combatant activities, but also to claims seeking redress for injuries caused by combat support activities. Such claims are naturally understood to "arise out of" the military's combat operations. The scope of preemption of claims against military contractors should be equivalent.

Accordingly, under a properly tailored preemption test, claims against a contractor are generally preempted if (i) a similar claim against the United States would be within the FTCA's combatant-activities exception because it arises out of the military's combatant activities, and (ii) the contractor was acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose. That test is particularly appropriate in situations where, as here, the contractor was integrated with military personnel on the same military base in the performance of the military's combat-related activities.[1] This rule respects the military's reliance on the expert judgment of contractors, gives effect to the reality of informal interactions between contractors and military personnel in combat and support operations, and guards against timidity of contractor personnel in performing critical functions out of fear of tort liability.

Under that approach, federal preemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract or took steps not specifically called for in the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government. Determination of the appropriate recourse for the contractor's failure to adhere to contract terms and related directives under its exclusively federal relationship with the United States would be the responsibility of the United States, through contractual, criminal, or other remedies—not private state-law suits by individual service members or contractor employees. Compare *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); see also *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). But preemption would not apply to conduct of a contractor employee that is unrelated to the contractor's duties under the government contract; a claim challenging such conduct would not ordinarily be said to "arise out of" the military's combatant activities. That standard assures that preemption is properly tailored to the federal interest inherent in the combatant-activities exception: that actions arising out of the Nation's conduct of military operations should not be regulated by tort law.

Importantly, other legal avenues for obtaining compensation are available to service members and others injured by contractor negligence. For example, the Department of Veterans Affairs provides compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. 1110; see also 38 U.S.C. 1131. In

[1] Even if all these factors exist, however, in narrow circumstances countervailing federal interests may make preemption inappropriate. For example, preemption should not apply to shield a contractor from liability for acts of torture as defined by federal law. See 18 U.S.C. 2340A.

addition, a variety of benefits, including payment of a death gratuity, see 10 U.S.C. 1475, are provided to the survivors of service members who die while on active duty.

c. The claims against petitioner should be dismissed under the preemption standard proposed here. Respondents claim that petitioner acted negligently in performing contractual duties arising out of the military activities of the United States on a foreign battlefield. The maintenance of buildings on forward bases is an essential support service when the United States military conducts combat operations. Furthermore, when petitioner raised the United States' proposed preemption standard in the courts of appeals, respondents did not identify any sound reason to believe that petitioner was acting outside the scope of its contractual relationship with the military. See Resp. C.A. Reply Br. 14-17. As explained, respondents' claims that petitioner violated the terms of its contracts are insufficient to demonstrate that petitioner was acting outside the scope of the contractual relationship. Accordingly, the court of appeals erred in holding that the claims could proceed.

B. Given The Interlocutory Posture Of This Case, Review Is Not Warranted At This Time

Despite the importance of the preemption issue and the incorrect standard adopted by the court of appeals, the United States believes, on balance, that review is not warranted at this time given the interlocutory posture of this case.

1. There is no substantial conflict among the circuits on either the justiciability question or the preemption question.

a. Each of the circuits to consider the applicability of the political-question doctrine in the context of battlefield contractors has held that suits that require a factfinder to assess judgments of the U.S. military are nonjusticiable. See Pet. App. 12; see also *Burn Pit*, 744 F.3d at 334-341; *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1282-1283 (11th Cir. 2009), cert. denied, 561 U.S. 1025 (2010). The decision below concluded that whether a factfinder would be required to evaluate military judgments may turn on the substantive state-law rule to be applied in the proceeding—for example, the requirements for proving a particular defense or assessing damages. See Pet. App. 12; see also *Burn Pit*, 744 F.3d at 339-341 & n.4; *Lane v. Halliburton*, 529 F.3d 548, 568 (5th Cir. 2008). Contrary to petitioner's contention (Pet. 27-29), the Eleventh Circuit's decision in *Carmichael* did not reject the proposition that the substantive legal requirements for proving a claim or defense can be relevant to whether a factfinder will be required to review military judgments. Rather, the Eleventh Circuit concluded only that the substantive principles of negligence relevant in that case did not vary among States. See 572 F.3d at 1288 n.13; cf. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359, 1365 (11th Cir. 2007) (holding that for a military contractor to successfully invoke the first *Baker* factor, it "must demonstrate that the claims against it will require reexamination of a decision by the military" and remanding for further factual development).

b. Likewise, no square conflict exists among the courts of appeals over the proper preemption test applicable to state-law tort claims against military contractors. As discussed, the decision below expressly adopted the standard articulated by the D.C. Circuit in *Saleh*, *supra*. …

Petitioner contends (Pet. 34-36) that the decision below rejected *Saleh*'s approach. But the court of appeals rejected only the breadth of the D.C. Circuit's articulation of the federal interest at stake, while ultimately adopting the same preemption standard. See Pet. App. 41-42. And the Ninth Circuit's earlier decision in *Koohi* comports with that standard. See 976 F.2d at

1336-1337 (holding that claims against manufacturers of air-defense system for downing of civilian aircraft were preempted).

Although no circuit conflict exists on the preemption question, the United States agrees with petitioner that the issue warrants this Court's review. The scope of state-law tort liability for battlefield contractors has significant importance for the Nation's military operations. A legal regime in which contractors that the U.S. military employs during hostilities are subject to the laws of fifty different States for actions taken within the scope of their contractual relationship supporting the military's combat operations would be detrimental to military effectiveness. And as this Court recognized in *Boyle*, 487 U.S. at 511-512, expanded liability would ultimately be passed on to the United States, as contractors would demand greater compensation in light of their increased liability risks. Indeed, many military contracts performed on the battlefield contain indemnification or cost-reimbursement clauses passing liability and allowable expenses of litigation directly on to the United States in certain circumstances. See, *e.g.*, 48 C.F.R. 52.228-7(c).

Moreover, allowing state-law claims against battlefield contractors can impose enormous litigation burdens on the armed forces. Plaintiffs who bring claims against military contractors (as well as contractors defending against such lawsuits) are likely to seek to interview, depose, or subpoena for trial testimony senior policymakers, military commanders, contracting officers, and others, and to demand discovery of military records. It is therefore imperative that courts apply a preemption standard that is consonant with the significant federal interests at stake, and that "district courts * * * take care to develop and resolve [preemption] defenses at an early stage while avoiding, to the extent possible, any interference with military prerogatives." *Martin v. Halliburton*, 618 F.3d 476, 488 (5th Cir. 2010).

2. Although this Court's review of the preemption issue is warranted, this case is not an appropriate vehicle to address that question at this time. The decision below is interlocutory, and it did not definitively resolve the political-question issue. Instead, it remanded the case for further proceedings that may result in dismissal or substantial narrowing of the case. …

This case thus may ultimately be deemed to raise a nonjusticiable political question even under the standard challenged by petitioner. If that does not occur, this Court could consider granting review at a later stage in this case. At that point, the issues will be more sharply presented for this Court's review.

3. If this Court were inclined to grant review of the questions presented, it should grant review in *KBR, Inc. v. Metzgar*, No. 13-1241, which arises out of the Fourth Circuit's *Burn Pit* decision and raises the same questions as the petition here, and hold this case. Because *Metzgar* includes an additional question about derivative sovereign immunity, granting review in that case would ensure that this Court can consider the full range of arguments against permitting state law to govern contractors' actions on foreign battlefields.

4. *KBR, Inc., et al. v. Metzgar*

As mentioned in the U.S. *amicus* brief in *Harris*, *supra*, the United States filed an *amicus* brief in the U.S. Supreme Court in December 2014 in another case involving military contractors, including KBR. In addition to the political question doctrine and

preemption, the *Metzgar* case involves an additional issue of the possible bar to claims against military contractors presented by the doctrine of derivative sovereign immunity. The district court dismissed the claims, concluding that the political question doctrine, preemption, and derivative sovereign immunity all presented alternative grounds for dismissal. The U.S. Court of Appeals for the Fourth Circuit reversed and remanded, relying in part on the Third Circuit's opinion in *Harris*. KBR petitioned for certiorari. As in *Harris*, the U.S. brief in the Supreme Court opposes granting certiorari. The claims in *Metzgar* relate to the contractors' waste disposal services, about which multiple complaints were filed in state and federal courts by U.S. military personnel and others alleging that burn pits used by the contractors had exposed them to harmful emissions and contaminated their water. The U.S. *amicus* brief in *KBR, Inc., et al. v. Metzgar*, No. 13-1241, presents the same arguments as the U.S. brief in *Harris* with respect to the political question doctrine and preemption. The section of the brief regarding the principle of derivative sovereign immunity is excerpted below.[***]

* * * *

3. The petition also presents (Pet. 35-39) the question whether petitioners are entitled to derivative sovereign immunity as government contractors. The United States believes the principle of derivative sovereign immunity informs the preemption analysis set forth above. Cf. Pet. 38 (noting that "the derivative sovereign immunity issue can be understood as part and parcel of the combatant-activities exception"). Indeed, *Boyle* relied on this Court's discussion of derivative sovereign immunity in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), in establishing the basic preemption framework that governs this case. See *Boyle*, 487 U.S. at 505-506. Accordingly, that doctrine serves to reinforce the inappropriateness of applying state law in this context.

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3. If this Court were inclined to grant review, this case would be a more suitable vehicle than *Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817, because of the breadth of the claims and the inclusion of the derivative-sovereign-immunity question, which the *Harris* petition does not include. Although the United States believes that the doctrine of derivative sovereign immunity informs the basic preemption question, granting review in this case would ensure that this Court can consider the full range of arguments against permitting state law to govern contractors' actions on foreign battlefields.

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[***] Editor's note: On January 20, 2015, the Supreme Court denied the petition for certiorari.

Cross References

McKesson v. Iran*,* **Chapter 8.B.2.**
Zivotofsky *case regarding executive branch authority over state recognition*, **Chapter 9.C.**
Execution of Judgments, **Chapter 10.A.4.(note)**
Restrictions on Attachment of Property under the FSIA and TRIA, **Chapter 10.A.4.b.**
Detroit International Bridge Co. v. Canada, **Chapter 11.B.2.a.**
International Comity, **Chapter 15.C.3.**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On February 27, 2014, the Department of State released the 2013 Country Reports on Human Rights Practices. The Department submits the reports to Congress annually in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries. The reports are available at *www.state.gov/j/drl/rls/hrrpt/*. Secretary of State John Kerry's remarks on the release of the reports are available at *www.state.gov/secretary/remarks/2014/02/222645.htm*.

2. ICCPR

a. Presentation to the Human Rights Committee

The United States presentation to the Human Rights Committee on its Periodic Report Concerning the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant") was one of three presentations made by the United States in 2014 to UN committees in Geneva regarding its human rights record. The presentation to the Committee on the Elimination of Racial Discrimination ("CERD") is discussed in section B.1.a., *infra*, and the presentation to the UN Committee Against Torture ("CAT") is discussed in section H., *infra*. In anticipation of these presentations, U.S. State Department Principal Deputy Legal Adviser Mary McLeod wrote to state, tribal, and local leaders on February 18, 2014 calling their attention to the reports and presentations to these UN treaty bodies, and requesting their ongoing assistance in

helping the United State to promote and protect human rights. Excerpts follow from Ms. McLeod's February 18 letter, which is available in full at *www.state.gov/j/drl/reports/treaties/index.htm#ftn1*.

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* * * *

I am writing to you to bring to your attention the important efforts the U.S. government is making this year to showcase the United States' human rights record. As you know, the United States has a long and proud tradition of advancing the protection of human rights around the globe. We also uphold these values by protecting human rights here at home, consistent with our international human rights obligations. These obligations are implemented not only by the federal government, but also through the dedicated efforts of state, local, insular, and tribal governments throughout our country, in areas such as protecting the civil and political rights of our citizens, combating racial discrimination, and protecting children from harms such as pornography and prostitution.

Over the next 18 months, the U.S. government will make four different presentations to United Nations committees in Geneva showcasing the United States' human rights record. These presentations provide vital opportunities to demonstrate to the world our country's commitment to protecting human rights domestically through the operation of our comprehensive system of laws, policies, and programs at all levels of government—federal, state, local, insular, and tribal. We want you to be aware of these efforts because we are proud of this shared role in upholding and protecting human rights. Indeed, representatives from state and local governments have participated in some of the U.S. government's prior treaty presentations, and we hope to continue this practice in the future.

Our first human rights presentation this year, in March 2014, will explain how the United States is implementing its obligations under the International Covenant on Civil and Political Rights (ICCPR), one of the seminal human rights treaties concluded following World War II. This will be followed in August by a similar presentation on U.S. government efforts to eliminate racial discrimination, consistent with the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and a presentation in November regarding the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT). In January 2015, we will submit the United States' second report under the UN Human Rights Council's Universal Periodic Review (UPR) process, followed by the presentation of this report in April or May 2015.

* * * *

On March 13-14, 2014, the United States presented for review its Fourth Periodic Report to the UN Committee on Human Rights Concerning the ICCPR. The United States submitted its Fourth Report in writing on December 30, 2011 and responded to questions from the Human Rights Committee on its Fourth Report on July 30, 2013. See *Digest 2013* at 124. Excerpted below and available in full at *https://geneva.usmission.gov/2014/03/13/u-s-opening-statement-at-presentation-of-*

the-fourth-periodic-report-of-the-u-s-on-implementation-of-the-iccpr/, is the March 13, 2014 opening statement by Ms. McLeod, the head of delegation at the U.S. presentation in Geneva of the Fourth Periodic Report.

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We have found the process of review and reflection with respect to the ICCPR very helpful as we continually strive to improve our efforts to protect civil and political rights in the United States. We appreciate this opportunity for dialogue with the Committee.

The broad and comprehensive legal framework within the United States to implement the ICCPR, described in the Second and Third Periodic Report presented seven years ago, remains firmly in place. Indeed, these laws form part of the bedrock of our democratic system of governance. The Fourth Periodic Report updated our prior Reports on major relevant developments, including new laws, judicial decisions, policies, and programs that expand protections in various areas and provide remedies for violations of protected rights.

Of course, many of the rights and freedoms protected under the ICCPR have parallels in the U.S. Constitution, including freedom of religion, speech, and peaceful assembly, the right to trial by jury, the prohibition on unreasonable searches and seizures, and the prohibition of cruel and unusual punishments, also find expression and protection in the ICCPR. Beyond these fundamental constitutional guarantees, we take pride in the numerous other civil and political rights protections available under U.S. laws and policies.

From our previous appearances before the Committee, we know that as we proceed over the next two days, there may be matters regarding the interpretation or application of the Covenant on which my government and members of the Committee may not be in full agreement. We hope the Committee will appreciate that our views on the interpretation of the treaty are informed by our principled interpretation of international treaty law and our abiding commitment to the protection of human rights and fundamental freedoms. We look forward to this wide-ranging discussion and to hearing the perspectives of the Committee. As in our last appearance before the Committee, we also know that our discussions may at times lead us to topics for which the law of armed conflict is the relevant governing law. We recognize your interest in this area and, in the spirit of cooperation with the Committee, we will provide as much information on these matters as possible, while identifying the relevant legal and policy considerations that guide U.S. actions in these areas.

We hope that our Fourth Periodic Report, along with our previous reports, has explained in detail the way in which the United States implements its obligations under the ICCPR, comprehensively and at all levels of government. As reflected in our report, a set of principles protecting civil and political rights, embedded structurally throughout our Constitution and laws, animates U.S. government action. While we enforce these fundamental protections through law, we view protection of civil and political rights as something that is more than a set of legal requirements, but as fundamental to our cultural identity, developed throughout our nation's history. While we are not perfect, our network of federal, state, and local institutions provides checks on the government and provides avenues for redress of rights violations. In the United States, there is a culture and history of civil society challenging the political branches of government through judicial processes, which is reflected by the fact that many of the authorities

referred to in our reports stem from litigation and from decisions of the United States Supreme Court and other courts. Finally, it is because we do have such strong protections for freedoms of expression, association, and peaceful assembly, that we have an active and vibrant civil society, as evidenced by the number of NGO reports submitted to the Committee, that provides an additional check to ensure the government is living up to its commitments to protect civil and political rights and continually striving to improve.

* * * *

Ms. McLeod's opening statement was followed by opening remarks by Roy Austin, Deputy Assistant Attorney General for Civil Rights at the U.S Department of Justice, addressing the measures taken by the Justice Department to protect civil and political rights in the United States. Mr. Austin's remarks are excerpted below and available at *https://geneva.usmission.gov/2014/03/13/iccpr-opening-statement-by-roy-l-austin-jr-deputy-assistant-attorney-general/*.

* * * *

Since the founding of our country, in every generation, there have been Americans who sought and struggled to realize our Constitution's promise of equal opportunity and equal justice for all. This past fall marked the 50th anniversary of the March on Washington, when Dr. Martin Luther King, Jr. delivered his "I Have a Dream" speech. As we as a country contemplate the progress we have made over the past fifty years, I am happy to take the floor to discuss our nation's continuing efforts to advance the cause of equality and ensure that all Americans can live free from discrimination.

Our aggressive enforcement of our nation's civil rights laws shows our commitment to meeting our international human rights obligations, including those under the International Covenant on Civil and Political Rights.

First and foremost, the right to vote is the bedrock of any democracy. The Justice Department is committed to ensuring full participation in our democratic process through the aggressive and evenhanded enforcement of our voting rights laws. In recent months, to protect the rights of minority voters, we, under the leadership of Attorney General Eric Holder, filed lawsuits against the states of Texas and North Carolina seeking to block the implementation of their highly restrictive voter identification laws. These lawsuits evidence the Department's continuing commitment to ensuring that Americans across the country can cast a ballot free from discrimination.

Like the right to vote, equal access to educational opportunities is essential to ensuring a strong future for our democracy. Education is the gateway to full participation in our society. Almost 60 years ago, our Supreme Court recognized that equal access to public education is a basic right. The Justice Department continues to vigorously enforce federal laws to expand opportunities for all students, protecting them from discrimination on the basis of race, national origin, sex, language, religion, and disability.

We strongly support diversity in our educational institutions. Diverse educational environments help to prepare students to succeed in our diverse nation and to transcend the boundaries of race, language, and culture as our economy becomes more globally interconnected. This past summer, the Supreme Court preserved the well-established legal principle that colleges and universities have a compelling interest in achieving the educational benefits that flow from a racially and ethnically diverse student body and can lawfully pursue that interest in their admissions programs.

Equal opportunity also means that qualified borrowers deserve equal access to fair and responsible lending. Since its creation in 2010, the Civil Rights Division's Fair Lending Unit has obtained more than $775 million in monetary relief for borrowers and communities impacted by discriminatory lending.

For the infrastructure of our democracy to remain strong, we must ensure meaningful access to our courts. The stakes are too high in the courtroom context for parties or witnesses to be excluded because of their national origin. Under Title VI of the Civil Rights Act, state courts that receive Justice Department funds must provide people with limited English skills meaningful access to their programs and services, and we have recently worked with over 15 states to ensure this access.

Through its Access to Justice Initiative, the Department is working to help the justice system efficiently deliver outcomes that are fair to all, irrespective of wealth and status. In support of its mission to protect the Sixth Amendment guarantee of effective assistance of counsel, the Department successfully filed a Statement of Interest in 2013 in a class action lawsuit in Washington State. Last December, the court issued an injunction that required the cities to hire a public defender supervisor to monitor and report on the delivery of indigent defense representation.

Effective and accountable police departments are also a fundamental part of the infrastructure of democracy. The vast majority of police departments in the United States work tirelessly to protect the civil and constitutional rights of the communities they serve. But when systemic problems emerge, or officers abuse their power, the Department uses its authority to implement meaningful reform and to hold specific individuals accountable under our criminal laws. Over the last five years, the Civil Rights Division has obtained ground-breaking reform agreements with police departments to address issues including the excessive use of force; unlawful stops, searches or arrests; or policing that unlawfully discriminates against protected minority groups or women.

Individuals confined in institutions are also often among the most vulnerable in our society. For that reason, the Justice Department is continuing its work to prevent, detect, and respond to abuse in U.S. prisons. Last month, a Department investigation of Pennsylvania's prisons found that the manner in which PDOC uses long-term and extreme forms of solitary confinement on prisoners with serious mental illness—many of whom also have intellectual disabilities—constitutes a violation of their rights under the Eighth Amendment and the Americans with Disabilities Act.

The United States takes seriously the importance of addressing racial and ethnic disparities at all levels in the justice system, especially as it pertains to criminal sentencing. We are working to modify our charging policies so that those who commit certain low-level, nonviolent federal offenses will receive sentences commensurate with their individual conduct—rather than be subject to mandatory minimum sentences.

In addition, in our 2013 annual report to the Sentencing Commission, the United States called for reform of some mandatory minimum sentencing statutes, including sentences triggered by drug trafficking offenses. In January 2014, the Commission voted to propose, for public comment, amendments that would include possible reductions to the sentencing guidelines levels for federal drug trafficking offenses. These could have the effect of reducing eligible sentences by approximately 11 months.

We are also making significant strides in our effort to reduce violence against women. Under new provisions in the reauthorized Violence Against Women Act (Act), tribes and the federal government can better work together to address domestic violence against Native American women, who experience the highest rates of assault in the United States. The Act has led to significant improvements at the local government level—where the majority of these crimes are prosecuted—by encouraging victims to file complaints, improving evidence collection, and increasing access to protection orders.

The United States recognizes that the promotion of civil rights, equal opportunity, and non-discrimination are fundamental to ensuring universal respect for human rights. As these efforts make clear, the United States has made great strides, but we recognize that much work remains in our efforts to realize Dr. King's dream of a country with equal opportunity and equal justice for all.

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Ms. McLeod also delivered a summary of the United States' responses to the Human Rights Committee's questions. That summary appears below. The numbered questions refer to the questions in the Committee's List of Issues in relation to the U.S. report, document CCPR/C/USA/Q/4, available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsijKy20sgGcLSyqccX0g1nk3FW%2by259hAHCqEMzpDNIQ9sSE6eSLqy1itbTJ2ydz%2bMwU%2bXhqgK4Tthl2nKE6Y0tlel5Dn%2bc6Zk%2bRgfPrO9mg.

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…The United States is working actively to address human and civil rights issues in ways too numerous to cover in the short time allotted, so we are looking forward to further elaboration during the discussion today and tomorrow. Let me also note that while we are pursuing these matters aggressively in the United States, and while we are making progress toward our goals, we would be the first to admit that there is much more work to be done.

Question 1. The United States continues to believe that its interpretation—that the Covenant applies only to individuals that are both within the territory of a State Party and within its jurisdiction—is the most consistent with the Covenant's language and negotiating history.

The United States is committed to domestic implementation of the ICCPR at all levels and for this purpose, actively pursues policy, coordinating, and outreach processes consistent with our Executive Order 13107. We also continue to evaluate possible additional measures to enhance outreach and coordination.

Question 2. Although the United States does not have a single national human rights institution, it does have multiple complementary protections and mechanisms to guarantee respect for human rights, including through our independent judiciary. We welcome ideas on how our efforts can be strengthened even further.

Question 3. At the time it became a Party to the ICCPR, the United States carefully evaluated the treaty to ensure that it could fully implement all of the obligations it would assume. The reservations taken by the United States to a few provisions of the Covenant were crafted in close collaboration with the U.S. Senate. The United States has no current plans to withdraw these reservations.

Question 4. The United States is committed to addressing unwarranted racial disparities in the criminal justice system. The 2010 Fair Sentencing Act reduced disparities in sentencing between powder cocaine and crack cocaine charges. In addition, the Department of Justice has pledged to work with the United States Sentencing Commission and the U.S. Congress on reform of mandatory minimum sentencing statutes.

Question 5. The United States is tackling racial profiling aggressively, including through training; use of Incident Community Coordination Teams in responding to homeland security incidents; application of strict rules for ICE and Border Patrol agents; and investigation and prosecution of cases.

Question 6. Under its first-ever, strategic plan to end homelessness, the Administration is assisting communities to adopt alternatives to laws and policies that lead to criminalization of homelessness.

Question 7. By law, all people in the United States, including undocumented migrants, are entitled to emergency health services.

With regard to education, most—but not all—states allow undocumented students to enroll in public institutions at out-of-state tuition rates, and more than a dozen allow such students to pay in-state tuition provided, for example, that the student attended high school in that state.

Question 8. The number of states that have the death penalty, the number of persons executed each year in the United States, and the size of the population on death row have continued to decline over the last decade. At present, 32 states have laws permitting imposition of the death penalty—down from 38 states in 2000 and 34 in 2011 when we filed our report. This is in addition to capital crimes under Federal law.

Question 9. To update our response from last July, in 2012, approximately 470,000 fatal and nonfatal violent crimes were committed with firearms. With regard to domestic violence, firearms were used in about 5% of nonfatal violent victimizations by intimate partners in the 5-year period from 2008 to 2012. The percentage of gun-related homicides committed by intimate partners declined from 69% in 1980 to 51% in 2008.

Question 10. The United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, and may also use force consistent with our inherent right of national self-defense. Targeted strikes with remotely piloted aircraft are conducted in a manner that is consistent with all applicable domestic and international law.

Question 11. Under U.S. law, every U.S. official is prohibited from engaging in torture or cruel, inhuman or degrading treatment or punishment, at all times, and in all places. The U.S. government conducts prompt and independent investigations into credible allegations concerning mistreatment of detainees, and has prosecuted a number of cases involving alleged detainee abuse

President Obama has said that he believes "waterboarding was torture and, whatever legal rationales were used, it was a mistake." "Water boarding"—referenced in the Committee's question—is explicitly prohibited in the Army Field Manual.

Question 12. The President has accepted and the U.S. government is implementing the recommendations of the Special Task Force on Interrogations and Transfer Policy Issues.

Where individuals are transferred subject to diplomatic assurances, the United States will pursue any credible report and take appropriate action if it has reason to believe that those assurances would not be, or have not been, honored. Where specific concerns about treatment cannot be resolved satisfactorily, the United States has declined to transfer the individual to the country of concern.

Question 13. The U.S. Department of Justice has jurisdiction to investigate and prosecute excessive uses of force, including where it constitutes a pattern or practice that violates the Constitution or federal law. Recently, our Department of Justice has put in place mechanisms to correct unlawful practices in police departments in New Orleans, Portland, Seattle, Puerto Rico and other places.

In Fiscal Years 2009-2012, 254 law enforcement officials were charged in 177 criminal cases for violating individuals' constitutional rights.

With regard to activities on the U.S.-Mexico border, while the vast majority of Border Patrol Agents fulfil their duties professionally and responsibly, the Department of Homeland Security and the Department of Justice are committed to holding accountable U.S. government officers and agents who abuse their authority. For example, since 2008, the Department of Justice has opened 48 matters involving allegations of civil rights abuses by Border Patrol agents, and five such cases have been successfully prosecuted.

Question 14. With regard to corporal punishment, there has been an encouraging trend away from corporal punishment in schools across the United States. Discipline in schools is largely a matter of state and local law and practice in the United States and, today, at least 31 of the 50 States have outlawed corporal punishment in schools. On January 8, 2014, the Department of Justice and the Department of Education issued a comprehensive guidance document to assist schools in administering discipline without discriminating on the basis of race, color, or national origin. In addition, the Department of Education funds a Positive Behavioral Interventions and Supports Center, which is being used by over 19,000 schools across the country to put into practice effective and positive school-wide disciplinary practices.

Question 15. Involvement of individuals in non-consensual studies and medical treatment is subject to stringent limitations under the U.S. Constitution and laws. The specific rules for non-consensual use of medication are largely governed by state law, which cannot violate U.S. and state constitutional provisions on due process, liberty, equal protection, and privacy.

Question 16. Under federal and state law, inmates, including those with serious mental illness and juveniles, may not be subjected to solitary confinement absent an administrative hearing and other procedures protective of their right to due process. Since October 2005, the Department of Justice has authorized investigations of 28 adult correctional facilities and 29 juvenile detention facilities for misuse of solitary confinement, and DOJ is currently pursuing matters related to adult correctional institutions in approximately 25 states, the Virgin Islands, Guam, and the Northern Mariana Islands.

With regard to protection of detainees from violence, including sexual violence, the Department of Justice has published comprehensive regulations implementing the Prison Rape Elimination Act that are applicable to federal prisons. States also risk losing certain Justice Department funding unless they bring prisons into compliance. The Department of Homeland Security published similar regulations on March 7, 2014.

With respect to private prison facilities, they are required to follow all applicable local, state, and federal laws and regulations, and also to adhere to specified Bureau of Prison policies.

Question 17. President Obama has repeatedly reaffirmed his commitment to close the Guantanamo Bay detention facility. In furtherance of these efforts, he has appointed Special Envoys at the Departments of State and Defense, who continue to pursue vigorously the transfer of detainees designated for transfer, consistent with U.S. law and policy and applicable international law. The United States has legal authority to hold Guantanamo detainees until the end of hostilities, but, as a policy matter, we have elected to ensure that it holds detainees no longer than is absolutely necessary.

77 of the 155 detainees at Guantanamo are approved for transfer, subject to appropriate security measures by the receiving government. Since last summer, the United States has transferred eleven detainees from the Guantanamo Bay detention facility. With these transfers, approximately 80 percent of those held at one time at the facility have been repatriated or resettled, including all detainees subject to a valid court order directing their release.

Detainees who are not currently designated for transfer, and who have not been criminally charged or convicted, are eligible for the Periodic Review Board process, which is described in greater length in our written answer. Detainees at Guantanamo also have the right to challenge the legality of their detention in U.S. federal court with the assistance of counsel of their choosing.

With respect to Military Commissions, the U. S. government has taken great strides and steps to ensure that those accused of criminal activity receive a fair trial by an independent, impartial, and regularly constituted court, consistent with Common Article 3 of the Geneva Conventions.

Question 18. In the U. S. federal system, juveniles may not be placed in adult jails or correctional institutions in regular contact with incarcerated adults. To be eligible for federal grant funding, states must also implement laws and policies prohibiting contact between adult inmates and juvenile offenders.

Question 19. The Immigration and Nationality Act provides for detention of aliens who have committed certain criminal acts and those for whom there are reasonable grounds to believe they have engaged in or are likely to engage in terrorist activity.

With respect to unaccompanied alien children, the United States implements policies and procedures that take into account the best interests of children and provide age appropriate care and services for children under its care. Unless eligible for voluntary return, their custody is in the least restrictive environment available that is in the best interest of the child. Family groups are separated from the general adult populations, and every effort is made to maintain family unity wherever possible.

Question 20. The Violence Against Women Act, reauthorized in 2013, has led to significant improvements in addressing violence against women at the local level complemented by the Family Violence Prevention and Services Act, administered by the Department of Health and Human Services, and the Victims of Crime Act, administered by DOJ, that support the national infrastructure of community-based emergency domestic violence shelters. Together

these three make possible a coordinated community response to domestic violence that links law enforcement, legal systems, advocates, and health professionals.

Question 21. The United States government aggressively investigates and prosecutes human trafficking cases. Working through Pilot Anti-Trafficking Coordination Teams, the United States has successfully prosecuted domestic servitude cases in jurisdictions where such cases had never before been federally prosecuted and we've initiated complex, multi-jurisdictional, and international labor trafficking investigations.

With respect to sexual exploitation of children, the Department of Justice's Child Exploitation and Obscenity Section investigates and prosecutes cases designed to reach many aspects of commercial sexual exploitation of children and provides training. The Department of Homeland Security also investigates cases of child pornography and child sex tourism.

Question 22. As we explained in our response to the list of issues, NSA surveillance activities are subject to extensive oversight by the Executive Branch, the Congress, and the Judiciary. The Foreign Intelligence Surveillance Court plays an important role in overseeing certain NSA collection activities conducted pursuant to the Foreign Intelligence Surveillance Act. It not only authorizes these activities, but it also plays a continuing and active role in ensuring that they are carried out lawfully. The Obama administration undertook a review of U.S. signals intelligence in 2013. The review examined how, in light of new and changing technologies, the United States can use its intelligence capabilities in a way that optimally protects national security, while respecting privacy and civil liberties, maintaining the public trust, supporting U.S. foreign policy, and reducing the risk of unauthorized disclosures. At the close of this review, President Obama announced on January 17th of this year a number of reforms to various programs and their oversight.

Question 23. The National Labor Relations Act, which protects the rights of employees to form labor organizations and bargain collectively, does exclude certain agricultural and domestic employees. These workers, however, are covered by other Federal statutes providing labor protections, including the Fair Labor Standards Act and the Occupational Safety and Health Act. The limited reach of the National Labor Relations Act does not restrict the constitutional right to form and join labor unions for workers not covered by the Act.

Question 24. Following the Supreme Court decisions in Graham and Miller, the Department of Justice conducted a review to determine whether any federal prisoners might be affected, and notified the Federal Public Defender of the prisoners who were identified. In addition, the Administration is developing legislation to ensure that federal law complies with the requirements of the Court decisions.

Question 25. The United States has held approximately 2,500 individuals under the age of 18 at the time of their capture in detention in Iraq, Afghanistan, and at Guantanamo Bay. The U.S. government recognizes the special needs of young detainees, and every effort is made to provide them a secure environment, to separate them from adult detainees, to facilitate telephone and video calls with family members, and to attend to the special physical and psychological care they may need. Complaints may be made to the ICRC or directly to the U.S. military.

Question 26. The majority of the 48 states that restrict voting by persons convicted of felony offenses in some manner provide for restoration of voting rights to felons who have been released from prison and/or are no longer on parole or probation. With regard to state-imposed voter restrictions, the federal courts blocked implementation under Section 5 of the Voting Rights Act of a photo identification requirement imposed by Texas and Florida's attempt to reduce the number of early voting hours in advance of the 2012 election on the grounds that

these laws would have discriminatory effects on minority voters. However, in June 2013, the Supreme Court invalidated the existing statutory coverage formula for Section 5, and Texas implemented the voter photo ID requirements shortly thereafter. In August 2013, the Department of Justice filed suit against Texas under Section 2 of the Voting Rights Act to challenge the Texas voter photo ID requirements.

Question 27. The United States recognizes the importance of understanding matters of spiritual and cultural significance to Native American communities, and doing so in consultation with tribal leaders. Under the leadership of President Obama, who has held five high-level meetings with more than 350 Native American leaders at each meeting, federal agencies are actively pursuing outreach to tribes in many areas described in detail in the U.S. 2013 Periodic report to the Convention on the Elimination of Racial Discrimination Committee. And just last week the Office of the President issued the 2013 White House Tribal Nations Conference Progress Report which addresses protection of Native American lands, the environment and respect for cultural rights.

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b. Observations on the Committee's Draft General Comment 35 on ICCPR Article 9

On June 10, 2014, the United States submitted its observations in response to the Human Rights Committee's call for comments on draft General Comment 35 regarding Article 9 of the ICCPR. Article 9 provides:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The U.S. submission is excerpted below (with most footnotes omitted) and available in full at *www.state.gov/s/l/c8183.htm*.

* * * *

1. The United States Government appreciates the opportunity to respond to draft General Comment 35 regarding Article 9 of the International Covenant on Civil and Political Rights ("the Covenant"), and thanks the Committee for its significant contributions to this project.[11] ….

2. The observations of the United States focus on a few key statements in the draft General Comment that, in the view of the United States, should be revised or, in some cases, deleted, from the final text. These include: the scope of the right to security of person under Article 9; the obligations of States Parties with respect to the conduct of non-state actors; the relevance of international humanitarian law to the application of the Covenant; and limitations on a State Party's derogation authority in times of public emergency under Article 4. After addressing these key topics, these observations make a number of specific points, which are illustrative of U.S. concerns rather than a comprehensive catalogue of all points on which the United States may disagree. The United States hopes its views will be useful to the Committee as it finalizes its General Comment on Article 9.

I. Preliminary Observations

3. The United States agrees with the Committee's assessment of the profound importance of Article 9 for both individuals and society as a whole …

4. The United States believes the views of the Committee should be carefully considered by the States Parties. Nevertheless, they are neither primary nor authoritative sources of law and the impression should not be given that they are being cited as such. Thus, the United States encourages the Committee in its final text to refrain from categorical statements regarding State Party obligations unless grounded in and referring to the specific text of the Covenant or other sources of treaty interpretation, rather than being based only on observations and comments of the Committee. The United States has addressed the functions and authorities of the Committee as established in Article 40 of the Covenant and refers the Committee to the U.S. Observations on General Comment 33, transmitted to the Chairman of the Committee on December 23, 2008, and to the U.S. Observations on General Comment 24, transmitted by the United States to the Chairman of the Committee on March 28, 1995.

5. Throughout the draft General Comment, references are made to the application of the Covenant, and Article 9 in particular, to actions outside the territory of a State Party. The United States has made the Committee aware of its position concerning the territorial scope of a State Party's legal obligations under the Covenant: that the Covenant applies only to individuals that are both within the territory of a State Party and subject to its jurisdiction. In the U.S. view, this position is the most consistent with the Covenant's language and negotiating history, and it is in accord with longstanding international legal principles of treaty interpretation. The United States has explained the legal basis for this position on a number of occasions and in considerable detail, including in response to the Committee's General Comment 31 and during

[11] *Draft General Comment No. 35: Article 9*, Human Rights Committee, hundred and tenth session, Geneva, March 29, 2010. Available at: http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx

dialogues with the Committee in March 1995, July 2006, and March 2014. The United States refers the Committee to the U.S. Observations on General Comment 31, transmitted to the Chairman of the Committee on December 27, 2007, and to these prior dialogues for further information on this point.

II. The Relationship between Liberty and Security of Person

6. The United States generally agrees with the Committee's view in paragraph 7 of the draft General Comment that, within its scope of application, security of person under Article 9 would be jeopardized when a State authority intentionally and unjustifiably inflicts bodily or mental injury on an individual. However, the extent of a State Party's obligation pursuant to the Covenant to protect security of persons outside the context of deprivation of liberty is unclear.

7. The ordinary meaning and context of the language in Article 9 supports the conclusion that the right to liberty and security of person, for purposes of Article 9, pertains to situations involving deprivation of liberty. …

8. The standards used in the text of Article 9—arbitrary and unlawful—are set forth only in relation to arrest, detention, and deprivation of liberty. Other articles of the Covenant that provide for security of persons more broadly adopt specific relevant standards, e.g., Article 6 provides that "no one shall be arbitrarily deprived of his life" and Article 7 creates a threshold of "cruel, inhuman or degrading treatment." There is nothing comparable in Article 9 to address justifiable actions that may infringe on the security of a person (such as self-defense or other action in the face of imminent threat to others) beyond the context of deprivation of liberty.

9. Thus, in finalizing the text of the draft General Comment (and related paragraphs throughout), the United States recommends that the Committee focus on the right to security in the context of arrest or detention, such as instances of excessive use of force by law enforcement personnel in stopping, seizing, arresting and ultimately detaining individuals (as noted in draft paragraph 7) or extreme forms of arbitrary detention that are themselves life-threatening (as noted in draft paragraph 55).

III. Regulating Conduct of Non-State Actors

10. The United States agrees with paragraph 9 of the draft General Comment that a State Party is required under the Covenant to exercise responsibility for the conduct of private individuals or entities in situations where the State Party authorizes private individuals or entities to exercise governmental powers of arrest or detention. This would include responsibility to ensure that appropriate steps are taken to prevent violations and provide for effective remedial measures contemplated by both Articles 2 and 9 whenever a private individual or entity is authorized to exercise such powers and the circumstances in the particular case warrant. The United States disagrees, however, with the Committee's imputing affirmative obligations to States Parties to prevent, regulate, or punish the non-governmental conduct of private actors. The ordinary meaning of the text of the Covenant does not support such a reading, and there is no indication in the negotiating history of any agreement to impose obligations to prevent security threats or arbitrary and unlawful arrest and detention other than under governmental authority.

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13. If the Committee is inferring such obligations solely from the restatement in Article 9 of the inherent right to liberty and security of persons set out in UDHR Article 3, the United States would note that the Third Committee of the General Assembly rejected an amendment to the UDHR that would have added to that Article the following: "The State should ensure the protection of each individual against criminal attempts on his person." This proposal was presented and rejected immediately prior to the final vote on Article 3 in the Third Committee of the General Assembly in 1948[12] and nothing comparable was pursued during negotiation of the Covenant.

14. The absence of language in the Covenant imposing a duty or obligation on the part of the State Party to prevent crimes or other conduct by non-state actors is significant when contrasted with the text of other international conventions that specifically impose such obligations upon States Parties to prevent certain types of misconduct by non-state actors in limited circumstances. For instance, as noted in the U.S. Observations on General Comment 31, both the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contain provisions that impose obligations upon States Parties to prevent discrimination "by any persons, group or organization" and "by any person, organization or enterprise." Similarly, under Article 4(1)(e) of the Convention on the Rights of Persons with Disabilities (CRPD), States Parties undertake "to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise."

15. Some States have chosen to assume affirmative treaty obligations regarding non-state actors in those States' efforts to prevent, punish and eradicate violence against women by becoming parties to such regional conventions as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belem do Para") and the Council of Europe Convention on preventing and combating violence against women and domestic violence ("COE Convention"). Both require States Parties to take a number of affirmative steps to prevent, investigate, punish and remedy acts of violence against women, including a "due diligence" obligation in each with respect to private conduct.

16. In addition, many States have taken on obligations with respect to conduct of private parties in the counter-terrorism context. The international community has elaborated 14 universal legal instruments and four amendments since 1963 to prevent various kinds of terrorist acts.[13] Under these treaties, States Parties assume comprehensive obligations to criminalize, prevent, and prosecute or extradite crimes that directly threaten the liberty and/or security of persons in specific transnational contexts. These various counter-terrorism obligations require the suppression of unlawful acts of violence against aircrafts, airports, and maritime safety, and suppression of hijacking, hostage-taking, and crimes against internationally protected persons. More recently, crime control initiatives under the 2000 United Nations Convention against Transnational Organized Crime have included protocols to combat human trafficking, the smuggling of migrants, and illicit manufacturing of and trafficking in firearms.

17. That the CERD, CEDAW, CRPD, Convention of Belem do Para, COE Convention and other conventions include provisions explicitly creating State obligations requiring the regulation of conduct by private actors demonstrates that when treaty drafters

intend for state obligations to include the regulation of private conduct, they explicitly impose such obligations, allowing States to decide whether or not to undertake international obligations on these subjects. The absence of any language to this effect in Article 9 or Article 2 of the Covenant reflects a decision by the drafters not to reach such conduct.

18. Although the United States appreciates that several of these recommendations are already framed as such ("should"), it strongly encourages the Committee to refrain from assertions that States Parties are "obliged" or "must" take measures against private conduct or threats when there is no legal basis in the Covenant for such interpretations.

IV. The Law of Armed Conflict

19. In all situations of armed conflict, the United States is deeply committed to complying with its obligations under the law of armed conflict (also referred to as international humanitarian law or the law of war). However, the United States does not agree with the analysis or conclusions set forth in several paragraphs of the draft General Comment regarding the applicability of Article 9 in situations of armed conflict.

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21. In particular, several paragraphs incorrectly imply that international humanitarian law does not provide the *lex specialis* in non-international armed conflicts. For example, after acknowledging that international humanitarian law applies in the context of an international armed conflict, paragraphs 15 and 65 appear to rule out the applicability of international humanitarian law in non-international armed conflicts. Although identifying the international law rules that apply to particular government action in the context of an armed conflict is a highly fact-specific inquiry, international humanitarian law is the *lex specialis* in both international and non-international armed conflicts, including with respect to detention of enemy combatants in the context of the armed conflict. Deleting the word "international" before "armed conflict" in paragraphs 15 and 65 would effectively address this issue.

22. Given that international humanitarian law is the controlling body of law in armed conflict with regard to the conduct of hostilities and the protection of war victims, the United States does not interpret references to "detainees" and "detention" in several paragraphs to refer to government action in the context of and associated with an armed conflict. For example, paragraph 15 incorrectly implies that the detention of enemy combatants in the context of a non-international armed conflict "would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available." On the contrary, in both international and non-international armed conflicts, a State may detain enemy combatants consistent with the law of armed conflict until the end of hostilities. Similarly, to the extent paragraphs 15 and 66 are intended to address law-of-war detention in situations of armed conflict, it would be incorrect to state that there is a "right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention" in all cases. In addition, to the extent the discussion of an individual right to compensation under Article 9 in paragraphs 49-52 is intended to extend to individuals detained in the context of an armed conflict, as a matter of international law, the rules governing available remedies for unlawful detention in the context of an armed conflict would be drawn from international humanitarian law. Relatedly, paragraph 31 and accompanying footnote 11, in references to "military prosecutions" and "military courts," do not distinguish between different types of military

prosecutions. For example, there may be a distinction between military tribunal proceedings under the law of war and courts-martial proceedings against service members, given that international humanitarian law is the *lex specialis* in situations of armed conflict.

23. Those portions of paragraphs 63-67 and other paragraphs throughout the General Comment that address the applicability of Article 9 in situations of armed conflict should be revised substantially to reflect appropriately the principle of *lex specialis*, or should be eliminated from the draft.

V. Derogation under Article 4

24. The United States also has concerns regarding the draft General Comment's treatment of derogation from Article 9. As the Committee notes, Article 9 is not included in the list of non-derogable rights in Article 4(2), but Article 4(1) requires that any derogation must be "strictly required by the exigencies of the situation" and must not be inconsistent with a State's other obligations under international law. The United States agrees with the Committee's statement in General Comment 29 (paragraph 11) that this limitation in Article 4(1) means that "[s]tates parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law." But the United States does not agree with the Committee's statement in paragraph 65 that "the fundamental guarantee against arbitrary detention would be non-derogable" on this basis. The only cited authority for this sweeping statement is a footnote reference to paragraph 11 of General Comment 29 which refers to "arbitrary deprivation of liberty" as either a peremptory norm, violation of international humanitarian law, or both, without any elaboration or authority. The United States does not believe that a "fundamental guarantee against arbitrary detention" is considered a peremptory norm. The United States also notes that, as discussed in paragraph 21, international humanitarian law provides the *lex specialis* in non-international armed conflicts as well as international armed conflicts, and that as a general matter derogation would only be relevant as to action within the Covenant's scope of application.

25. Nor can the United States support the sweeping statement in paragraph 64 that "prohibitions against taking of hostages, abductions or unacknowledged detention are . . . not subject to derogation" because they would necessarily violate international law. The only cited support for this statement is a prior statement by the Committee. The United States believes that the authority under Article 4 to derogate from the specific prohibitions contained in Article 9 – which does not use the terms "hostages, abductions or unacknowledged detention" – is not, as a strictly legal matter, constrained in this manner, but agrees that once a State Party has derogated, measures taken must be consistent with the State Party's other obligations under international law, to include specific treaty obligations, customary international law and peremptory norms.

26. In addition, the United States agrees that the duration of any derogating measure must be strictly constrained by the exigencies of the situation. But it cannot accept the view expressed in paragraph 65 that in determining that a derogating measure is "strictly required by the exigencies of the situation" within the meaning of Article 4(1), the derogating State Party is constrained by a requirement of "strict necessity or proportionality" for any derogating measures involving security detention. Nor can it accept the view that any such measures must be accompanied by procedures that the Committee considers necessary to prevent arbitrary application of measures involving security detentions, such as "review by a court or an equivalent independent and impartial tribunal." First, the United States does not recognize that "strict necessity or proportionality" is the correct standard or that such procedures are necessarily required to prevent arbitrary detention under Article 9, even in the absence of derogation (see

paragraph 31 below). Additionally, if the Covenant negotiators had intended for such requirements to apply, they would have added specific language so providing in the text of either Article 4(1) or (2).

27. Furthermore, the assertion in paragraph 66 (citing paragraph 6 of General Comment 32) that "[t]he procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights" is not supported by the ordinary meaning of the text of Article 4. The United States agrees that a derogating State Party would need to ensure compliance with all other international obligations, including the provisions of the Covenant not subject to derogation and, in so doing, carefully weigh the impact of any derogating measure on its ability to do so. But Article 4(2) clearly defines which articles are non-derogable. All other articles are thus derogable, to the extent authorized by Article 4. The Committee has not identified a general "non-circumvention obligation" either in the Covenant or elsewhere, nor does it indicate what would constitute circumvention. It is therefore within the discretion of a derogating State Party to determine how best to meet any related obligations without reliance on derogated measures.

28. As a practical matter, the United States has never declared a public emergency within the meaning of Article 4 or availed itself of the right of derogation under its terms. It is in fact highly unlikely that the United States would ever do so. There is no authority under the U.S. Constitution to suspend any of the Constitutional rights that parallel Covenant rights, with the sole exception of the authority under Article I, Section 9, to suspend the Writ of *Habeas Corpus* "when in Cases of Rebellion or Invasion the public Safety may require it." The United States shares the Committee's laudable objective of discouraging derogation of Covenant rights and freedoms to the extent possible. But it believes the text of Article 4 is sufficient for this purpose and that in defining States Parties' obligations under the Covenant, the draft General Comment needs to remain true to that text.

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3. Human Rights Council

a. Overview

The United States participated in three sessions of the HRC in 2014. The key outcomes of each session for the United States are summarized in fact sheets issued by the State Department. The key outcomes at the 25th session, described in a March 28, 2014 fact sheet, available at *www.state.gov/r/pa/prs/ps/2014/03/224138.htm*, include: responses to the situations in Sri Lanka, Iran, Syria, DPRK, Burma, Ukraine, and Venezuela and cross-cutting resolutions on civil society and the renewal of the mandate of the special rapporteur on freedom of expression. The key outcomes at the 26th session are described in a June 30, 2014 fact sheet, available at *www.state.gov/r/pa/prs/ps/2014/06/228634.htm*. They include responses to the situations in Ukraine, Syria, Belarus, and South Sudan and resolutions on Internet freedom, women's rights, and business and human rights. The key outcomes at the 27th session are summarized in the State Department's September 26, 2014 fact sheet, available at *www.state.gov/r/pa/prs/ps/2014/09/232210.htm*. They include resolutions on

violence and discrimination against LGBT persons, civil society, Syria, Yemen, Central African Republic, Democratic Republic of Congo, Sudan, safety of journalists, female genital mutilation ("FGM"), and equal political participation.

b. Actions regarding Ukraine

See Chapter 9 for a discussion of measures by the UN Security Council and the UN General Assembly in response to actions by the Russian Federation against the territorial integrity of Ukraine. See Chapter 16 for discussion of sanctions targeting those responsible for Russian actions in Ukraine. The situation in Ukraine was also addressed at the Human Rights Council, including through a resolution during the 26th session in June 2014. U.N. Doc. A/HRC/RES/26/30. On March 26, 2014, at the 25th session of the HRC, the United States delivered a statement on behalf of 42 states, which appears below and is available at *https://geneva.usmission.gov/2014/03/26/joint-statement-by-42-states-at-the-human-rights-council-on-the-situation-in-ukraine/*.

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1. Mister President. We stand with the people of Ukraine at this moment of crisis.

2. We strongly support the new Ukrainian government. That government was overwhelmingly approved by the democratically elected parliament, representing all regions of the country, and supported by all major political parties in Ukraine.

3. The new government has proposed and is preparing for presidential elections on May 25 that will give all the people of Ukraine the opportunity to decide their own future democratically, a decision they must be able to take freely without any outside interference.

4. We reiterate the importance of respecting the sovereignty, unity and territorial integrity of Ukraine, according to Article 2(4) of the United Nations Charter. We condemn all use or threat of the use of force against the territorial integrity or the political independence of any state, or in any other manner inconsistent with the Purposes and Principles of the United Nations.

5. We express our deepest concern regarding the continuing deterioration of the situation in Ukraine. We are further concerned by Russia's unsubstantiated narrative of human rights violations, including as a justification for its military incursion into Ukraine. We are further concerned by Russian actions that continue to contribute to the deterioration of the situation, including its ongoing violation of Ukraine's sovereignty and territorial integrity, its actions in support of the illegal Crimean referendum—which took place despite a boycott of the referendum by the Crimean Tatars, who comprise 15% of the population of the region—and its purported annexation of Crimea. These actions are in violation of Russia's obligations under the UN Charter and inconsistent with its commitments under the Helsinki Final Act.

6. We are deeply concerned about credible reports of kidnappings of journalists and activists, the blocking of independent media, and the barring of independent international

observers. Furthermore, the situation of minorities in Crimea, in particular the Crimean Tatars, is extremely vulnerable since the Russian military incursion. The best method to ensure the rights of all Ukrainians are being respected, including ethnic Russians, is for Russia to support international monitors in all of Ukraine, including Crimea, so that alleged human rights violations and abuses can be reported objectively and independently.

7. We commend the measured response shown so far by the new Ukrainian government and call upon the Ukrainian authorities, through an inclusive process, to continue efforts to ensure free and fair national elections, advance constitutional reform and investigate all acts of violence and human rights violations and abuses. Efforts should continue to reach out to all Ukrainian regions and population groups and to ensure full protection of the rights of persons belonging to minorities, drawing on the expertise of the Council of Europe and the OSCE.

8. We support the call made by the High Commissioner at the beginning of this session for an immediate, comprehensive and independent investigation into all human rights violations and abuses including killings, disappearances, arbitrary detentions, torture and ill-treatment.

9. We welcome Assistant Secretary General Simonovic's recent visit to Ukraine and call for access to be granted to all parts of Ukraine, including Crimea, to the human rights monitoring mission. We request that the OHCHR publically release the findings of its assessment report from both missions.

10. In addition to the UN presence, we welcome the involvement of Council of Europe mechanisms and the deployment of OSCE monitors in Ukraine. We call on Russia and all concerned to ensure full and unimpeded access and protection for the teams to all of Ukraine, including Crimea, in order to provide transparency and unbiased reporting on the human rights, economic, and security situation there, including the situation of persons belonging to all minority groups.

11. We support the actions undertaken by UN Secretary General Ban Ki-moon, who personally traveled to Ukraine and Russia in order to find a diplomatic solution to this crisis. We believe that the UN, pursuant to its Purposes and Principles, has a key role to perform in order to restore calm and promote dialog between the parties.

12. We call on all member states to work together to provide necessary assistance to Ukraine, and welcome further engagement by the High Commissioner's office and the special procedures of the Council, to assist in ensuring that human rights are respected during this period of crisis.

13. Finally, we call upon the authorities of Ukraine and the Russian Federation to engage in direct dialogue in order to restore calm and order, as well as to find a peaceful solution to this crisis.

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The United States joined in another joint statement on Ukraine delivered at the 27th session of the HRC by Peter Mulrean, U.S. Deputy Permanent Representative to the U.S. Mission to the UN in Geneva, on behalf of 25 states. The September 24, 2014 joint statement follows, and is available at *https://geneva.usmission.gov/2014/09/24/joint-statement-on-minorities-in-ukraine/*.

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We remain concerned by reports of violations of the rights of Crimean Tatars and members of other minorities in Crimea.

We are deeply concerned by reports that de facto authorities in Russia-occupied Crimea are systematically committing abuses against native Crimean Tatars, other religious and ethnic minorities, and those who oppose the occupation.

Raids on Tatar homes and mosques, prosecutions of Tatars for possessing so-called "extremist" literature, pressure on Tatar NGOs and publications, and the recent raids against the Crimean Tatar Mejlis are just the latest in a series of human rights violations that raise concerns about dramatically deteriorating conditions for minority populations.

De facto authorities in Crimea have also banned respected Ukrainian parliamentarian and former leader of the Crimean Tatar Mejlis, Mustafa Dzhemilev, and current head of the Mejlis, Refat Chubarov. We condemn this baseless five year ban of these officials from Crimea, their homeland.

This interference with elected officials and civil society also further undermines democracy in Crimea. The illegal referendum held in Crimea on 16 March was neither free, nor fair. As acknowledged in the United Nation's report of 15 April, there was widespread vote rigging and a policy to exclude voters from minority groups.

There has also been an increase in violence against Jews and members of other religious minorities in Crimea since the Russian occupation began. Following threats of violence, the Chief Reform Rabbi and numerous Ukrainian Orthodox Clergy were forced to flee the peninsula. Ukrainian Greek Catholic Clergy have also been subjected to harassment and surveillance by de facto authorities in Crimea. We are concerned over the increase of hate crimes, including physical violence and vandalism, against Jehovah's Witnesses and their houses of worship in Crimea.

We also note with concern that de facto authorities in Russia-occupied Crimea are requiring a new registration for all religious organizations in Crimea, including more than 1,500 previously registered with the Ukrainian government.

We call on Russia to cease its repressive actions towards these communities and to end its illegal purported annexation of Crimea, and we encourage all parties to cooperate with the UN Human Rights Monitoring Mission in Ukraine (HRMMU) and give it access throughout all regions of the country, including Crimea.

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c. Actions regarding Syria

The HRC adopted several additional resolutions addressing the crisis in Syria in 2014 and supported the ongoing work of the HRC's Independent International Commission of Inquiry on the Syrian Arab Republic ("COI"). At the 25th session of the HRC, on March 27, 2014, Paula Schriefer, Deputy Assistant Secretary of State for International Organization Affairs and the head of the U.S. delegation, delivered an explanation of vote, explaining the U.S. vote in favor of a resolution on Syria and urging the renewal of the mandate of the COI. The resolution was adopted by a vote of 32 in favor, 4 against, and 11

abstentions. U.N. Doc. A/HRC/RES/25/23. Ms. Schriefer's statement is excerpted below and available at *https://geneva.usmission.gov/2014/03/28/u-s-appeals-to-all-delegations-to-renew-mandate-of-syria-coi/*.

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The U.S. strongly supports the resolution on "the continuing grave deterioration of the human rights and humanitarian situation in the Syrian Arab Republic" and urges all members to vote in favor of it.

In addition to the extension of the Commission of Inquiry and other elements the other co-sponsors have laid out, the resolution calls attention to the desperate humanitarian situation inside Syria. Reliable access for humanitarian workers to reach those in need is urgent. The resolution stresses the need for full implementation of UN Security Council resolution 2139 and condemns the regime's starvation campaign. There has been no significant progress in the implementation of UNSCR 2139. As the Secretary-General states in his report, "humanitarian access in Syria remains extremely challenging . . . and delivering lifesaving items remains difficult." Since the unanimous adoption of resolution 2139, 200 people have been killed daily, 220,000 people remain besieged, and the regime has continued its ruthless aerial, indiscriminate bombardment campaign.

We remain gravely concerned about the Asad regime's continued detention of tens of thousands of Syrians--including women, children, doctors, humanitarian aid providers, human rights defenders, journalists, and civilians from opposition controlled areas. They are subjected to torture, cruel, inhuman and degrading treatment, and extrajudicial killings. The resolution condemns these violations and calls for the immediate release of all arbitrarily detained persons, improvement in prison conditions, and access for independent monitors, including the Commission of Inquiry.

This tragic chapter in Syria's history began over three years ago with the Asad regime's decision to meet peaceful protests with violence. We reiterate our call, united with the Syrian people and members of the international community, for an immediate end to all violations of human rights and abuses and violations of international humanitarian law, especially those egregious, widespread and continued violations committed by the Asad regime.

There must be accountability for these crimes. We appeal to all members of this Council to vote in favor of this resolution and the renewal of the mandate of the Commission of Inquiry, so it may continue to provide objective, balanced reporting on the appalling human rights situation in Syria. With the passage of this resolution, the Human Rights Council continues to fulfill the important role of drawing global attention to the atrocities taking place in Syria and collecting the evidence necessary to ensure future accountability for these acts.

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d. Actions regarding Sri Lanka

On March 27, 2014, the UN Human Rights Council adopted a resolution on reconciliation, accountability, and human rights in Sri Lanka. U.N. Doc. A/HRC/RES/25/1. Secretary Kerry's press statement on the vote is excerpted below and available at

www.state.gov/secretary/remarks/2014/03/224003.htm. The White House also issued a statement welcoming adoption of the resolution, available at https://geneva.usmission.gov/2014/03/28/white-house-on-u-n-human-rights-council-vote-on-sri-lanka/. For discussion of previous Sri Lanka resolutions at the HRC, see *Digest 2013* at 131 and *Digest 2012* at 140.

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Today's vote in the UN Human Rights Council sends a clear message: The time to pursue lasting peace and prosperity is now; justice and accountability cannot wait.

This resolution reaffirms the commitment of the international community to support the Government of Sri Lanka as it pursues reconciliation and respect for human rights and democratic governance. That's why the resolution requests that the Office of the High Commissioner for Human Rights continues monitoring the human rights situation in Sri Lanka. That's why it calls on the Office to conduct an investigation into allegations of serious human rights abuses and related crimes during Sri Lanka's civil war. And that's why the United States will continue speak out in defense of the fundamental freedoms that all Sri Lankans should enjoy.

We are deeply concerned by recent actions against some of Sri Lanka's citizens, including detentions and harassment of civil society activists. Further reprisals against these brave defenders of human rights and the dignity of all Sri Lankan citizens would elicit grave concern from the international community.

The Sri Lankan people are resilient. They have demonstrated grit and determination through years of war. Now, they are demanding democracy and prosperity in years of peace. They deserve that chance.

The United States stands with all the people of Sri Lanka. We are committed to helping them realize a future in which all Sri Lankans can share in their country's success.

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e. Actions regarding North Korea ("D.P.R.K.")

On February 17, 2014, the United States welcomed the release of the final report of the UN HRC's Commission of Inquiry on human rights in the Democratic People's Republic of Korea ("D.P.R.K."). The State Department press statement on the subject is available at www.state.gov/r/pa/prs/ps/2014/02/221710.htm. That press statement notes that the report "provides compelling evidence of widespread, systematic, and grave human rights violations by the D.P.R.K." and "reflects the international community's consensus view that the human rights situation in the D.P.R.K. is among the world's worst." The United States co-sponsored the resolution at the UN HRC that established the Commission of Inquiry in March 2013. U.N. Doc. A/HRC/RES/22/13. The Commission of Inquiry presented its report on the situation in the D.P.R.K. in front of the Human Rights Council in March.

In December, the UN Security Council held a meeting on North Korea's human rights record, spurred in part by the work of the Commission of Inquiry. Permanent Representative to the UN for the United States Samantha Power delivered remarks, which are excerpted in Chapter 3 and available at *http://usun.state.gov/briefing/statements/235494.htm*.

f. Joint Statement on Egypt

On March 7, 2014, the United States cosigned a cross-regional joint statement on Egypt at the UN Human Rights Council. U.S. State Department Spokesperson Jen Psaki explained in the daily press briefing on March 7 that the United States remains "concerned about the climate for freedom of expression and freedom of assembly and association in Egypt." Excerpt from Daily Briefing, available at *https://geneva.usmission.gov/2014/03/08/u-s-joins-cross-regional-joint-statement-on-egypt-at-the-human-rights-council/*. Ms. Psaki elaborated on the U.S. position on the joint statement on Egypt:

> We were pleased to join 27 countries to reiterate our common concern for the …universal human rights of all Egyptian citizens. In addition, and separately, the international community clearly condemns the reprehensible terrorist attacks that have taken place in Egypt.
>
> The statement also reflects a broad consensus that restrictions to peaceful assembly, association, and expression run counter to Egypt's pursuit of stability and democracy, and that a free press is an essential pillar of any democratic society. It further expresses our concern about the disproportionate use of lethal force by security forces against demonstrators, noting that even when faced with persistent security challenges, security forces have a duty to respect and observe Egypt's international human rights obligations and commitments.

g. Actions regarding the situation in Israel and the Palestinian Territories

On July 23, 2014, the 21st Special Session of the HRC adopted resolution S-21/1, titled "Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem," by a vote of 29 in favor, 1 against, and 17 abstentions. The United States voted against the resolution. The U.S. explanation of vote delivered by Ambassador Keith Harper, U.S. Representative to the UN Human Rights Council, is excerpted below, and available in full at *https://geneva.usmission.gov/2014/07/23/u-s-explanation-of-vote-on-the-hrc-resolution-on-the-situation-in-gaza/*. The U.S. statement delivered during the special session is available at

https://geneva.usmission.gov/2014/07/23/u-s-statement-at-the-hrc-special-session-on-gaza/.

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The United States remains gravely concerned over the recent violence that has impacted Palestinian and Israeli civilians. We are working intensively to secure an immediate cessation of hostilities based on a return to the November 2012 cease-fire agreement between Israel and Hamas. But this resolution will not help in achieving that goal. This resolution is not constructive, it is destructive.

The United States is deeply troubled by the resolution presented for adoption today. We will vote against it. Once again, this Council fails to address the situation in Israel and in the Palestinian Territories with any semblance of balance. There is no mention of indiscriminate rocket attacks by Hamas into Israel or the tunnels used to cause mayhem.

Nor is the resolution tailored to act in furtherance of our shared goals. Our goal is to facilitate an immediate cessation of hostilities. Let us be clear: This resolution will undermine achieving that objective.

The resolution also creates yet another one-sided mechanism targeting Israel. The Commission of Inquiry this resolution calls for is a needless, duplicative effort. This would be the fourth such investigation created by this body since 2006. This resolution is not tailored towards impacting the human rights of Palestinians or Israelis. It is a political and biased instrument. The resolution will cause real and lasting damage to this Council and its ability to comprehensively address human rights in this region. This body already has a standing agenda item solely focused on Israel. No other state faces such intense scrutiny. It also has a special rapporteur with a virtually unlimited mandate that could review any relevant human rights question. There is absolutely no need for an additional mechanism concerning Israel.

Additionally, this resolution takes steps that are far outside the mandate of this Council by attempting to convene the high contracting parties to the Geneva Conventions. It is essential that we do not politicize these important treaties. The action today threatens to do exactly that.

The United States calls for a vote and will vote NO on the draft resolution. We call on other states to join us in voting against it. We call on other states to underscore their opposition to any initiative of this Council that takes a one-sided approach to the Israeli-Palestinian conflict. It is essential that the community of nations takes a balanced approach to these issues.

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B. DISCRIMINATION

1. Race

a. Committee on the Elimination of Racial Discrimination

The United States appeared before the Committee on the Elimination of Racial Discrimination on August 13 and 14, 2014 in Geneva to present its 2013 periodic report

on the implementation of U.S. obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). The United States submitted its written report to the Committee on June 13, 2013. See *Digest 2013* at 132. See also discussion in section A.2., *supra*, of the letter sent to state, tribal, and local authorities informing them of the CERD presentation, among others. Ambassador Keith Harper led the U.S. delegation. The delegation made a presentation and took questions from the Committee on a broad range of issues, including racial profiling; racial disparities with respect to criminal justice, education, housing, health care, and employment; voting rights; treatment of Native Americans and members of other racial and ethnic minorities; and immigration policy. Ambassador Harper's opening remarks are excerpted below and available at *https://geneva.usmission.gov/2014/08/13/ambassador-harper-opening-remarks-at-u-s-presentation-to-the-committee-on-the-elimination-of-racial-discrimination-cerd/*.

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The United States is a vibrant, multi-racial, multi-ethnic, and multi-cultural democracy, in which individuals are protected against discrimination based on race, color, and national origin under the U.S. Constitution and federal laws, as well as under the constitutions and laws of the states and other governmental units. As noted in our report, the United States has made great strides towards eliminating racial discrimination. This progress is reflected in many levels in our society as will be elaborated further by my colleagues on our delegation. But one notable indicator of this is our country's political leadership. Thirty years ago, the idea of having an African-American president would not have seemed possible. Today it is reality. The nation's top law enforcement officer, our Attorney General, is also African-American. Three of the last five Secretaries of State have been women, and two have been African-American. We have appointed Justice Sonia Sotomayor, the first Latina Supreme Court Justice.

As a member of the Cherokee Nation of Oklahoma I am proud to be the first Native American to be U.S. Ambassador to the Human Rights Council. On a related note, I would like to congratulate the Chairperson of this Committee as the first indigenous Chairperson of any human rights treaty body.

While we have made visible progress that is reflected in the leadership of our society, we recognize that we have much left to do. Issues covered by this Convention are of such fundamental and deep importance that we must continue to make progress. For this reason, we value the opportunity for dialogue with the Committee. We hope and expect it to generate new ideas, to identify new ways to address persistent challenges, and to assist us in our ongoing efforts to improve. And for that, we are grateful.

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The opening statement of Deputy Assistant Secretary Schriefer is excerpted below, and is available at *https://geneva.usmission.gov/2014/08/13/32479/*.

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Over the last several years, under active White House leadership, the State Department has worked closely with many federal agencies and others to reinforce the importance of human rights obligations, including those set forth in the Convention, in our daily work implementing domestic laws and policies. The reporting processes for the Convention and other human rights treaties, as well as the Universal Periodic Review, have helped create a core network of officials throughout the federal government who spread awareness of human rights obligations within their agencies and with other stakeholders. Through mechanisms such as the Equality Working Group, co-chaired by the Departments of State and Justice, we are trying to leverage that increased engagement to focus on concrete issues of implementation, not simply reporting.

At the same time, given our federal system of government, implementation of our obligations under the Convention must be a true collective effort among federal, state, local, tribal, and territorial governments. Communication and coordination with these federal government partners is critical, and we have stepped up efforts in this regard significantly since our 2008 presentation before this Committee. In particular, we have increased our communications with state, local, tribal, and territorial governments, both by providing information related to these treaties and their requirements, and requesting information relevant to implementation. The presence of the Attorney General McDaniel and Mayor Bell today is one testament to this improved outreach.

We have also worked to improve our outreach to the public and coordination with members of civil society, who serve as vital partners and constructive critics in the implementation of our obligations. In addition to making public extensive amounts of information about our treaty obligations and reporting activities, U.S. agencies engage in an ongoing dialogue with civil society. We have held several consultations with civil society specifically about our recent periodic report, and we look forward to future consultations. We greatly appreciate the efforts of civil society to coordinate and organize their concerns and recommendations, which inform our consideration of actions our government should take to improve implementation of our obligations.

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Statements of other members of the U.S. delegation are also available on the website of the U.S. Mission to the UN in Geneva. The opening statement of Loretta Lynch, U.S. Attorney for the Eastern District of New York, is available at *https://geneva.usmission.gov/2014/08/13/32482/*. The opening statement of Mark Kappelhoff, Deputy Assistant Attorney General of the Civil Rights Division of the U.S. Department of Justice, is available at *https://geneva.usmission.gov/2014/08/13/deputy-assistant-attorney-general-mark-kappelhoff-opening-statement-before-cerd-committee/*. The opening statement of Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education, is available at *https://geneva.usmission.gov/2014/08/13/catherine-lhamon-opening-statement-committee-on-the-elimination-of-racial-discrimination/*. The opening statement of

William Bell, Mayor of Birmingham, Alabama, is available at https://geneva.usmission.gov/2014/08/13/william-bell-mayor-of-birmingham-alabama-addresses-committee-on-the-elimination-of-racial-discrimination/. The opening statement of Dustin McDaniel, Attorney General of Arkansas, is available at https://geneva.usmission.gov/2014/08/13/arkansas-attorney-general-dustin-mcdaniel-opening-remarks-to-committee-on-the-elimination-of-racial-discrimination/.

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b. Human Rights Council

On March 28, 2014, the United States explained its position on the resolution introduced at the 25th session of the Human Rights Council on the mandate of the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance. U.N. Doc. A/HRC/RES/25/32. As David Sullivan, Legal Adviser for the U.S. Mission to the UN in Geneva, explained in the U.S. statement, the United States disassociated from consensus on the resolution. Mr. Sullivan's statement is excerpted below and available at https://geneva.usmission.gov/2014/03/28/u-s-statement-on-resolution-mandate-of-the-special-rapporteur-on-contemporary-forms-of-racism-racial-discrimination-xenophobia-and-related-intolerance/.

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The United States has consistently sought to support practical and concrete efforts to end racism and racial discrimination wherever it occurs. We discussed some of these efforts the United States is pursuing domestically just a few weeks ago here in Geneva with the Human Rights Committee, and we look forward to discussing them in more detail in a few months' time with the Committee on the Elimination of Racial Discrimination. Our priority, as we have made clear for some years, is to help ensure that all states live up to their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and implement practical measures to fulfill the promise of that Convention and other instruments barring racial discrimination. Unfortunately, we are concerned that the mandate of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance does little to contribute to forward movement on such practical measures.

Moreover, as in the past, we cannot endorse all of the provisions of the current mandate. The mandate contains elements we believe neither reflect international law nor advance appropriate policies. For instance, we believe it is critically important to balance necessary legal protections for freedom of expression with solutions to the problem of incitement.

It is, therefore, with sincere regret that the United States must again disassociate from consensus on this resolution. We will continue to look for ways to balance our differences with the overriding goal we all share to eliminate racism in all its forms, wherever it occurs. We are

proud of the efforts we have made in that regard and will continue to seek consensus on practical ways to make progress to achieve that worthy objective.

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In April 2014, the United States attended the 12th session of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Program of Action, a body in which the United States normally does not participate. This session was dedicated to the negotiation of a Program of Activities for the Implementation of the International Decade for People of African Descent. For background on U.S. concerns about the Durban Declaration, see *Digest 2001* at 267-68, *Digest 2007* at 315-17, *Digest 2008* at 284-85, *Digest 2009* at 174-75, *Digest 2010* at 222-23, *Digest 2011* at 160-62, and *Digest 2012* at 148-50. The U.S. opening statement, delivered on April 7, 2014 by David Sullivan, is excerpted below and available at *https://geneva.usmission.gov/2014/04/07/durban-declaration-program-action/*.

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As you know, the United States normally does not participate in this working group because of our significant and well-known concerns about the Durban Declaration and Program of Action.

That said, we are always ready to find common ground with others in the effort to combat racism, bigotry, and racial discrimination. As Brazil's delegation emphasized, our nation's society is also multiracial, multiethnic, and multicultural. The situation of people of African descent is a very significant element of our national history, of the social fabric of our society, and of our concern about human rights worldwide.

Accordingly, in New York last December we supported UN General Assembly resolution 68/237, which proclaims the International Decade for People of African Descent beginning January 1, 2015. That resolution also asked this Working Group to develop a draft Program, to serve as the basis for the General Assembly President's work in developing a program for the implementation of the Decade.

As you told us as the Chair, the time for that project is short; the Decade will begin less than eight months from now, and General Assembly gave itself a deadline of June 30, 2014 to finalize and adopt the program.

In our work on the Program, as my European Union colleague said, we should emphasize the significant common ground that we share in our struggle against racism and racial discrimination, rather than our areas of differences. This means focusing on taking real, practical steps in all of our countries, in law and in policy, to confront racism and racial discrimination. We are skeptical, however, of proposals to create new instruments rather than focusing on implementation of existing ones such as the CERD, and of proposals to create costly new mechanisms that would have minimal impact on the lives of people of African descent.

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On June 24, 2014, Candace Bates delivered a statement for the United States at the interactive dialogue with the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, held during the 26th session of the HRC. The U.S. statement is excerpted below and available at *https://geneva.usmission.gov/2014/06/24/dialogue-on-contemporary-forms-of-racism-racial-discrimination-xenophobia-and-related-intolerance/*.

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The United States welcomes Special Rapporteur Mutuma Ruteere and thanks him for his thoughtful attention in his most recent report to the use of the Internet and social media to propagate racist ideas.

As we live in an increasingly interconnected world, expanded access to the Internet and new connections via social media have enabled unprecedented access to information.

These technological developments have also brought mutually beneficial exchanges of ideas, linking individuals throughout countries and across borders in ways unimagined even a decade ago.

At the same time, we recognize that some have tried to use these tools to spread hateful and discriminatory ideas and beliefs.

The United States abhors racist ideology.

As our history and experience have shown us, the best way to counteract these statements is through allowing a variety of more reasoned voices, including voices of members of minority groups, to outshine the vitriol of a hardened few.

We appreciate the Special Rapporteur's focus on the various methods that are being used around the world to counteract the use of Internet and social media to spread hate speech.

We agree strongly with his conclusion that the "censorship approach" to controlling hate speech has significant draw backs.

However, we strongly disagree with Mr. Ruteere's recommendation that legislative measures are essential to combat and prevent racial hatred on the Internet.

We disagree with the assertion that Article 19(3) of the ICCPR allows for prohibition of any hate speech—a very broad category of speech.

We would highlight the very different and well-reasoned approach to this issue taken by others, including Special Rapporteur Frank LaRue, emphasizing the need for restrictions to be very narrowly tailored.

We firmly support a multi-stakeholder approach to the issue, as noted in the report.

Technology companies, the private sector, civil society, academia, and governments can work together to address and overcome this complex phenomenon.

One example is the positive collaboration between stakeholders and ISPs to take down infringing content.

We applaud the inclusion in the Special Rapporteur's report of some of the novel educational programs, online tools, and mobile apps being developed by organizations such as the Southern Poverty Law Center, the Anti-Defamation League, and other non-governmental organizations around the United States and the globe to address this issue.

We encourage the continued exchange of such best practices.

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c. UN General Assembly

On December 10, 2014, Ambassador Power addressed the UN General Assembly at a special event on the International Decade for People of African Descent, which will extend from January 2015 through December 2024. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/234942.htm*.

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The United States comes to the International Decade for People of African Descent with a full and robust commitment to ensuring the rights of persons of African descent, and to combating racism and discrimination against them. That is our commitment to members of all groups—whether they are discriminated against because of the color of their skin, because of what they believe, because of their ethnic group, because of who they love, or for any other reason

Our commitment to addressing enduring discrimination and inequality is rooted in our belief in "the inherent dignity and of the equal and inalienable rights of all members of the human family" — a principle the General Assembly affirmed when it adopted the Universal Declaration of Human Rights.

And our commitment is rooted in the understanding that when we reduce discrimination and racism — whether it is manifested in access to education or access to credit, in political participation or economic empowerment — entire societies benefit. …

While we are proud of the progress we have made in the United States toward reducing discrimination and ensuring equal opportunity for all, we know that we are not yet where we need to be. …

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The President has laid out a series of steps we are taking … , from creating a task force to promote community-oriented policing, which encourages strong relationships and builds trust between law enforcement and the communities they serve, to budgeting money for local law enforcement agencies to purchase body-worn cameras, which have been shown to strengthen accountability and transparency. These actions complement the reinvigorated police reform work being led by the Justice Department and United States Attorneys' Offices throughout this nation.

We understand that the most effective way to address gaps in rights and opportunities is by pinpointing where they exist, analyzing their causes, and finding targeted interventions to address them.

For example, we know boys and young men of color face disproportionate challenges and obstacles in the United States. In 2013, only 14 percent of black boys and 18 percent of Hispanic boys in the fourth grade scored proficient or better on the National Assessment of Educational Progress, the test we use to measure students' knowledge; by comparison, 42 percent of white boys scored proficient or better.

In response, in February, President Obama launched the "My Brother's Keeper" initiative, which is aimed at empowering boys and young men of color from cradle to college to career and ensuring that all young people can reach their full potential. …

We believe strongly that the Decade for People of African Descent will be most effective in tackling racism if it is rigorous in its analysis of where discrimination persists, and if it encourages fact-driven interventions to address it.

The United States also recognizes that we have to go beyond tackling racism and discrimination within our own borders, as big a challenge as that remains. In 2008, we launched a joint action plan with Brazil to promote racial and ethnic equality in both countries; and in 2010, we started a similar program with Colombia. The programs and others like them allow us to learn from and share best practices with our neighbors, such as hosting representatives of Brazil's Ministry of Health at our Centers for Disease Control to discuss ways to address racial disparities in health. We are also developing tools that can be used beyond our communities, like the "Teaching Respect for All" initiative, which we are spearheading with Brazil and UNESCO. The program launched a curriculum guide in June to instill respect and tolerance in young students, which has already been piloted in Côte d'Ivoire, Guatemala, Indonesia, Kenya, and South Africa.

Sixty-six years ago today, the General Assembly adopted the Universal Declaration of Human Rights, affirming the human rights of all individuals, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status." And fifty years ago this year, in 1964, the United States enacted the Civil Rights Act, broadly outlawing discrimination in our country. Upon signing the act into law, then-President Lyndon Johnson said, "Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity."

In these two historic documents we see a common sense of purpose in working to ensure the rights of all people, and eradicating the discrimination and prejudice that undermines their inherent dignity. We remain fully committed to achieving that noble purpose.

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2. Gender

a. Sexual violence in conflict and emergencies

(1) United Nations

On April 25, 2014, Ambassador Power addressed the Security Council at a debate on sexual violence in conflict. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/225207.htm*.

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In the past decade, the Security Council has identified the scourge of sexual violence in conflict as a matter of acute and urgent concern. We meet today to assess progress in combating this pernicious form of criminality and to consider next steps. We begin with confidence that the

standards we have established are clear, and the terrible knowledge that these standards are regularly ignored. We have made abundantly clear that there should be zero tolerance for rape and zero tolerance for other forms of sexual abuse in all circumstances and at all times. The terror of sexual violence is uniquely horrific and merits our continued and determined efforts to eliminate it. Neither the fog of war nor the associated breakdown of law provide any explanation or excuse for actions that violate the rights and disrespect the fundamental dignity of human beings.

To articulate a zero tolerance standard of course is not difficult. Indeed, we have done it many times. But to endow it with real meaning in real conflicts remains a challenge of great urgency and one of many dimensions. This is not work that should be delegated only to a Special Representative of the Secretary-General on Sexual Violence—even one as capable as Special Representative Bangura—or to Women's Protection Advisors in a peacekeeping mission or to UN Women. These offices and officials, and the UN as a whole, assuredly have an indispensable role to play, but the key to further progress in reducing suffering and protecting the vulnerable is action by parties to conflict. Every government has a responsibility to establish standards, to develop institutions, and to pursue policies that protect its people from sexual violence, whether perpetrated by the government's own forces or by others. This responsibility includes, as Special Representative Bangura just put it, redirecting the stigma from the survivors to the perpetrators. This duty extends to men and boys, who have suffered sexual violence to an extent we have only recently begun to appreciate in places like Colombia, where boys were turned into sex slaves by illegal armed groups; in Rutshuru in the DRC, which was under savage M23 control for much of 2013; and in Libya, where the UN reported armed brigades used rape in detention as a form of torture. In far too many countries, the victims of sexual violence still have little, if any, effective legal recourse. Until that changes, predators will not be deterred, victims will hesitate to come forward, and justice will remain beyond reach.

In places where governments are weak, we must help to improve their capabilities, while also holding accountable those who commit crimes. Among the most culpable are the ruthless militias in the Central African Republic, whose assaults on civilians have almost literally torn the country apart and where rape, forced marriage, and sexual slavery are widespread. In Burma, where there are widespread reports of soldiers raping women and girls. And, as we've just heard, in South Sudan where, just this week, militants have gone on radio - which my Rwandan colleague has called an evil multiplier—to incite the use of sexual violence against named ethnic groups. In Yemen, where child protection workers have verified the abduction and abuse of boys by Ansar Al-Shari'a. With all of this in mind, we must express special outrage at the continued and widespread incidence of sexual abuse practiced by Syrian government armed forces as part of the regime's ruthless campaign to terrorize civilians and drive families from their homes.

Despite chronic under-reporting and difficulties of access, we do know more about the nature and scope of the problem than ever before. The Secretary General's report, the information collection mechanisms on which it is based, and the steadfast leadership shown by Special Representative Bangura are all welcome developments.

In addressing sexual violence, the UN must set the right example in what it does both here in New York and in places around the world where tensions are high and UN peacekeepers or political missions are deployed. Special Representative Bangura has shown determination in coordinating UN efforts across agencies to ensure that the imperative of stopping sexual violence is addressed in training, included in mission mandates and reports, is a central focus of enforcement activities, and is a major part of holding perpetrators accountable for war crimes

and crimes against humanity. As members of this Security Council though, we must do our part by exercising proper oversight and pushing for full implementation of the objectives we set - mission by mission.

In this connection, I note that Women Protection Advisers were deployed last year to Somalia and Mali and are expected this year in Sudan, South Sudan, Cote d'Ivoire, and the Central African Republic. In Somalia, the UN has helped to train 12,000 police officers and the government has supported increased recruitment of women police. An improved effort has also been made to strengthen investigative and prosecutorial capabilities in the Democratic Republic of Congo, where sexual violence perpetrated by government and rebel forces has long been a source of chronic and massive injustice. We must strive, as well, to help the Secretariat achieve its goal of twenty percent female participation among UN police. But for this to happen, each of our countries must ourselves increase recruitment of women police into our domestic forces so that there is a far broader pool on which the UN can draw. We must also insist on enforcing the absolute prohibition on sexual abuse by UN peacekeepers. Again this requires home countries to hold perpetrators of sexual violence accountable once they are sent home.

In closing, let me voice the strong support of my government and the American people for a concerted strategy across the globe to address the problem of sexual violence both in and outside situations of combat. For far too long such abuses have been treated as part of the spoils of victory or the rewards of physical might. Let us be clear. Sexual abuse is among the worst of crimes, because it robs people of the precious and inalienable right to be secure in their bodies and because it is inflicted out of cruelty. In our effort to stop it, we have made gains in recent years, but we have a very long way to go. Thank you.

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(2) U.S. Actions

On February 25, 2014, the U.S. Department of State hosted a discussion on ending and preventing sexual violence in conflict situations. Secretary Kerry, U.S. Ambassador-at-Large for Global Women's Issues Catherine M. Russell, and United Kingdom Foreign Secretary William Hague delivered remarks to open the discussion. Secretary Kerry's remarks excerpted below include the announcement of a U.S. visa ban directed at perpetrators of sexual violence in conflict. Remarks at the discussion are available at *www.state.gov/secretary/remarks/2014/02/222556.htm*.

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…[T]here's really no way to adequately describe the depths of depravity and the extraordinary violence of rape as a tool of war, as violence against women as a tool of intimidation, coercion, submission, and power. And I think that those of us who have known about this for a long time are disturbed by the levels at which this is used as exactly that kind of tool in too many parts of the world.

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So I have seen this also, personally, in ways around the world in too many places of conflict. And today, we're making certain something additional; even though we've been aware of it, we haven't sent yet an embassy-wide message, which I am sending today, that no one, and I mean no one at the highest level of military or governance, who has presided over or engaged in or knew of or conducted these kinds of attacks, is ever going to receive a visa to travel into the United States of America from this day forward. We're not going to allow that. And every embassy will engage—every embassy and post will be alert to this and to report any of these kinds of incidences, but most importantly there has to be a price attached, and that's one of the things we need to do.

The way we will make a difference on this issue is, frankly, by heeding the example of people who've gone before us who broke the back of slavery and other oppressive acts that were being applied to the life of people in various times in history. William Wilberforce, historic figure in Great Britain, stood up against slavery and set an example for people elsewhere. And it was that example that helped us ultimately to break the back of Jim Crow in the United States when people learned that you needed to put yourselves on the line, and you needed to take risks as a matter of moral conscience in order to be able to make the difference.

That's really what we're going to have to summon here, is that kind of moral commitment to fighting back against and holding accountable those people who engage in these kinds of activities on a global basis. …

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b. Addressing gender-based violence

On March 20, 2014, the State Department issued a media note on the launch of the Gender-Based Violence Emergency Response and Protection Initiative. The media note, available at *www.state.gov/r/pa/prs/ps/2014/03/223727.htm*, is excerpted below.

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Under Secretary for Civilian Security, Democracy, and Human Rights Sarah Sewall launched the Bureau of Democracy, Human Rights, and Labor's (DRL) Gender-Based Violence Emergency Response and Protection Initiative (GBV Initiative) today at the Department of State. This first-of-its-kind, global program is dedicated to assisting survivors of extreme forms of gender-based violence around the world. To mark the launch of this program, the Department of State hosted experts from around the world to discuss the initiative, including activists from India, Mexico, Nepal, and South Africa.

The GBV Initiative's coordination network is funded by DRL, and is managed by a consortium of nongovernmental organizations led by Vital Voices Global Partnership. Consortium partners include Promundo-US, the International Organization for Migration, and the American Bar Association Rule of Law Initiative. …

This targeted program addresses the immediate security needs of survivors of severe gender-based violence, as well as individuals under credible threat of imminent attack due to

their gender or gender identity. The initiative includes provision of short-term emergency grants to cover medical and psychosocial care, emergency shelter, legal assistance, and other costs.

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On April 18, 2014, the State Department issued a fact sheet, available at *www.state.gov/r/pa/prs/ps/2014/04/224983.htm* on the new Gender-Based Violence Emergency Response and Protection Initiative. Excerpts follow from the fact sheet.

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Under the leadership of President Barack Obama, the United States has put gender equality and the advancement of women and girls at the forefront of U.S. foreign policy. Preventing and responding to gender-based violence (GBV) is a cornerstone of the Administration's commitment to advancing gender equality. In recognition of this policy, and in coordination with other GBV-related programs at the U.S. Department of State and USAID, the Bureau of Democracy, Human Rights, and Labor (DRL) has launched the GBV Emergency Response and Protection Initiative. This Initiative fills a critical gap by providing urgent assistance to threatened individuals with rapid, targeted, short term assistance.

Gender-based violence is a global pandemic that affects women, men and children. GBV should be understood as violence directed at a person based on gender, gender identity, or perceived adherence to socially defined norms of masculinity or femininity. The GBV Initiative can assist individuals facing harmful traditional practices such as early and forced marriage, "honor" killings, and female genital mutilation, as well as other forms of GBV, such as female infanticide; child sexual abuse; sex trafficking and forced labor; sexual coercion and abuse; neglect; domestic/intimate partner violence and elder abuse.

Initiative Objectives

• Short-term Assistance for Survivors

The GBV Initiative addresses the immediate security needs of survivors of severe gender-based violence, as well as individuals under credible threat of imminent attack due to their gender or gender identity. Individuals can receive assistance for up to 6 months or $5,000. Assistance is intended to be one-time support. Funds can be used to address short-term emergency needs, like payment of legal and medical bills, relocation, security, and dependent support.

• Targeted training and Advocacy

The Initiative supports integrated training for governments, judiciary and key civil society in implementing laws that address GBV. These trainings are funded by a partnership with the Avon Foundation.

The Initiative also supports targeted advocacy programs for civil society groups working to address cultural attitudes and norms around gender-based violence. These programs include engaging men and boys around GBV prevention.

• Building and Coordinating a Global Network

The Initiative will focus on and coordinate programs in 11 hub countries in the Middle East, Africa, South and Central Asia, and Latin America.

The Initiative's network is managed by a consortium of non-governmental and international organizations led by Vital Voices Global Partnership. Consortium members include Promundo-US, the International Organization for Migration, and the American Bar Association Rule of Law Initiative.

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At the 26th session of the HRC, the Council adopted a resolution on eliminating all forms of violence against women. U.N. Doc. A/HRC/RES/26/15. On June 26, 2014, Ambassador Harper delivered a general comment welcoming the resolution, excerpted below and available at *https://geneva.usmission.gov/2014/06/26/u-s-welcomes-resolution-on-eliminating-all-forms-of-violence-against-women/.*

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The United States welcomes the resolution entitled "Accelerating efforts to eliminate all forms of violence against women: Violence against women as a barrier to women's political and economic empowerment."

Seven out of ten women and girls suffer gender-based violence in their lifetimes, and for women and girls to take full advantage of opportunities in the political and economic sphere they must be able to live freely, without the threat of violence.

We applaud the focus of this resolution on that critical nexus.

The United States considers harmful traditional practices a form of violence against women and girls.

Those include child, early, and forced marriage, which the resolution mentions specifically, as well as "honor" killings, acid-related violence, and female genital mutilation/cutting.

The significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, but states have a duty, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

We are pleased that this resolution recognizes that members of minority groups may be at increased risk of violence.

In this regard we welcome its specific references to indigenous women and girls and women and girls with disabilities.

We underscore our continuing, deep concern about violence against lesbians and transgender women and girls, violence against women human rights defenders, and conflict-related sexual violence.

Violence seriously jeopardizes the physical and mental health of women and girls, including, in many instances, their sexual and reproductive health.

Respecting and promoting reproductive rights—including the right to make decisions concerning reproduction free of discrimination, coercion and violence, and access to

comprehensive sexual and reproductive health services—must be integral to our efforts to end violence against women and girls.

We are, therefore, pleased that this resolution recognizes the strong connection between sexual and reproductive health and reproductive rights and efforts to address and end violence against women, including rape.

Reproductive rights were originally defined in the International Conference on Population and Development's Program of Action adopted in 1994 and elaborated and reaffirmed in numerous intergovernmental documents since.

They provide the foundation for our global effort.

Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so.

The implementation of these instruments is contributing significantly to progress on preventing, mitigating, and ultimately eliminating violence against women and girls.

We believe this resolution should have contained specific references to sexual and reproductive health services, which among other things are crucial because the risk of pregnancy is also an important possible outcome of rape.

We are pleased to note that the Commission on the Status of Women and CPD have recognized the significance for survivors of access to emergency contraception, safe abortion, and post-exposure prophylaxis for HIV and other sexually transmitted infections.

We continue to believe this Council should do the same.

We are gratified that this resolution urges states to take myriad actions to further the goal of ending violence against women and girls.

We note that nothing in this resolution urges states to implement special measures where such actions would not be appropriate; the United States will address other recommendations in the resolution consistent with our federal system.

In conclusion, the United States is pleased to renew our commitment to supporting the Council as it redoubles its efforts to eliminate all forms of violence against women and girls.

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c. Commission on the Status of Women

Ambassador Power addressed the UN Commission on the Status of Women on March 10, 2014. Ambassador Power's statement is excerpted below and available at *http://usun.state.gov/briefing/statements/223217.htm*.

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Whether women and girls are prohibited from pursuing an education, serving their country, driving a car, or earning equal pay, the reminders are everywhere that our work is far from complete. So let us reaffirm, together, our global commitment to fight against discrimination and prejudice. In so doing, we must also recognize that our reaffirmations are insufficient. Words matter, but words alone do not shatter glass ceilings, actions do. And each of us—each of our

governments—must act to ensure that half of the citizens of these United Nations will one day enjoy an equal chance to serve, to work, to live, to grow, and to thrive.

As we know, the Millennium Development Goals have served as an important rallying point for equality, helping the world to nearly establish gender equality in primary education and to make progress on maternal health. Yet, we remain far short of equality for boys and girls in secondary education, and more than sixty percent of young adults who lack basic literacy skills are women; thus stifling both the hopes of these women, and endangering the next generation.

A woman in a poor country is still fifteen times more likely to die giving birth than her wealthier counterpart. That is just wrong: for any mother anywhere, a bank account should never spell the difference between death and life.

The United States believes that women's empowerment belongs at the heart of our global development agenda. This means having a standalone goal on the equality and empowerment of women and girls, and strong gender-specific targets in critical areas, including the elimination of sexual and gender-based violence, secondary education, equal access to productive economic assets like property and credit, and advances in political participation at all levels of government.

It is true that the number of women parliamentarians has almost doubled since 1995, but 10 percent compared to 20 percent only underscores the size of the equality gap remaining. We have miles to go. The goals we set are more than social aspirations; they reflect profound truths about women's capabilities, women's dignity, and our common humanity. Equality must be our standard, justice our watchword, and unity our strength. Thank you.

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U.S. Ambassador-at-Large For Global Women's Issues Catherine M. Russell also delivered remarks before the Commission on the Status of Women at its 58th session on March 12, 2014. Ambassador Russell's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/223393.htm*.

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Today I stand before you to reaffirm the commitment of the United States to the full and effective implementation of the Millennium Development Goals, and to the simple but foundational statement that was so groundbreaking almost 20 years ago.

"Human rights are women's rights, and women's rights are human rights."

These words are just as true today as they were two decades ago, when then First Lady Hillary Rodham Clinton spoke them for the first time at the Fourth World Conference on Women in Beijing.

And just as she did then, today each of us speaks for the women and girls around the world who continue to be denied the opportunity to gain an education, to live free from violence, to obtain employment and escape poverty, or to enjoy equal access to health care, simply because of their gender.

For almost 30 years, this Commission as well as the broader United Nations community has sought to promote gender equality. And thankfully, the progress and commitments we have made together are significant.

By setting blueprints such as the Program of Action adopted during the 1994 International Conference on Population and Development, and the landmark 1993 Declaration on the Elimination of Violence Against Women, we have made clear our shared commitment to women's autonomy and empowerment.

And since the adoption of the Millennium Development Goals 15 years ago, and through our specific focus on gender equality through MDG 3, we have helped lift millions of women out of extreme poverty, send millions of girls to primary school, and seen a slow rise in women's political participation.

But unfortunately, like many blueprints, too many boxes and too many aspirations remain unchecked and under-achieved.

Of the more than one billion people living in extreme poverty today, the majority are women. In fact, poverty continues to increase for women in rural areas. While we have seen unprecedented progress in achieving access to universal primary education, of the 123 million young people unable to read or write, a majority are girls. Secondary education continues to be only an aspiration for far too many girls and young women. The quality of education also remains a serious problem.

Worldwide, we continue to see women overrepresented in informal, unstable sectors of the labor market, and underrepresented at all levels of government.

One in three women worldwide will be beaten, coerced into sex, or otherwise abused in her lifetime, most often by an intimate partner. Some of the most vulnerable women, including lesbian, gay, bisexual, and especially transgender women, experience levels of violence many times greater.

Women and girls with disabilities are particularly vulnerable.

Addressing early and forced marriage is another profound challenge. There are more than 60 million child brides worldwide, and one in nine girls around the world marries before the age of 15, often facing severe health consequences as a result.

And as we all know, despite a specific "to-do" list we set for ourselves through MDG 5, the least progress has been made on reducing maternal mortality and providing universal access to sexual and reproductive health information, education, and services, including addressing the unmet need for family planning.

Fully meeting the ambitious goals we set for ourselves almost 15 years ago will require a careful review of what has worked and what has not. It will also require us to acknowledge that a tremendous amount of work remains to be done.

We know that countries where women can reach their full potential are more stable and more prosperous. And that is why the United States cannot imagine a Post-2015 development agenda that does not include the equality and empowerment of women and girls as one of its central goals. Furthermore, we believe gender-specific targets should be integrated into other relevant goals.

The United States has made important progress with respect to the MDGs, and we will continue to prioritize these efforts. As Secretary of State John Kerry has said, "gender equality is critical to our shared goals of prosperity, stability, and peace, and that is why investing in women and girls worldwide is critical to advancing U.S. foreign policy."

In 2011, the Administration launched our National Action Plan on Women, Peace and Security. Now in our second year of implementation, we have taken concrete actions to institutionalize and better coordinate our efforts to advance women's inclusion in peace negotiations, peacebuilding activities, conflict prevention, and decision-making institutions.

In 2012, the Obama Administration launched the first-ever U.S. Strategy to Prevent and Respond to Gender-Based Violence Globally. And this year, Secretary Kerry launched *Safe from the Start*, a joint initiative with USAID to strengthen the humanitarian system to prevent and respond to gender-based violence at the very onset of emergencies.

We continue to support programs to improve the quality of clinical care for sexual assault survivors in both refugee camps and communities, to improve data collection on gender-based violence, and to identify best practices on safe shelter to protect survivors.

Through our PEPFAR support, there are now more than 4 million women receiving anti-retroviral treatment. In the last four years, we've also provided post-rape care for more than 115,000 survivors to prevent HIV contraction.

The United States also continues to be a leader in providing international family planning assistance.

And of course, the United States fully supports the efforts of the UN to promote gender equality and end violence against women and girls—from the creation of UN Women in 2011, to the establishment of a UN Special Representative on Sexual Violence in Conflict, to demanding accountability when UN personnel engage in sexual exploitation and abuse, to empowering women as equal partners in conflict prevention and peacebuilding.

Two years ago, we were proud to launch the Equal Futures Partnership at the General Assembly—a multilateral platform to break down barriers to women's political and economic participation. Today, we are proud to stand with 24 member countries, the European Union, UN Women, the World Bank, and private sector partners in making a committed effort to identify those barriers so we can systematically break them down.

Through our programmatic efforts, we have made great strides in helping others achieve the goals set out 15 years ago. By investing in women's entrepreneurship through networks like the African Women's Entrepreneurship Program, we are providing skills, training, and tools necessary for women to start and grow their businesses.

Funding has increased women's leadership of small and medium-sized enterprises, and to higher education programs that cultivate women leaders in business, academia and research. New and innovative efforts have strengthened the skills and capacity of women members of legislatures, and supported the creation of a new female parliamentarian network.

However, each of us recognizes that we have much more to do. A blueprint and a checklist are not enough. We must implement our blueprint, and hold ourselves accountable. We must continue to prioritize women's and girls' empowerment as we look to the next 15 years.

We need action, not just by governments but by all parts of society – the NGO community, religious and faith-based leaders, grassroots organizations, research institutions, and the private sector. And so we are especially thankful for those representatives from civil society with whom we all work. We must also recognize that full gender equality will not be achieved without the support and participation of men and boys, who are critical partners in this effort.

The United States looks forward to forging a robust set of Agreed Conclusions that recognize and reaffirm the bold statements of almost 20 years ago. Women and girls are not just a line on our to-do list: they are our mothers, sisters, daughters, friends, and neighbors. They are each of us, and so today, and every day, we speak out and we speak up for each and every one of them.

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d. U.S. actions

On September 8, 2014, the State Department issued a fact sheet on "Promoting Gender Equality and Advancing the Status of Women and Girls," available at *www.state.gov/r/pa/pl/231391.htm*. The fact sheet is excerpted below.

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Globally, women and girls are disproportionately affected by poverty and discrimination. Women often end up in insecure, low-wage jobs, and have limited access to the educational resources and financial tools they need to succeed. Women's leadership and participation in politics, civil society, and the private sector is limited on local, national, and global levels. Adolescent girls in developing countries face particular challenges, including poorer educational outcomes; traditional harmful practices such as early and forced marriage; and higher vulnerability to disease and infections, such as HIV.

Promoting Peace and Ending Gender-based Violence

Women's perspectives and participation, which are vital to achieving and sustaining peace, are too often overlooked in conflict resolution, prevention, and relief and recovery efforts. Women's active participation in decision-making processes is critical to sustainable conflict resolution and in turn increases the effectiveness of prevention efforts. Throughout the world, we continue to see risks of gender-based violence increase when disasters or conflicts strike. This type of violence especially impacts women and girls and remains pervasive in both developed and developing countries, in times of both peace and conflict.

Providing Opportunity

There is ample evidence to show when governments and societies afford women and girls the opportunity to lead healthy, safe, and productive lives, greater economic growth and stronger societies emerge.

Diplomacy and Women's Equality

… [T]he United States has brought an unprecedented focus to bear on promoting gender equality and advancing the status of women and girls around the world.

The Department of State, through the Quadrennial Diplomacy and Development Review and the Policy Guidance on Promoting Gender Equality and Advancing the Status of Women and Girls, supports global progress towards gender equality through its diplomatic engagement, foreign assistance programming, and partnerships with civil societies and private sector actors across the globe.

Strengthening U.S. Efforts

Secretary Kerry has directed all U.S. embassies and Department bureaus to continue to prioritize these issues in all of their diplomatic, development, and operations activities, including focusing efforts to:

- **Promote women's economic and political participation** – by addressing discrimination against women in economic and political spheres, fostering entrepreneurship and leadership, and removing barriers to meaningful engagement and opportunity;
- **Support U.S. strategic initiatives related to gender-based violence and women, peace, and security** – by implementing the U.S. Strategy to Prevent and Respond to Gender-based Violence Globally (2012) and the U.S. National Action Plan on Women, Peace, and Security (2011);
- **Empower adolescent girls** – by focusing on the specific challenges faced by girls, investing in girls' education, and countering harmful traditional practices, such as early and forced marriage and female genital mutilation/cutting;
- **Prioritize gender equality in international fora** – by advocating for issues affecting women and girls, including a stand-alone goal on gender equality in the Post-2015 Development Agenda; and
- **Lead by example** – by continuing to promote, fund, and integrate gender equality into programs, policies, and planning in all areas of the State Department.

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e. Inter-American Commission on Human Rights.

On September 10, 2014, the United States submitted its response to a questionnaire from the Inter-American Commission on Human Rights ("IACHR") on access to information from a gender perspective. The IACHR plans to use the information gathered in response to the questionnaire to produce a report on the challenges women face in accessing State-managed information in the areas of violence and discrimination. The U.S. response and the questionnaire are both available at *www.state.gov/s/l/c8183.htm*.

Also on September 10, the United States submitted a response to a request for information pursuant to article 18 of the IACHR Statute regarding reports of forced sterilization of female inmates in U.S. prisons. The U.S. response to this request is also available at *www.state.gov/s/l/c8183.htm*. The response describes measures taken to investigate the sterilizations, pay reparations to victims, and prevent future sterilizations.

3. Sexual Orientation and Gender Identity

a. Human Rights Council

On September 26, 2014, at its 27th session, the HRC adopted its second resolution on human rights, sexual orientation and gender identity, by a vote of 25 in favor, 14 against, and seven abstentions. U.N. Doc. A/HRC/RES/27/32. See *Digest 2011* at 177-79 for discussion of resolution 17/19. Ambassador Harper delivered the U.S. explanation of vote, which is excerpted below and available at

https://geneva.usmission.gov/2014/09/26/human-rights-council-expresses-grave-concern-about-violence-against-lgbt-persons/.

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As a strong proponent of the rights of all persons and an advocate for anti-discrimination, the United States is pleased to be among the strong supporters of this resolution protecting LGBT persons.

We appreciate the leadership shown by the core group of Chile, Colombia, Uruguay and Brazil and the support of all Council members and observer delegations who cosponsored this resolution.

The Council's decision today to again reaffirm the Council's grave concern about acts of violence and discrimination against individuals because of their sexual orientation and gender orientation is an historic step in improving human rights protections for all.

President Obama said recently that the story of America's LGBT community is "the story of our fathers and sons, our mothers and daughters, and our friends and neighbors who continue the task of making our country a more perfect Union. It is a story about the struggle to realize the great American promise that all people can live with dignity and fairness under the law."

We are pleased to see that today the international community is visibly and publicly upholding the rights of LGBT individuals, and thereby we demonstrate ourselves as a global community respecting the rights of all.

We appreciate that today's vote is not an easy one for many states and that the issues we face today are the subject of controversy and also rapid change in many member states—including my own.

But just as some, at one point in history, claimed that cultural reasons justified slavery and discrimination and apartheid, we stand firmly for the idea that human rights are universal. Cultural or regional differences simply cannot justify discrimination. It cannot excuse violence in any way, in any place, or against any person.

We appreciate that the Council's decision will allow for a report by the Office of the High Commissioner for Human Rights. This report should help to guide us in the future as states continue to address difficult and challenging issues related to the rights of LGBT persons.

So while the vote today was difficult for many, I am confident that the issues will become easier and easier for the Council to address with over time. I am also confident that, as an international community and as a Council, we can find ways to work together to combat all types of violence and discrimination. I look forward to the day when a future resolution on this topic that will be able to pass this Council by consensus.

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Secretary Kerry issued a press statement on resolution 27/32, excerpted below and available at www.state.gov/secretary/remarks/2014/09/232225.htm. Ambassador Power also issued a statement on September 26 on the HRC resolution on sexual orientation and gender identity, which is available at http://usun.state.gov/briefing/statements/232223.htm.

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Today the community of nations made an historic statement in support of LGBT rights, which are human rights.

The United Nations Human Rights Council adopted the second-ever UN resolution on the human rights of lesbian, gay, bisexual and transgender (LGBT) persons. Along with the Ministerial event at the UN General Assembly yesterday, this marks yet another important chapter in UN efforts to stand united against the human rights abuses that LGBT individuals face around the world.

The United States was pleased to work with countries from many regions of the world on this resolution, especially the lead sponsors Brazil, Chile, Colombia, and Uruguay. This resolution will commission a major UN report on the challenges facing LGBT persons around the globe and will help move LGBT human rights issues to the forefront of international attention.

The United States will continue to promote human rights around the world for all people. Who you love, and who you are, must not be an excuse or cover for discrimination or abuse, period.

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b. United States

The United States hosted the third Annual Conference to Advance the Human Rights of and Promote Inclusive Development for Lesbian, Gay, Bisexual, Transgender and Intersex Persons ("LGBTI") held in Washington from November 12–14, 2014. On November 21, 2014, the State Department issued a media note summarizing the key outcomes from the conference, available at www.state.gov/r/pa/prs/ps/2014/11/234331.htm. Excerpts follow from the November 21 media note.

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The conference was the largest such gathering to date, bringing together senior leaders from government, civil society and the private sector to discuss and strategize on how to most effectively protect the human rights of LGBTI persons and promote their inclusion in development programs. Thirty governments were represented from all regions as well as representatives from nine multilateral agencies, including the United Nations and World Bank. Key outcomes of the conference include:

- *Joint Communique*: Over 25 governments and multilateral bodies formally affirmed their commitment to increase cooperation to advance the human rights of and promote inclusive development of LGBTI persons through agreeing to

support a joint communique issued yesterday. The communique sets out important principles to guide our collective engagement and notes the signatories' plan to continue to hold regular discussions on an annual basis ….

- *Chile Joins the Global Equality Fund*: Chile became the first Latin American government to support the Global Equality Fund. Chile joins a group of nine like-minded governments, two corporations, three private foundations and Out Leadership who are all dedicated to committing resources to advance the human rights of LGBTI persons through providing support to civil society organizations.
- *PEPFAR Launches New Partnership with Global Equality Fund*: The President's Emergency Plan for AIDS Relief (PEPFAR) announced plans to provide funding for the Global Equality Fund to document how stigma and discrimination, including discriminatory laws and policies, impede efforts to address HIV/AIDs, as well as undermine human rights.
- *New Initiatives to Support the Human Rights of Transgender and Intersex Persons*: Private donors announced efforts to strengthen assistance to transgender and intersex persons through activist-led funding initiatives.
- *Increasing Research and Data on LGBTI-related Assistance*: Activists, researchers, and a number of governments expressed their intention to further explore how to most effectively share information on efforts, both diplomatic and financial, to further advance the human rights of LGBTI persons.

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4. Age

At the 27th session of the HRC, a clustered interactive dialogue convened with the independent expert on older persons. The United States statement at the clustered dialogue regarding the independent expert on older persons was delivered on September 8, 2014 by Valerie Ullrich, political officer for the U.S. Mission to the UN in Geneva, and is excerpted below. The full text of Ms. Ullrich's statement is available at *https://geneva.usmission.gov/2014/09/09/hrc-holds-dialogue-with-independent-expert-on-older-persons/*.

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The report mentions the Independent Expert's intent to complement rather than duplicate the work of the Open-Ended Working Group on Ageing; to assess how member states implement the Madrid International Plan of Action on Ageing and laws relating to older persons; and to identify best practices. The United States strongly supports all of those approaches.

We agree with the report's observation that although there is no international instrument devoted solely to older persons, most human rights treaties contain implicit obligations toward

them. This is consistent with the U.S. view that the protections found in international human rights instruments apply to persons of all ages, including older persons.

While we do not regard many of the important issue areas identified by the Independent Expert as "rights," the United States nonetheless believes that many of the ideas put forward by the Independent Expert represent an aspirational framework that can better inform and guide our policies to protect older persons.

For example, the United States has emphasized developing practical measures to address the rights of older persons and to improve their quality of life. President Obama signed into law the Elder Justice Act in 2010, dedicated to preventing, detecting, and responding to elder abuse, neglect, and exploitation. We have established the Elder Justice Coordinating Council, consisting of the heads of 12 federal departments and other government entities, to coordinate activities related to these issues.

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C. CHILDREN

1. Rights of the Child

a. Human Rights Council

The United States delegation to the 25th session of the Human Rights Council delivered a statement on March 27, 2014 on two resolutions on children adopted at that session. U.N. Doc. A/HRC/RES/25/6 and U.N. Doc. A/HRC/RES/25/10. The statement, as delivered by Deputy Political Counselor for the U.S. Mission to the UN in Geneva Eric Richardson, is excerpted below and available at *https://geneva.usmission.gov/2014/03/28/u-s-deeply-committed-to-protecting-the-rights-of-children-and-to-preventing-violence-against-children/*.

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…The United States is pleased to have joined consensus on the resolution on the "Rights of the Child: Access to Justice for children" and to have co-sponsored the resolution on "Ending violence against children: a global call to make the invisible visible." The United States appreciates the collaborative efforts of other member states during the negotiations of both texts. Our domestic efforts to strengthen existing protections for children, including under our National Action Plan for Children in Adversity, and ensure that the rights of the child are realized remain a priority for the United States.

We are glad to see that the resolution on the rights of the child calls upon states to take steps to remove barriers to children's access to justice by ensuring their national legal systems provide effective remedies to children for violations and abuses of their rights. As this resolution also emphasizes, international cooperation is of relevant importance to supporting the efforts of each nation in ensuring child-sensitive justice. We are pleased to see specific language on vulnerable persons and persons in vulnerable situations and emphasize that LGBT persons fall

within this category. The United States strongly supports any language protecting the rights of vulnerable groups, including LGBT persons, persons with disabilities, women, and indigenous persons, among others.

We thank the sponsors of this resolution for incorporating some of our suggestions into the rights of the child resolution. We were unable to co-sponsor that resolution due to concerns that the resolution calls upon States to comply with various principles that are not obligations undertaken by the United States. For example, the resolution calls upon States to ensure that life imprisonment is not imposed on individuals under the age of 18 which is not an obligation that customary international law imposes on States or that the United States has undertaken.

Our action on these resolutions today was taken with the express understanding that neither implies that states must become parties to instruments to which they are not a party or implement obligations under human rights instruments to which they are not a party. States will consider the measures recommended within this resolution in accordance with relevant international law and their own domestic laws, within their constitutional and legal frameworks. Furthermore, to the extent that it is implied these two resolution[s] or any others this Council adopts at this session, the United States does not recognize the creation of any rights or principles that we have not previously recognized, the expansion of the content or coverage of existing rights or principles, or any other change in the current state of treaty or customary international law. Further we understand the reaffirmation in the rights of the child resolution of prior documents to apply to those who affirmed them initially.

The United States remains deeply committed to protecting the rights of children and to preventing violence against children. We look forward to continuing to work with other nations and international partners to ensure justice systems are child-sensitive and that progress is demonstrated more readily in the countries where serious challenges exist to accessing justice.

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On September 26, 2014, at the 27th session of the HRC, the United States provided an explanation of position on resolutions on human rights and children: one entitled "preventable mortality and morbidity of children under 5 years of age as a human rights concern," and another, "the right of the child to engage in play and recreational activities." U.N. Doc. A/HRC/RES/27/14 and U.N. Doc. A/HRC/RES/27/15, respectively. Eric Richardson delivered the statement of the U.S. delegation, explaining why the United States would join consensus on the resolutions. Mr. Richardson's statement is excerpted below and available at *https://geneva.usmission.gov/2014/09/26/explanation-of-position-resolutions-on-rights-of-the-child/*.

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… The United States is pleased to join consensus on the resolutions addressing morbidity and mortality for children under five and the importance of play and recreation for children.

Preventing childhood mortality and morbidity is a priority for the United States government. In 2013, the United States—one of the largest government donors—contributed more than $130 million to UNICEF.

These funds are helping support the health of children, including through vaccinations, breastfeeding campaigns, and nutrient supplementation. We look forward to continuing our work with other States to ensure that all children around the globe live healthy lives. We are glad that this resolution calls upon States to increase efforts to address child mortality, including by focusing on root causes.

However, we wish to reiterate the importance of using United Nations resources cost-effectively, and ask the OHCHR to minimize the cost of the report this resolution requests. We welcome the development of the OHCHR technical guidance as a useful policy orientation, although it is overly prescriptive, particularly in its description of a human-rights based approach.

We understand that a human rights-based approach is anchored in a system of rights and corresponding obligations established by international human rights law.

With regard to the right to play: the United States believes that play and recreation are instrumental in helping a child learn about the world.

We are pleased that the resolution suggests a range of activities to promote play and recreation for children. It also addresses the need to encourage these important activities in humanitarian situations.

We thank the Government of Romania for accommodating many of our concerns. We also note that our support is consistent with our limited authority at the federal level with respect to education, as education is primarily a responsibility of our state and local governments.

We are glad the resolution signals the importance of including children in digital activities and we fully promote children's safe use of digital technology, while respecting freedom of expression, including for children.

We support both of these resolutions with the understanding that they do not imply that States must become parties to instruments to which they are not a party, or implement obligations under instruments to which they are not a party.

The United States does not recognize the creation of any rights or principles we have not previously recognized or the expansion of the content or coverage of existing rights or principles. We also understand the resolution's reaffirmation of prior documents to apply to those who affirmed them initially.

We are glad that the Human Rights Council is addressing these important matters on the well-being of children.

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b. UN General Assembly

On October 15, 2014, the United States made a statement at the UN General Assembly Third Committee meeting on the rights of children. Kelly L. Razzouk, United States Senior Advisor, delivered remarks on behalf of the United States, excerpted below and available at *http://usun.state.gov/briefing/statements/233085.htm*.

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We welcome the opportunity to participate in today's general debate on children and to commemorate the twenty-fifth anniversary of the Convention of the Rights of the Child. The United States is party to two of its Optional Protocols. We are dedicated to improving the lives and promoting the rights of children both within our borders and throughout the world. We support UNICEF, as one of its largest donors, and applaud the organization for the lifesaving work it is doing around the world. Children's rights are an important piece of the Post-2015 discussions, and the outcome document must adequately reflect them.

We enthusiastically congratulate Malala Yousafzai of Pakistan and Kailash Satyarthi of India for receiving the Nobel peace prize earlier this month. Their fearless and tireless work on girls' education, child labor, and human trafficking is making lasting changes to the world, and is an inspiration to us all.

The United States government is expanding and improving services for children. For example, we are providing new funding for our Early Head Start and Race to the Top programs to expand access to high-quality preschool education to children from low and moderate-income families. Our Affordable Care Act gives parents greater control over their children's health care by providing quality, affordable health care for all children; lowers costs to cover children; and provides greater choices to meet the needs of children.

We should all celebrate our successes in improving the lives of children over the past twenty-five years. As the Secretary-General's report indicates, the global rate of under-five mortality has been almost halved, from 90 deaths per 1,000 live births in 1990 to 48 per 1,000 in 2012. New HIV infections in children under 15 have declined by 35 percent globally between 2009 and 2012.

But challenges remain, and there is much work that still needs to be done. In 2014, the lives of children around the world continue to be threatened. We have been horrified by images of ISIL terrorists rounding up young Yezidi and Christian girls from Iraq and auctioning them off to the highest bidder as sex slaves. Ebola has orphaned thousands of children in West Africa. We were appalled when hundreds of schoolgirls in Nigeria were abducted and terrorized because they were seeking an education. And the children of Syria continue to suffer physical and psychological pain under a brutal regime. According to UNICEF, over 5 million are in need inside Syria and 1.5 million are living in Syria's neighboring countries as refugees.

Improving the lives of girls must remain a top priority for all of us. Being born a girl should not resign you to a life without an education or future. Being born a girl should not mean that you are forced into marriage at the age of 12. We must do more to ensure that our girls are empowered to reach their full potential. As a group of UN experts recently said, "When adolescent girls are empowered, it benefits all. Empowered girls grow into empowered women who can serve as active and equal citizens and change agents, who make valuable contributions to the growth of their communities and nations."

We have a lot to learn from our children and we must all do more to ensure, together, that we leave them the world they deserve. As President Obama said in his speech last month at the UN General Assembly, "No children are born hating, and no children—anywhere—should be educated to hate other people. Around the world, young people are moving forward, hungry for a better world. Around the world, in small places, they're overcoming hatred and bigotry and sectarianism. And they're learning to respect each other, despite differences."

As Eleanor Roosevelt—an author of the Universal Declaration of Human Rights—said, "It is today that we must create the world of the future."

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On December 18, 2014, the United States joined consensus in adopting the annual UN General Assembly resolution on the rights of the child. U.N. Doc. A/RES/69/157. Terri Robl, U.S. Deputy Representative to the UN Economic and Social Council, delivered the U.S. explanation of its position on the resolution in the UN Third Committee when the resolution was discussed there in November. The U.S. explanation of position appears below, and is available at *http://usun.state.gov/briefing/statements/234386.htm*.

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The United States is very pleased to join consensus on the Rights of the Child resolution today. We welcomed working with the sponsors and other partners throughout the extensive negotiation process. Our domestic efforts to strengthen existing protections for children and ensure that the rights of the child are protected remain a priority for the United States.

We join consensus on this resolution today, as well as the resolutions on Migrant Children and Adolescents and Protecting Children from Bullying, with the express understanding that it does not imply that States must become parties to instruments to which they are not a party or implement obligations under human rights instruments to which they are not a party. Further we understand the resolution's reaffirmation of prior documents to apply to those who affirmed them initially. The United States also underscores its understanding that this resolution does not change its or other States' obligations under current treaty or customary international law. Nor does this resolution affect States' domestic laws implementing such treaty or customary international law.

We also note that U.S. support for this resolution is consistent with our limited authority at the federal level with respect to education, as education is primarily a responsibility of our state and local governments. We reaffirm that each country has primary responsibility for its own economic and social development and note that language on the mobilization of all necessary resources should not be interpreted as constituting new or expanded commitments of official development resources.

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2. Children and Armed Conflict

a. United Nations

(1) Security Council

On March 7, 2014, Ambassador Power delivered remarks at a UN Security Council debate on children in armed conflict. Ambassador Power's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/223124.htm*.

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My colleagues, few issues are of graver humanitarian concern than the impact of armed conflict on civilians. The horror is especially acute when the victims—or the perpetrators—are boys and girls. In recent years, the tragic connection between children and war has assumed a prominent place on the global agenda. In 2008, the United States approved the Child Soldiers Protection Act, which curtails U.S. military assistance, licenses, and sales to governments that recruit or use child soldiers, and which has given our diplomats leverage to engage constructively with governments on additional steps they need to take.

In 2012, in one example, the United States withheld security assistance the DRC needed to develop a second light infantry battalion until the government there signed an action plan with the UN to address use and recruitment of child soldiers. Within just a couple weeks, the government signed the action plan and is now working with the UN in a sincere effort to address this challenge. In 2012, the International Criminal Court sent a welcome message when it found Thomas Lubanga guilty of forcibly conscripting child soldiers in the Democratic Republic of Congo.

Meanwhile, the UN has launched a systematic campaign to help governments and armed groups develop action plans to end the use of child soldiers—eighteen of which have now been signed. Chad and Yemen are among the countries that have recently made a commitment to further progress. To that end, I commend Ambassador Lucas for leading a Security Council Working Group trip to Burma to review the country's effort to fulfill its action plan. Rescuing children from armed conflict is not always a simple process, especially when they have experienced the trauma of direct involvement in violence. Reintegration requires careful planning, money, and the recognition that some scars—whether of body or mind—will heal slowly, if at all.

And yet, for all the helpful activity, too many children are still being exploited. And some leaders have not thrown their weight behind eliminating this scourge. No state or armed group has yet been delisted by the Secretary General, and 28 of the 52 listed parties are persistent perpetrators who have been listed for more than five years. Sudan is the one listed government that still has not signed an action plan. But even when plans are developed, they have value only if implemented. Donors can help by sharing resources, and the UN must provide assistance and monitoring. The United States encourages the deployment of child protection advisers in all relevant UN missions. Further, we urge the UN to develop standardized training on child protection responsibilities so that UN peacekeepers who encounter violations respond effectively. These training standards should be shared with member states, the African Union,

and other regional organizations involved in peacekeeping activities. And all of us must press for the creation of birth registration systems in order to verify that a child is a child. And as this resolution does, we must each urge greater protections for schools, which are too often militarized.

Today, Syria is at ground zero of the most appalling humanitarian catastrophe of our era, and children—Syria's future—are among the principal victims. Since the civil war began, more than ten thousand boys and girls have been killed; more than 1.2 million have become refugees; and more than 3 million are unable to attend school. The United States is part of the UN-led "No Lost Generation" initiative that is striving to shield children from the fighting, re-unite broken families, and deliver opportunities for education. One four year old refugee in Turkey told UNICEF that he wants to become a surgeon so that he will be able to save his brother, who is still in Syria, should he get hurt.

According to the Secretary General's January 27th report, the government and extremist groups have inflicted direct and unspeakable violence against children, including kidnappings, torture, maiming, and murder. Pro-government forces have detained children as young as 11 for alleged association with the opposition and subjected them to beatings and other brutal mistreatment in order to extract confessions. Both sides have prevented injured children from receiving medical treatment and both—but especially the government—have launched indiscriminate attacks in which children and other civilians have been killed. Babies—some killed and some barely breathing—have been pulled from the rubble caused by barrel bombs.

On February 22, the Council demanded a halt to such attacks, and to the sieges that have forced many Syrians to choose between the certainty of starvation and the false promise of safety through surrender. The Assad regime may be sure that our scrutiny of its actions, as well as any of those who would recruit or target children, will not let up until our demands are met and the savagery is stopped.

In recent months, the Central African Republic has also been the scene of horrific violence. The cycle of vengeance between the Séléka and anti-balaka militias has been singularly repulsive in that nearly all of the victims on both sides have been unarmed. Children have been attacked, beaten, maimed, raped, and killed, some by beheading. An estimated 6,000 young people have been recruited and trained to kill by armed groups and, in some cases, girls have been forced into marriage.

In addition, the outlaw Lord's Resistance Army—the LRA—remains a threat in the Central African Republic and parts of South Sudan and the Democratic Republic of Congo. It is heartening that, in December, nineteen soldiers—including six young boys—defected from the LRA and that they cited radio broadcasting produced by Invisible Children as giving them the courage to take that brave step. It is encouraging, as well, that the LRA has been forced to break up into small groups and that, in 2013, the number of their attacks went down. The level of deaths and abductions attributable to those attacks, however, remains far too high. The world must not rest until Joseph Kony and his clique have been held accountable and the LRA has become just a horrible memory.

Finally, in South Sudan, children are once again being made subject to all the ravages of war because the country's leaders have failed to settle their differences peacefully. Scared youngsters are wandering among the thousands of displaced persons searching for their "mommies and daddies." Our hearts go out to Mangkok Bol, a former "lost boy," now living in Boston, who has returned to his home village in South Sudan to try to find his nieces and nephews who've been abducted by militants from a competing ethnic group.

In 2001, when the 14-year-old Alhadji Babah Sawaneh testified before this Council, he said, quote "removing the gun from me was a vital step." In that context, I commend the special representative for her "Children, not Soldiers" campaign. Boys and girls belong in playgrounds, not battle grounds. Around their young shoulders, they should have school backpacks, not ammunition belts. Their hearts should be filled with optimism and hope, not terror at what the next day may bring.

To make matters right for all the world's children is a daunting mission, but none could be more worthy of our resources, our dedication, or our time. Thank you, Mr. President.

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Ambassador Power again addressed the subject of children and armed conflict on September 8, 2014. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/231361.htm*.

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We've heard a lot of statistics today measuring the massive scale of this problem: 3 million kids out of school in Syria; 9,000 children recruited to fight in South Sudan. And many of my colleagues have rightly spoken to the enduring, big-picture problems we have to address, like sexual violence and attacks on schools. Amidst so many numbers and issues, it's easy to forget that we're talking about a lot of individual children—boys and girls and infants—who suffer these deplorable injustices.

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First, we're seeing the continuing rise of extremist groups that are openly hostile to children's rights, and particularly the rights of girls. Girls captured by groups like Boko Haram and ISIL are being sold into markets, given to fighters as so-called "brides," or kept as sex slaves.

Second, as others have noted, we have a repeat offender problem. 31 of the 59 armed groups listed in the report have been named … the last five years. 11 of those "persistent perpetrators" have been named in every single report issued by the Secretary General since the office began issuing reports in 2002.

We have to do better in protecting kids.

One key step is condemning—in a single, unified voice—these abuses. The resolution this Council adopted in March condemning military use of schools is one example. The only battles fought in schools should be battles over ideas.

We also need to try to work with all groups—state and non-state—to set concrete, time-bound action plans to root out these practices. This can be especially challenging with non-state groups, but in 2013, nine non-state groups issued public statements or command orders prohibiting the use of child soldiers. Last month, the Free Syrian Army sent a letter to this Council announcing it had banned the use of child soldiers, and pledging to punish child recruiters.

As the "persistent perpetrator" problem makes clear, global campaigns, action plans, and trainings won't do it alone. As Sandra told us today so movingly, perpetrators have to be held accountable. Groups that fail to change their behavior must be hit where it hurts.

The UN can apply this pressure, of course. So can individual countries. In 2008, the United States passed the Child Soldier Prevention Act, which limits U.S. military assistance to governments that recruit or use child soldiers.

Chad provides an example of how multilateral pressure can bring about real change. Last year, a chorus of actors pressed Chad to address its child soldier problem in the run up to re-hatting its peacekeepers for the UN mission in Mali. And Chad responded – setting up child protection units in its military; conducting age verification reviews of its troops with the UN; and signing a presidential decree making 18 the minimum recruitment age; among other steps. As a result, Chad was taken off the list of abusive parties in the Secretary General's annual report. Now, this doesn't mean that our work is finished, but real progress has been made. Governments can change, and when they do, so do the lives of kids.

We were all so moved today by Sandra's story – a child, as she described it, "born into war." A girl driven from her school and her home, who witnessed her relatives gunned down, in cold blood, in a refuge that they thought was safe.

But the most defining part of Sandra's story is not the trembling, ten-year-old girl – who said that what she feared was her last prayer at the barrel of a gun. The defining feature is the young woman who, with tremendous strength and determination, addressed the United Nations today, a young woman who spoke not of revenge, but of justice. A young woman who's already done so much to assist children recovering from experiences like hers, and dedicated herself to changing the world so fewer children endure such horrors.

To see Sandra today is to see the potential of all the children out there whose destinies hang in the balance in today's conflicts. There are so many of them. Sandras held captive in Nigeria; Sandras suffering through humanitarian blockades in Syria; Sandras fleeing massacres in the Central African Republic, children who, like Sandra, have a world to change. We must do more to ensure that they can.

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(2) General Assembly

On October 15, 2014, the United States participated at the 69th UN General Assembly in an interactive dialogue with Special Representative of the Secretary-General for Children and Armed Conflict Leila Zerrougui. Carol Hamilton, Senior Advisor for the U.S. delegation, delivered remarks for the United States, excerpted below and available at *http://usun.state.gov/briefing/statements/233772.htm*.

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We enthusiastically congratulate Malala Yousafzai of Pakistan and Kailash Satyarthi of India for receiving the Nobel Peace Prize earlier this month. Ms. Yousafzai and Mr. Satyarthi's fearless work on girls' education, child labor, and human trafficking is making lasting changes to the world, and is an inspiration to us all.

We are concerned when any innocent victim is affected by conflict, and our hearts break when those victims are children. The abuses that children endure in conflict settings are horrifying: sexual violence, child soldiering, ideological indoctrination, unlawful attacks on schools and hospitals, indiscriminate killings, indiscriminate maiming. Those responsible for such violations and abuses committed against children, including non-state actors, must be held accountable.

We support the Special Rapporteur's work, and want to highlight some important themes in her report: engagement with non-state actors, ending the unlawful recruitment and use of children by government forces, and mainstreaming child protection concerns in mediation and peace processes.

As noted in the Special Representative's report, there is a significant social stigma against children who have experienced sexual violence in conflict settings. Community acceptance provides basic dignity to victimized children and represents a crucial step in their rehabilitation process. What best practices can the Special Representative share about communities who accept children who have been sexually abused in conflict, and accept babies born of rape? To what extent can lessons of community reintegration in non-conflict settings translate to conflict settings?

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b. Child Soldiers Prevention Act

Consistent with the Child Soldiers Prevention Act of 2008 ("CSPA"), Title IV of Public Law 110-457, the State Department's 2014 Trafficking in Persons report lists the foreign governments that have violated the standards under the CSPA, *i.e.* governments of countries that have been "clearly identified" during the previous year as "having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers," as defined in the CSPA. Those so identified in the 2014 report are the governments of Burma, Central African Republic, Democratic Republic of the Congo, Rwanda, Somalia, South Sudan, Sudan, Syria, and Yemen. The full text of the TIP report is available at *www.state.gov/j/tip/rls/tiprpt/2014/index.htm*. For additional discussion of the TIP report and related issues, see Chapter 3.B.3.

Absent further action by the President, the foreign governments designated in accordance with the CSPA are subject to restrictions applicable to certain security assistance and licenses for direct commercial sales of military equipment. In a memorandum for the Secretary of State dated September 30, 2014, President Obama determined, "that it is in the national interest of the United States to waive the application of the prohibition in section 404(a) of the CSPA with respect to Rwanda, Somalia, and Yemen," and that, with respect to the Central African Republic, the Democratic Republic of the Congo, and South Sudan, it is in the national interest that the prohibition should be waived in part. Daily Comp. Pres. Docs., 2014 DCPD No. 00732, p. 1.

D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. General

On March 27, 2014 at the 25th session of the HRC, Regina Waugh delivered the explanation of position of the United States on the resolution on "the realization in all countries of economic, social and cultural rights." U.N. Doc. A/HRC/RES/25/11. Ms. Waugh's statement is excerpted below and available at *https://geneva.usmission.gov/2014/03/27/eop-on-resolution-question-of-the-realization-in-all-countries-of-economic-social-and-cultural-rights/*.

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The United States is pleased to join consensus on this resolution concerning the realization of ESC rights. We engaged in the negotiations that developed this resolution and join consensus today as part of our efforts to work constructively with like-minded delegations on this important area.

As a matter of public policy, the United States continues to take steps to provide for the economic, social and cultural needs of its people.

While we share the broad aims of this resolution, the United States is concerned about a few key points in it. As the International Covenant on Economic, Social, and Cultural Rights provides, each State Party undertakes to take the steps set out in Article 2.1, "with a view to achieving progressively the full realization of the rights." We agree that States' Parties efforts to that end are important. Even so, we interpret this resolution's references to the obligations of States as applicable only to the extent they have assumed such obligations, and with respect to States Parties to the Covenant, in light of its Article 2(1). The United States is not a party to that Covenant, and the rights contained therein are not justiciable as such in U.S. courts.

The principle of non-discrimination that underpins the very concept of human rights is critical, and one the United States strives continually to fulfill. We read the references to non-discrimination in this resolution consistent with Article 2.2 of the International Covenant on Economic, Social, and Cultural Rights, as well as Article 2.1 of the International Covenant on Civil and Political Rights.

On a separate issue, the United States regrets the introduction of language on the "right to development" in this resolution. The concerns of the United States about the existence of a "right to development" are long-standing and well known, and the term does not have an agreed international understanding. Work is needed to make it consistent with human rights, which the international community recognizes as universal rights that individuals hold and enjoy—and which every individual may demand from his or her own government.

The United States takes this opportunity to reinforce the need for all States to promote, protect, and respect human rights when carrying out their development goals and policies. We welcome the contribution of the Council and other relevant UN bodies to the process of elaborating the post-2015 development agenda. However we stress the Council itself is not the agreed venue for international community to reach consensus on the agenda itself. Nothing in this resolution should be construed as pre-determining the post-2015 development agenda.

Finally, we interpret this resolution's reaffirmation of previous documents, resolutions, and related human rights mechanisms as applicable to the extent states affirmed them in the first place. In joining consensus on this resolution the United States does not recognize any change in the current state of conventional or customary international law.

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2. Food

On March 27, 2014, the United States joined consensus on a resolution adopted at the 25th session of the HRC on the right to food. U.N. Doc. A/HRC/RES/25/14. The U.S. explanation of position on the right to food resolution, delivered by Jonathan Mitchell, is excerpted below and available at *https://geneva.usmission.gov/2014/03/27/eop-on-resolution-right-to-food/*.

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By robbing people of a healthy and productive life and stunting the development of the next generation, hunger and malnutrition has devastating consequences for individuals, families, communities, and nations. The United States believes that maintaining a focus on global food and nutrition security is essential to realize our vision of a world free from hunger and malnutrition and pursues domestic and international policies that reflect that view. In joining consensus on this resolution today, the United States reiterates our commitment to pursuing a variety of approaches to reduce hunger and address poverty sustainably.

Despite our broad support for policy initiatives to end hunger and malnutrition, we have several concerns about this resolution. It contains numerous references to "the world food crisis," yet no such global crisis exists. Factors such as long-term conflicts, lack of strong governing institutions, and systems that deter investment and innovation contribute significantly to the recurring state of food insecurity in some parts of the world. We regret that this resolution does not even mention those issues.

Furthermore, we reiterate that states are responsible for implementing their human rights obligations. This is true of all obligations that a state has assumed, regardless of external factors, including, for example, the availability of technical and other assistance. The United States also does not concur with any reading of this resolution or related documents that would suggest that states have particular extraterritorial obligations arising from a right to food.

We would also like to take the opportunity to note that the text contains many references to obligations on the part of donor nations and investors. We believe that a well-balanced text would also include references to obligations of nations receiving assistance—specifically regarding transparency, accountability, and good governance, as well as the obligation to create an environment conducive to investment in agriculture. We also underscore our view that the statements on trade and trade negotiations in this resolution are inappropriate, as they are both beyond the subject-matter and the expertise of this Council. We also wish to clarify that this resolution today will in no way undermine or modify the commitments of the United States or

any other government to existing trade agreements or the mandates of ongoing trade negotiations.

The United States supports the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights. In joining consensus on this resolution, the United States does not recognize any change in the current state of conventional or customary international law regarding rights related to food. The United States is not a party to the International Covenant on Economic, Social and Cultural Rights. Accordingly, we interpret this resolution's references to the right to food, with respect to States Parties to that Covenant, in light of its Article 2(1). We also construe this resolution's references to member states' obligations regarding the right to food as applicable to the extent they have assumed such obligations. Domestically, the United States pursues policies that promote access to food, and it is our objective to achieve a world where everyone has adequate access to food, but we do not treat the right to food as an enforceable obligation.

Finally, while this resolution reaffirms previous documents, resolutions, and related human rights mechanisms, that language applies only to the extent countries affirmed them in the first place.

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The Second International Conference on Nutrition, hosted by the Food and Agriculture Organization of the United Nations ("FAO") and the World Health Organization ("WHO"), was held at the Headquarters of the FAO in Rome, Italy, in November 2014. The Conference resulted in the Rome Declaration on Nutrition with its accompanying Framework for Action. The United States provided the following explanation of its position on the Rome Declaration and the Framework for Action, which forms part of the official record of the Conference, available at *www.fao.org/3/a-at764e.pdf*.

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The United States views the Political Declaration and the voluntary Framework for Action as important steps in our collective efforts to advance global food security.

States are responsible for implementing their international obligations, including human rights obligations. This is true of all obligations a state has assumed, regardless of external factors. The United States does not concur with any reading of the Declaration or Framework that suggests states have particular extraterritorial obligations arising from a right to food; and in adopting these documents today in no way changes appropriate interpretation of any other international instrument or undermines or modifies commitments of the United States, or any other government, to trade and investment agreements or the mandates of ongoing trade negotiations.

The United States supports the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights. In joining consensus on the Political Declaration and Framework for Action, the United States does not recognize any change in the current state of conventional or customary international law or

obligations, including regarding rights related to food, or to the interpretation of trade or investment obligations, including those related to intellectual property, public health, and sanitary or phytosanitary measures. The United States also reiterates its view that individuals, and not governments, should make determinations about what foods comport with each individual's culture and traditions, and the United States does not view anything in the Political Declaration or Framework for Action as suggesting otherwise. The United States does not accept that anything in either the Political Declaration or Framework for Action can or should be taken to offer any guidance on the interpretation of any international instrument.

The United States is not a party to the International Covenant on Economic, Social and Cultural Rights. Accordingly, we interpret this resolution's references to the right to food, with respect to States Parties to that Covenant, in light of its Article 2(1). We also construe these documents' references to member states' obligations regarding the right to food as applicable to the extent they have assumed such domestic obligations. Domestically, the United States pursues policies that promote access to food, and it is our objective to achieve a world where everyone has adequate access to food, but we do not treat the right to food as an enforceable obligation.

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3. Water and Sanitation

On September 25, 2014, the U.S. delegation provided an explanation of its position, joining consensus on the resolution at the 27th session of the HRC on "the human right to safe drinking water and sanitation." U.N. Doc. A/HRC/RES/27/7. The U.S. explanation of position, delivered by Ambassador Harper, appears below and is available at *https://geneva.usmission.gov/2014/09/25/explanation-of-position-the-human-right-to-safe-drinking-water-and-sanitation/*.

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The United States recognizes the importance and challenges of meeting basic needs for water and sanitation to support human rights, economic development, and peace and security. The United States is committed to addressing the global challenges relating to water and sanitation and has made access to safe drinking water and sanitation a priority in our development assistance efforts.

In joining consensus on this resolution today we reaffirm the understandings in our explanations of position on the Council's September 2012 and 2013 resolutions on the human right to safe drinking water and sanitation, available on the U.S. Mission's website.

The United States joins consensus with the express understanding that it does not imply that States must implement obligations under human rights instruments to which they are not a party.

The United States is not a party to the International Covenant on Economic, Social, and Cultural Rights (ICESR), and the rights contained therein are not justiciable in U.S. courts.

In addition, we also stress that we read preambular paragraph 20 of this year's resolution to be consistent with the Council's 2010, 2011, and 2013 resolutions on this topic, which noted that transboundary water issues fall outside the scope of the human right to drinking water and sanitation derived from the economic, social and cultural rights contained in the ICESCR.

We are pleased that preambular paragraph 8 of this resolution refers to the 2014 Sanitation and Water for All High-Level Meeting. The United States participated actively in that meeting, at which participants made commitments concerning access to safe drinking water and sanitation. Those commitments were made in support of achieving universal access to safe drinking water and sanitation and not explicitly to advance a human right to water.

In addition, while the United States agrees that safe water and sanitation are critically important, we do not accept all of the analyses and conclusions in the Special Rapporteur's latest report.

Likewise, while the United States attaches high priority to agreeing on a meaningful and ambitious post-2015 development agenda by next September, we underscore that this resolution does not prejudge those continuing negotiations.

Our views on the outcome document of the Open Working Group on Sustainable Development Goals are elaborated in our statement on the resolution on technical cooperation and capacity resolution.

With respect to the resolution's language concerning human rights education and training, we note that within the federal structure of the United States, higher education, including law school education, is primarily a state and local responsibility.

We therefore join consensus on the understanding that the United States will continue to address the resolution's goals consistent with current U.S. law and the federal government's authority.

Unfortunately, while we are pleased to join consensus on this year's resolution, the United States must dissociate from consensus on preambular paragraph 21.

The language used to define the right to safe drinking water and sanitation in that paragraph is based on the views of the Committee on Economic, Social, and Cultural Rights, which does not appear in an international agreement and does not represent a consensus position.

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4. Housing

On March 28, 2014, the U.S. delegation provided an explanation of its position, joining consensus on the resolution at the 25th session of the HRC on "**Adequate housing as a component of the right to an adequate standard of living**." U.N. Doc. A/HRC/RES/25/17. The U.S. explanation of position, delivered by Regina Waugh, appears below.

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The United States is pleased to join consensus on this resolution on housing. We welcome the focus of this text which draws our attention to the housing challenges of the urban poor and persons belonging to marginalized groups. We congratulate Germany and Finland for the spirit of flexibility and compromise they brought to the negotiations, and regret that certain delegations sought to subvert the negotiating process through last minute amendments. The United States supports the need to promote, protect, and respect human rights in carrying out housing policies. We note the importance of mainstreaming human rights in urban development. We understand that approach to mean one anchored in the rights established by international human rights law. To that end, we read this resolution's references to nondiscrimination as reflecting the prohibition, under the international covenants on human rights, of discrimination on the basis of all protected grounds, or as otherwise furthering important policy goals.

We take note of this resolution's description of the concept of security of tenure. Like good governance and the rule of law, security of tenure has the potential to enhance the enjoyment of relevant human rights. This concept is not itself a human right. It is also not part of the right to adequate housing as a component of the right to an adequate standard of living. Security of tenure is nonetheless a tool that can help all states accomplish their housing policy goals.

We join consensus on this resolution with the express understanding that it does not imply that States must become party to or implement obligations under human rights instruments to which they are not a party, or signal any change in the current state of conventional or customary international law. We interpret this resolution's reaffirmation of previous documents as applicable to the extent countries affirmed those documents in the first place. We consider the resolution's phrase "the right to adequate housing" to be synonymous with the longer phrase in its title, and with similar language in Article 25 of the Universal Declaration of Human Rights.

In the spirit of our shared policy objective, to make adequate housing available to all of our people, we are pleased to join consensus on this resolution today.

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5. Health

On December 11, 2014, at its 69th session, the UN General Assembly adopted a resolution on global health and foreign policy. U.N. Doc. A/RES/69/132. Terri Robl delivered a statement on behalf of the United States, which was a co-sponsor of the resolution. Ms. Robl's remarks, excerpted below, are available at *http://usun.state.gov/briefing/statements/235162.htm*.

* * * *

… This year's focus on the safety and security of health workers is particularly timely and relevant in light of the recent tragic outbreak of the Ebola Virus in West Africa. The devastating impact on the region's health workers, both national and international, has emphasized the

dangers faced by medical professionals in the field. We have all been immeasurably inspired by their service. In this regard we were pleased to see that Time Magazine has named them their People of the Year for this year. This outbreak has decimated the health profession in a region already challenged with limited health infrastructure. We must give all possible support to the courageous individuals on the front lines of this crisis. We must do more to ensure the safety of health workers as they respond to the public health challenges of their patients.

The international community needs to reinforce the obligation of parties to armed conflicts to respect and protect medical personnel exclusively engaged in medical duties. We also need to respect the personal safety of medical workers who come to an area to provide vaccinations and other health services to the local population. And we must take necessary steps to provide supplies and train health workers in the ways of avoiding infections.

Not all threats to the safety of health workers come from their proximity to disease. In recent years we have seen violations by parties to armed conflicts of the obligation to respect and protect medical personnel exclusively engaged in medical duties. The origins of this rule date back 150 years to the Geneva Conference of 1863.

Threats to the safety of health workers are increasingly apparent in parts of Syria where, according to the WHO, nearly 70 percent of hospitals and health care centers have been damaged or closed. Forces loyal to the Assad regime have been making it next to impossible for doctors and nurses to do their jobs—dropping barrel bombs on medical facilities as if they were military encampments, stealing medicine out of humanitarian convoys, and even dragging patients from sickbeds. More than 460 civilian health professionals have been killed across Syria, and of the 5,000 doctors who worked in Aleppo before the war, only 36 remain.

Let me highlight the Global Health Security Agenda, which has brought together a strong coalition of countries dedicated to strengthening global capacity to prevent, detect and respond to infectious diseases.

We look forward to continuing to work with our international counterparts to reinforce the rights of health workers, through the activities and resolutions of the General Assembly, Security Council and other relevant UN bodies, and by our actions on the ground.

One small but important clarification: We are joining consensus and co-sponsoring resolution A/69/L.35 today with the express understanding that this resolution's reaffirmation of human rights instruments are applicable to the extent countries have affirmed those instruments in the first place, and that it does not imply that States must implement obligations under human rights instruments to which they are not a party [including the International Covenant on Economic, Social, and Cultural Rights (ICESCR)]. To the extent that it is implied in this resolution, the United States does not recognize the creation of any new right which we have not previously recognized, the expansion of the content or coverage of existing rights, or any other change in the current state of treaty or customary international law, including international humanitarian law. Countries have a wide array of policies and actions that may be appropriate for the progressive realization of the right to the enjoyment of the highest attainable standard of physical and mental health, and neither this resolution or others should try to prescribe or define how individual countries pursue such progressive realization.

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At the 26th session of the Human Rights Council, on June 26, 2014, the United States joined consensus on a resolution on t**he right of everyone to the enjoyment of the highest attainable standard of physical and mental health: sport and healthy lifestyles as contributing factors**. U.N. Doc. A/HRC/26/18. The United States delivered an explanation of position, including the following:

> [W] e are pleased to join consensus on this resolution today.
>
> The United States wishes to offer a limited point of clarification on Operative Paragraph 6. That language, calling for certain international financial and technical support, is derived from the International Covenant on Economic, Social and Cultural Rights, to which the United States is not a party. The United States reiterates that while international technical and financial support can facilitate positive health outcomes, human rights law does not address states' decisions whether or not to provide such support. Furthermore, as the language in this operative paragraph notes, states have the primary responsibility for promoting and protecting human rights, and while international assistance may facilitate a state's promotion of human rights domestically, its absence does not justify a state's failure to fulfill its human rights obligations to its people.
>
> Additionally, to the extent that it is implied in this resolution, the United States does not recognize creation of any new right which we have not previously recognized, the expansion of the content or coverage of existing rights, or any other change in the current state of treaty or customary international law. We consider the resolution's phrase "the right to the highest attainable standard of physical and mental health" to be synonymous with the longer phrase in the title of the resolution, and with similar language in Article 21 of the International Covenant on Economic, Social and Cultural Rights.

E. HUMAN RIGHTS AND THE ENVIRONMENT

On March 28, 2014, on behalf of the U.S. delegation to the 25th session of the HRC, David Sullivan delivered the U.S. explanation of position on the resolution entitled "Human rights and the environment." U.N. Doc. A/HRC/RES/25/21. Mr. Sullivan's statement is excerpted below and available at *https://geneva.usmission.gov/2014/03/28/eop-on-resolution-human-rights-and-the-environment/.*

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The United States continues to agree with other members of the Council that protection of the environment and its contribution to sustainable development, human well-being, and the enjoyment of human rights are vitally important. In this spirit, we join consensus on this resolution.

At the same time, we remain concerned regarding the general approach of placing environmental concerns in a human rights context and about addressing them in fora that do not have the necessary expertise. For related reasons, while we recognize the efforts of the independent expert and UN bodies in this area, we do not agree with a number of aspects of their work.

We are also concerned about certain elements in the final text. For example, while sustainable development is a goal we all aim to achieve, the concerns of the United States about the existence of a "right to development" are long-standing and well known—the "right to development" does not have an agreed international meaning. Furthermore, work is needed to make it consistent with human rights, which the international community recognizes as universal rights held and enjoyed by individuals and which every individual may demand from his or her own government.

We interpret this resolution's references to the obligations of States as applicable only to the extent the State has assumed such obligations by becoming party to various human rights instruments. In joining consensus on this resolution the United States does not recognize any change in the current state of conventional or customary international law. Furthermore, we reiterate that States are responsible for implementing their human rights obligations. This is true of all obligations that a State has assumed, regardless of external factors, including the availability of technical and other assistance.

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On June 27, 2014, at the 26th session of the HRC, the United States provided an explanation of its position on a resolution on human rights and climate change adopted by the Council. U.N. Doc. A/HRC/RES/26/27. David Sullivan delivered the statement on behalf of the U.S. delegation, excerpted below and available at *https://geneva.usmission.gov/2014/06/27/eop-on-climate-change/*.

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The United States thanks the Philippines and Bangladesh for their continued dedication to an issue of tremendous importance to all countries. We recognize that climate change is an urgent, complex, and far-reaching global challenge. Addressing climate change requires cooperation among all nations—for any effective solution to climate change depends upon all nations taking responsibility for their own actions and for our planet. The United States has recently re-emphasized our continued firm commitment to addressing this challenge at home and with our partners around the world. Furthermore, as we said regarding the last resolution on this topic, we agree that the effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights. On that basis, we will join consensus on this resolution.

At the same time, this resolution raises a number of serious concerns for the United States.

We regret that the sponsors missed an opportunity to discuss climate change issues through a true human rights lens. That means ensuring that States respect their human rights obligations to persons in their territories when they react to climate change. By including

language in the resolution on issues beyond the competence and expertise of this body, the sponsors have attempted to insert the Human Rights Council into expert climate negotiations taking place in other UN fora. The result could be misinterpreted in a way that would risk sabotaging existing initiatives that have the potential to meaningfully address climate change. Therefore, we want to make clear that the language of this resolution will in no way affect what is considered acceptable and has been agreed on in the context of the UN Framework Convention on Climate Change (UNFCCC).

In addition, we interpret this resolution's reaffirmation of human rights instruments as applicable to the extent countries affirmed those instruments in the first place. Regarding the resolution's multiple references to the right to development, the United States position on this issue is well known, and applies here. Further, we understand the phrases used in this text to refer to many human rights as shorthand for the more accurate and widely accepted terms, consistent with their phrasing in the applicable international covenants, and we maintain our longstanding positions on those rights.

The resolution's unnecessary and inappropriately selective quotations from the UNFCCC, to which the United States is a party, and its Conference of Parties (COP) decisions, also raise concerns. We understand the quotations from the UNFCCC and COP decisions as acknowledging that the Convention and those Decisions contain the stated provisions. They do not mean the Council itself has endorsed the content of such provisions. Of course, the applicability of these quotations and the concepts they describe is limited to the context of that carefully negotiated Convention. Furthermore, to the extent that the language in this resolution might be misused in the context of the UNFCCC or elsewhere to reinterpret carefully negotiated climate change decisions about climate impacts and vulnerability, financial and technical support, or responsibility for climate action, we underscore that we will stand by the UNFCCC decisions.

While we appreciate the tremendous work by everyone who participated in the negotiation of this resolution, this text suffers from failure to take into consideration a diverse range of views. To a great and unfortunate degree, it addresses the issue in polarized terms of north versus south opposition. We believe that approach is the wrong way for this Council to address such important and challenging issues. We strongly recommend that the Council's future work on this topic be led by a cross-regional core group that includes representation of a range of valid perspectives. That will allow a future session of this Council to take a less divisive and more effective approach to this important issue that we all face.

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F. RESPONSIBLE BUSINESS CONDUCT

1. Implementation of Guiding Principles

In 2014, the United States continued to promote implementation of the UN Guiding Principles on Business and Human Rights, which were endorsed by the Human Rights Council in 2011 in resolution 17/4. The United States opposed a resolution introduced at the 26th session of the HRC which proposed the creation of an intergovernmental working group ("IGWG") to work toward the conclusion of a new, legally-binding

instrument on business and human rights. Stephen Townley, Deputy Legal Adviser for the U.S. Mission to the UN in Geneva, delivered the U.S. explanation of vote on the resolution, which was adopted by a vote of 20 to 14, with 13 abstentions, on June 26, 2014. U.N. Doc. A/HRC/RES/26/9. Mr. Townley's statement is excerpted below and available at *https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/*.

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We are extremely disappointed with the decision by Ecuador and South Africa to table this resolution.

We regret they have decided to proceed to action now, as we heard this morning that the core group on Business and Human Rights, consisting of Argentina, Russia, Norway, and Ghana, remains interested in seeking a consensus solution to the debates we have had at this session.

Indeed, as we understand it, the core group has proposed to the main sponsors of this resolution the establishment of an intergovernmental expert group, an idea that might have enjoyed consensus and made a meaningful difference, but which was rejected out of hand.

This action contradicts the consensus-based approach of John Ruggie's mandate and the first few years of the UN Guiding Principles.

It will unduly polarize these issues, taking us back ten years to the days of the Commission on Human Rights.

We have not given states adequate time and space to implement the Guiding Principles.

Despite that lack of time, the Principles have already made a meaningful difference in raising standards across industry, promoting responsible investment, and encouraging further collaboration among stakeholders.

They have also helped to create a level playing field for companies.

Furthermore, individual states have taken a variety of steps in implementing the Guiding Principles to prevent corporate involvement in human rights abuses.

The Guiding Principles are a success, although they are only three years old.

Indeed, while we share and appreciate the concerns expressed by some delegations and civil society colleagues that we need to do more to improve access to remedy for victims of business-related human rights abuses, our concern is that this initiative will have exactly the opposite effect.

First, this resolution is a threat to the Guiding Principles themselves.

To be clear, it is not complementary to the resolution to be offered by the Business and Human Rights core group.

The proposed Intergovernmental Working Group will create a competing initiative, which will undermine efforts to implement the Guiding Principles.

The focus will turn to the new instrument, and companies, states, and others are unlikely to invest significant time and money in implementing the Guiding Principles if they see divisive discussions here in Geneva.

Second, on the substance, this initiative is unlikely to address the concerns that animate calls for a legally binding instrument, as a one-size-fits-all instrument is not the right approach to handling the complex fabric that is regulation of business.

It also would only be binding on the states that became party to it.

The IGWG will not benefit from the necessary and important voices of key stakeholders, including the private sector.

The United States will not participate in this IGWG, and we encourage others to do the same.

There are also a host of practical questions about how an internationally binding instrument would apply to corporations, which are not subjects of international law, and how states would implement such an instrument.

For one thing, we heard one of the sponsors during informals that it wishes to apply legal obligations directly to businesses, which are non-state actors.

What precedent will this set? Second, we see in this resolution an effort to define certain businesses.

How will this create a coherent set of legal rules if there are exceptions to what purports to be a human rights instrument?

For all these reasons, and because the main sponsors of this initiative did not appear to wish to have a consensus solution, we request a vote on this text and will vote no.

We urge others to do likewise.

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With regard to national implementation of the Guiding Principles, President Obama announced on September 24, 2014, on the margins of the UN General Assembly, that the United States would develop a National Action Plan ("NAP") to promote responsible and transparent business conduct overseas. See Remarks of President Obama at an Open Government Partnership Meeting at the UN in New York on September 24, 2014, available at *www.whitehouse.gov/the-press-office/2014/09/24/remarks-president-obama-open-government-partnership-meeting*. As explained by President Obama when he announced the development of the plan:

> …[W]e intend to partner with American businesses to develop a national plan to promote responsible and transparent business conduct overseas. We already have laws in place; they're significantly stronger than the laws of many other countries. But we think we can do better. And we think that ultimately it will be good for everybody, including business. Because when they know there's a rule of law, when they don't have to pay a bribe to ship their goods or to finalize a contract, that means they're more likely to invest, and that means more jobs and prosperity for everybody.

The United States convened the first of several planned dialogues with interested stakeholders to gather input for the NAP process and content in December 2014. See Announcement of Opportunity to Provide Input, available at *www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business-*.

2. Extractive industries

On March 26-27, 2014, Switzerland hosted the Voluntary Principles on Security and Human Rights Initiative annual plenary meeting in Montreux. For background on the Voluntary Principles ("VPs") see *Digest 2013* at 354-55; *Digest 2012* at 409-10; and *Digest 2000* at 364-68. The State Department media note about the 2014 plenary is available at *www.state.gov/r/pa/prs/ps/2014/04/224380.htm* and includes 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.

3. Principles on Responsible Agricultural Investment

In 2014, the United States participated in negotiations on the Principles for Responsible Agricultural Investment ("RAI") as part of the UN Committee on World Food Security at the FAO in Rome. The principles are intended to provide guidelines for national regulations, global corporate social responsibility initiatives, and individual contracts relating to investment in agriculture. The U.S. mission to the UN in Rome provided a statement on May 16, 2014 welcoming the negotiations, available at *http://usunrome.usmission.gov/news/negotiations-principles-responsible.html*. In October 2014, the United States delivered an explanation of its position at the session on the RAI Principles at the Committee on World Food Security. The U.S. explanation of position follows, and is available at *http://photos.state.gov/libraries/italy/231771/images/US_EOP_RAI.pdf*.

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These principles are voluntary and non-legally binding. We do not view them as changing the interpretation of any instruments referenced therein or the current state of conventional or customary international law, including with regard to countries' international obligations under

any agreements or in any areas including but not limited to trade and investment agreements, intellectual property rights including legal transfer of technology, labor rights, or human rights. We wish to emphasize that the implementation of human rights obligations is the responsibility of states.

Trade in food and agriculture products in a predictable, transparent market is critical to achieving global food security and essential to ensuring long-term success in ending hunger by increasing food availability. The Principles support the view that individual consumer preferences guide what foods are produced, sold, or consumed, and these principles should not be read to suggest otherwise.

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G. INDIGENOUS ISSUES

On May 13, 2014, Raina Thiele, Associate Director of the White House Office of Intergovernmental Affairs and Public Engagement, addressed the UN Permanent Forum on Indigenous Issues in New York. Ms. Thiele's remarks are available at *http://usun.state.gov/briefing/statements/226313.htm* and excerpted below.

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Thank you, Madam Chair. Before commenting on the UN's activities relating to indigenous peoples, I would like to highlight notable developments within the United States.

The U.S. government is committed to improving the situation of U.S. tribal communities. To that end, we continue to strengthen our government-to-government political relationship with U.S. federally recognized tribes when formulating our broader policy objectives. The White House Tribal Nations Conference—hosted by the President—is now an established annual event, the fifth conference occurring in November 2013. Cabinet secretaries, senior U.S. officials, and tribal leaders gathered to have an open, informed, and constructive discussion in the U.S. Capitol [sic]. To make the meeting as useful as possible, we organized breakout sessions on priority topics that tribal leaders wanted discussed: self-determination and self-governance, healthcare, economic and infrastructure development, education, protecting natural and cultural resources, climate change, natural disaster mitigation, and law enforcement and public safety. We invite you to read the 2013 White House Tribal Nations Conference Progress Report, which is available online and which documents the many tribal-related policies and programs we have in place.

The November 2013 Tribal Nations Conference was the first of these annual meetings where tribal governments were able to speak directly with the gathered members of the White House Native American Affairs Council, which was established by the President in a June 2013 Executive Order. The Council consists of the heads of U.S. government departments, agencies, and offices and meets three times a year, allowing for improved high-level information exchange and coordination among Federal agencies. Its five focus areas—tribal economies, health and nutrition, education for Native American youth, law enforcement and public safety in tribal

communities, and natural resource protection and the environment, including climate change—are among the major concerns of indigenous peoples in the United States.

Turning from our domestic actions to the multilateral arena, we are focused on preparations for the September World Conference on Indigenous Peoples. The World Conference is an unprecedented, milestone event—the first time that senior UN and member state representatives will gather together with indigenous representatives at a UN high-level meeting to consider recommendations that indigenous peoples have presented over the years to the Permanent Forum, Expert Mechanism on the Rights of Indigenous Peoples, and other UN meetings devoted to human rights, development, environment, and conservation issues.

We understand that the preparatory process remains in flux. We support the efforts by the President of the General Assembly to reach agreement on the arrangements for the World Conference, including for the negotiation of its outcome document, that are acceptable to all member states and take into account the views of indigenous peoples. We encourage efforts to find a solution that will allow planning to proceed. To achieve a successful World Conference, indigenous peoples must be able to participate meaningfully in the preparatory process and the Conference itself. While there are differing views on what constitutes meaningful participation, we think the arrangements ultimately settled upon must be acceptable to the broader indigenous community, as it wouldn't be productive to proceed with a World Conference on Indigenous Peoples if the main stakeholders were dissatisfied. The United States supports holding the informal interactive hearing called for by the UN General Assembly Resolution as soon as is practicable and structuring it to allow for an inclusive exchange of views. Elected and traditional indigenous leaders, non-governmental organizations, civil society organizations, academics, and others should all be given the opportunity to offer their observations.

We strongly support the call for a concise, action-oriented outcome document. Conciseness is important because in our experience, documents of this nature that are lengthy and lacking in focus will be diluted to secure consensus. The risk of not gaining consensus also increases with a document that attempts to do too much. The document should be action-oriented and contain steps that member states and the UN system can take in the near future to promote the rights of indigenous peoples and to tangibly improve the situations of indigenous peoples and conditions in their communities. Those steps may include additional work by UN bodies on issues of concern to indigenous peoples, and may also include best practices of member states on those topics. Lastly, we strongly believe that the outcome document needs to be a consensus document in order for the World Conference to meet its potential. We will continue to work with all stakeholders to arrive at a consensus document.

To inform how the United States will approach the World Conference, we are engaging regularly with U.S. indigenous representatives. We held a scoping session in March and formal State Department-hosted U.S. consultations on May 9 with both representatives of U.S. federally recognized tribes and with other U.S. indigenous peoples, groups, and organizations. As we indicated at the May 9 consultations, we are working on setting up other opportunities to consult with U.S. indigenous peoples before the World Conference, possibly in July or August.

Thank you for your attention. The U.S. delegation looks forward to working with member states and indigenous partners during this Permanent Forum on Indigenous Issues session.

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On June 24, 2014, at the 26th session of the HRC, Ambassador Harper delivered a joint statement on behalf of a group of 35 states on "Eliminating Violence against Indigenous Women and Girls." The group included Albania, Australia, Austria, Belgium, Benin, Bulgaria, Chile, Croatia, Congo, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Guatemala, Iceland, Italy, Lithuania, the former Yugoslav Republic of Macedonia, Mexico, Moldova, Montenegro, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Spain, St Kitts and Nevis, Sweden, Switzerland, the United Kingdom, and the United States. The joint statement appears below and is available at *https://geneva.usmission.gov/2014/06/24/joint-statement-on-eliminating-violence-against-indigenous-women-and-girls/*.

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As we prepare for the upcoming World Conference on Indigenous Peoples, we express great concern that indigenous women and girls often suffer multiple and intersecting forms of discrimination and poverty that increase their vulnerability to all forms of violence. We also stress the need to seriously address the high and disproportionate rates of violence, which takes many forms, against indigenous women and girls worldwide. Indigenous women and girls have the same human rights and fundamental freedoms as everyone else, and a common recognition of those rights must underpin efforts to address violence against indigenous women and girls.

Improving access to justice and empowering indigenous peoples are critical to this effort. We recognize that indigenous peoples themselves may well be in the best position to combat violence against indigenous women and girls. They are closer and better able to address the issue when provided with tools and the legal capability to stop the violence. We will strive to, and encourage other states to, where appropriate, enable and empower indigenous peoples to better address these issues themselves by providing resources, adopting legislation and policies, and taking other necessary steps in an effort to stop the cycle of violence that affects them. We also stress the need for coordination and dialogue between state and indigenous justice institutions to improve access to justice for indigenous women and girls and to enhance awareness campaigns, including ones directed at men and boys.

Ending the global scourge of violence against indigenous women and girls will also require comprehensive support services for survivors and improved data collection to illuminate the scope of the problem. It will demand intensified measures to provide accountability for perpetrators and redoubled efforts to prevent abuse. It will also entail improvements in indigenous women's access to birth registration. Respecting and promoting reproductive rights – including the right to make decisions concerning reproduction free of discrimination, coercion and violence, and access to comprehensive sexual and reproductive health services – must be integral to our efforts to end violence against indigenous women and girls.

We believe the topic of violence against indigenous women and girls requires greater attention. We encourage the relevant UN mechanisms to recommend ways to use the UN's existing tools more effectively to prevent and address this serious problem. We also believe the upcoming World Conference on Indigenous Peoples should consider this problem and ways to heighten awareness and respond to this concern throughout the UN system. The meaningful

participation of indigenous representatives in the World Conference and its preparatory process will be essential in this regard.

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On September 22, 2014, Ambassador Harper addressed a roundtable of the World Conference on Indigenous Peoples, held at UN Headquarters in New York. The subject of the roundtable was "UN System Action for the Implementation of the Rights of Indigenous Peoples." Excerpts follow from Ambassador Harper's remarks, which can be found in full at *https://geneva.usmission.gov/2014/09/23/the-world-conference-on-indigenous-people-a-call-for-further-action/*.

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As U.S. Ambassador to the Human Rights Council and member of the Cherokee Nation, I am honored to lead the U.S. delegation to this high-level UN General Assembly meeting devoted to advancing indigenous peoples' rights worldwide.

We applaud the joint efforts of member states and indigenous representatives to arrive at a World Conference outcome document containing positive, action-oriented commitments on behalf of indigenous peoples. The text addresses key priorities of the U.S. government and U.S. tribal leaders, including those discussed during formal United States-hosted consultations.

The document adopted this morning underscores the commitments of member states to advance and uphold the principles and goals of the UN Declaration on the Rights of Indigenous Peoples. We are gratified that the document supports the empowerment of indigenous women and eliminating violence and discrimination against them. Violence against indigenous women and girls has devastating effects on the individuals, their families, and their communities. I have made this one of my highest priorities at the Human Rights Council. To call attention to this worldwide scourge, the United States issued a joint statement on behalf of 35 countries, a number of them represented here today, at the June 2014 Human Rights Council session. Further, we support the outcome document's call to have the Commission on the Status of Women focus on empowering indigenous women.

There are three topics in the outcome document on which further action is especially needed. First, the United States sees great merit in reflecting on how the UN can measure member states' progress in achieving the objectives of the UN Declaration. We welcome specific proposals from member states, indigenous representatives, and the UN in this regard. We look forward to the Secretary-General's recommendations and options on how to use existing UN mechanisms for this purpose. The possibility to modify the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) for this purpose holds promise, and options for amending its mandate or revising its composition should be explored.

Second, the outcome document requests the Secretary-General to present proposals on enhancing indigenous peoples' participation at the UN. At the present time, indigenous governments and other representational institutions can participate in the Permanent Forum on Indigenous Issues (PFII), but only accredited NGOs can participate in any of the other meetings at the United Nations open to civil society observers. The United Nations must establish

procedures that recognize tribal leaders and tribal governments for who they are – persons and governments who are distinct from NGO representatives and who represent their own constituencies. The United States looks forward to working with tribal governments, the Secretary-General and other Member States to enable indigenous representative institutions to participate accordingly in UN meetings.

Finally, we need to approach indigenous issues holistically—throughout the UN system. We support the call for an inter-agency effort to derive a plan for a coherent approach—including UN agencies, funds, and programs in field as well as at headquarters—to achieve the ends of the Declaration. The United States will work with the Secretary-General to identify an appropriate existing official within the system to oversee and coordinate these efforts.

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On September 25, 2014, at the 27th session of the HRC, Ambassador Harper delivered a general statement for the United States on the resolution on human rights and indigenous peoples. The United States co-sponsored the resolution, which was adopted by consensus. U.N. Doc. A/HRC/RES/27/13. Ambassador Harper's statement follows and is available at *https://geneva.usmission.gov/2014/09/25/general-statement-on-indigenous-peoples/*.

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The United States is pleased to co-sponsor the Resolution on Human Rights and Indigenous Peoples. Indigenous peoples around the world face grave challenges, and the United States is committed to addressing these challenges both at home and abroad through actions aimed at advancing indigenous peoples' development.

We welcome the resolution's reference to promoting indigenous peoples' participation in the UN and to have the concerns of indigenous peoples considered in the post-2015 development agenda.

We would like to note our concerns about the lack of inclusiveness surrounding the August 2014 Cochabamba conference, mentioned in OP 7 of the resolution. Because the meeting was announced on very short notice, many member states and indigenous governments and representatives could not participate.

In order to further improve the situation of indigenous peoples, the United States believes that we must focus on the promotion and protection of both the human rights of indigenous individuals and the collective rights of indigenous peoples, and is pleased that the resolution covers both these topics in various ways.

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At the UN General Assembly's 69th session, Terri Robl delivered remarks on the rights of indigenous peoples. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/233198.htm*.

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Both the World Conference on Indigenous Peoples outcome document and the Secretary-General's report on the Second International Decade of the World's Indigenous Peoples recognize the importance of supporting the principles and goals of the UN Declaration on the Rights of Indigenous Peoples. Doing so is essential to effecting tangible improvements to indigenous persons' lives and their ability to maintain their cultures, lands, and livelihoods. Both documents recommend that all stakeholders—notably member states, indigenous peoples, the UN, and non-governmental organizations—consult and cooperate on this effort.

In accordance with this recommendation, as well as with Executive Order 13175, the U.S. government holds regular consultations with U.S. tribal leaders on policies affecting their members. During two additional State Department-hosted consultations for U.S. tribal and NGO participants in the lead-up to the World Conference, indigenous participants articulated several priorities for future UN action on indigenous peoples. The United States shares these priorities and is pleased to see them highlighted in the WCIP outcome document as areas for follow-up activity.

First, we must collectively develop more effective ways to prevent and address violence and discrimination against indigenous women and girls. To raise awareness about this topic, the United States delivered a joint statement on behalf of 35 countries at the June 2014 Human Rights Council session. The U.S. Ambassador to the HRC, a member of the Cherokee Nation, also spoke of his personal experience regarding the devastating consequences that violence against indigenous women and girls has on individuals, their families, and their communities, and his commitment to addressing this issue in the Council and throughout the UN system. The United States therefore welcomes the World Conference outcome document's suggestion that the Commission on the Status of Women examine empowering indigenous women.

Second, because the Declaration is key to advancing the status of indigenous peoples worldwide, the United States sees merit in having the UN monitor and assess member states' progress in achieving the objectives of the Declaration. We welcome specific proposals from member states, indigenous representatives, and the UN in this regard. The World Conference outcome document requests the Secretary-General to formulate recommendations on using existing UN mechanisms to this end, and we look forward to his suggestions. The possibility of modifying the Expert Mechanism on the Rights of Indigenous Peoples for this purpose holds promise, and options for amending its mandate or revising its composition should be explored. We support the outcome document's invitation to the HRC to examine how EMRIP could be made better fit for this purpose.

Third, the existing arrangements for indigenous peoples' participation in the UN are not currently satisfactory. In addition to contributing to the Permanent Forum on Indigenous Issues and EMRIP, which were created especially for indigenous peoples, indigenous representatives want to provide input to UN fora focused on development concerns, including issues involving employment, education, health, the environment, conservation, and cultural and intellectual property. Currently, indigenous organizations can participate in the PFII, but only accredited NGOs can take part in any other UN meetings open to civil society observers. The WCIP outcome document requests the Secretary-General to present proposals on enhancing indigenous peoples' participation at the UN, and the United States will provide its thoughts on this subject going forward.

Fourth, the United States looks forward to continued efforts with other member states to address repatriation of human remains and sacred or culturally significant objects.

We believe that the outcome document of the World Conference, coupled with the elaboration of the post-2015 development agenda, paves the way for a reinvigorated approach to promoting and protecting the rights of indigenous peoples and addressing their needs and concerns. Therefore, we do not agree with the recommendation contained in the Secretary-General's report A/69/271 that a third decade should be established. While we agree with many of the recommendations in that report for recognizing and strengthening indigenous peoples' own forms of governance and ensuring their effective participation at the United Nations, we do not believe that a third decade would be the most productive route to attaining those goals.

Let me close by commenting on the theme of promoting reconciliation between governments and indigenous peoples. As part of our efforts to correct past injustices, the United States has resolved significant historical grievances concerning discrimination and the mismanagement of tribal trust funds, trust lands, and resources such as water rights. The Keepseagle and Cobell Settlements were among the high-profile cases settled. These lawsuits have caused considerable contention between U.S. tribes and the U.S. government, and we now look forward to moving into a new era of partnership with indigenous peoples in the United States.

Thank you for your attention on this important agenda item. The United States looks forward to working with all stakeholders to build upon the achievements of the World Conference.

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

UN Committee Against Torture

On November 12-13, 2014, the United States appeared before the UN Committee Against Torture in Geneva to present its third periodic report on implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1465 U.N.T.S. 85 (1984). See discussion in section A.2., *supra*, of the letter sent to state, tribal, and local authorities informing them of the CAT presentation, among others. The United States submitted its third, fourth, and fifth periodic reports to the Committee Against Torture (as one document) on August 12, 2013. See *Digest 2013* at 187-90.

The opening statement of Mary McLeod before the Committee on November 12, 2014 and interventions by Ms. McLeod and State Department Counselor on International Law Catherine Amirfar, are excerpted below and available at *https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/*. Statements of other members of the U.S. delegation are also available on the website of the U.S. Mission to the UN in

Geneva. The opening statement of Tom Malinowski, Assistant Secretary of State for Democracy, Human Rights, and Labor, is available at *https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/*. The opening statement of Ambassador Harper is available at *https://geneva.usmission.gov/2014/11/12/ambassador-harper-opposition-to-torture-is-a-fundamental-american-value/*. And the statement of Deputy Assistant Attorney General David Bitkower of the Criminal Division of the U.S. Department of Justice is available at *https://geneva.usmission.gov/2014/11/12/david-bitkower-justice-department-plays-critical-role-in-upholding-us-obligations-under-convention-against-torture/*.

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The United States is proud of its record as a leader in respecting, promoting, and defending human rights and the rule of law, both at home and around the world. But in the wake of the 9/11 attacks, we regrettably did not always live up to our own values, including those reflected in the Convention. As President Obama has acknowledged, we crossed the line and we take responsibility for that.

The United States has taken important steps to ensure adherence to its legal obligations. We have engaged in ongoing efforts to determine why lapses occurred, and we have taken concrete measures to prevent them from happening again. Specifically, we have established laws and procedures to strengthen the safeguards against torture and cruel treatment. For example, immediately upon taking office in 2009, President Obama issued Executive Order 13491 on ensuring lawful interrogations. This Executive Order was clear: consistent with the Convention Against Torture and Common Article 3 of the 1949 Geneva Conventions, as well as U.S. law, any individual detained in armed conflict by the United States or within a facility owned, operated, or controlled by the United States, in all circumstances, must be treated humanely and must not be tortured or subjected to cruel, inhuman, or degrading treatment or punishment. The Executive Order directed all U.S. officials to rely only on the U.S. Army Field Manual in conducting interrogations in armed conflict. And it revoked all previous executive directives that were inconsistent with the Order including legal opinions regarding the definition of torture. Executive Order 13491 also created a Special Task Force on Interrogations and Transfer Policies Issues, which helped strengthen U.S. policies so that individuals transferred to other countries would not be subjected to torture.

In addition to these steps, the United States has sought to make its interrogation operations more transparent to the American public and to the world. We have made public a number of investigations of the treatment of detainees in the post 9/11 time-period. We are expecting the public release of the Findings and Conclusions of a detailed congressional investigation into the former detention and interrogation program that was put in place in the immediate aftermath of 9/11. President Obama has made clear that this document should be released, with appropriate redactions to protect national security.

In an effort to ensure that we are doing the utmost to prevent torture and cruel treatment, the United States has carefully reviewed the extent to which certain obligations under the Convention apply beyond the sovereign territory of the United States and is prepared to clarify its views on these issues for the Committee today.

In brief, we understand that where the text of the Convention provides that obligations apply to a State Party in "any territory under its jurisdiction," such obligations, including the obligations in Articles 2 and 16 to prevent torture and cruel, inhuman or degrading treatment or punishment, extend to certain areas beyond the sovereign territory of the State Party, and more specifically to "all places that the State Party controls as a governmental authority." We have determined that the United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, and with respect to U.S. registered ships and aircraft. Although the law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection of war victims, a time of war does not suspend operation of the Convention Against Torture, which continues to apply even when a State is engaged in armed conflict. The obligations to prevent torture and cruel, inhuman, and degrading treatment and punishment in the Convention remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict.

There should be no doubt, the United States affirms that torture and cruel, inhuman, and degrading treatment and punishment are prohibited at all times in all places, and we remain resolute in our adherence to these prohibitions.

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On November 13, 2014, the United States responded to questions posed by the committee the previous day. Excerpts follow from those responses. Catherine Amirfar, Counselor on International Law in the Office of the Legal Adviser at the U.S. Department of State, addressed questions regarding the geographic scope of the Convention. Mary McLeod addressed the applicability of the Convention during armed conflict.

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Counselor on International Law Catherine Amirfar: . . . . Messrs. Bruni and Modvig, I will address the questions you posed with respect to the geographic scope of the application of the Convention. So let me start by saying that torture is absolutely prohibited at all times, in all places, no matter what the circumstances. Likewise, cruel, inhuman or degrading treatment or punishment is absolutely prohibited at all times and in all places. And these are legal prohibitions, based on U.S. domestic law, treaties and customary international law.

For example, the prohibition against torture is customary international law binding on all nations everywhere, at all times. Articles 2 and 16 of this Convention require prevention of both torture and cruel, inhuman or degrading treatment or punishment in territory under U.S. jurisdiction. [… T]he DTA, or the Detainee Treatment Act of 2005, takes it even further: no individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or

punishment. Under the DTA, the prohibitions apply at all times, and in all places, not just to territory under U.S. jurisdiction. In the context of armed conflict, the Geneva Conventions prohibit torture and cruel treatment as well. President Obama issued Executive Order 13491 to ensure humane treatment and compliance with the treaty obligations of the United States, including this Convention and the Geneva Conventions. Any individual detained in any armed conflict who is in the custody or under the effective control of the United States or detained within a facility owned, operated, or controlled by the United States, in all circumstances, must be treated humanely and must not be tortured or subjected to cruel, inhuman, or degrading treatment or punishment. Taken together, these make clear that these prohibitions are categorical and unequivocal. They bind the United States and its officials at all times, everywhere.

There exists the separate question under the Convention of the geographic reach of the articles specifically referring to "territory under [a state's] jurisdiction." Since its last presentation, the United States has carefully reviewed the extent to which such obligations under the Convention apply beyond the sovereign territory of the States Parties. The United States understands that where the text of the Convention provides that obligations apply to a State Party in "any territory under its jurisdiction," such obligations extend to "all places that the State Party controls as a government authority." We believe this is the proper interpretation of the Convention and is consistent with the position taken by both the U.S. Executive Branch during the ratification of the Convention and by the U.S. Senate, in considering whether to provide advice and consent to ratify the Convention. This language clearly covers the sovereign territory of the United States. In addition, we believe that it covers other places the United States "controls as a governmental authority." We have concluded the United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, and over all proceedings conducted there, and with respect to U.S.-registered ships and aircraft.

I should note that with respect to the obligation in Article 16 to prevent cruel, inhuman or degrading treatment or punishment, that provision also explicitly extends to "territory under [a state's] jurisdiction." As this Committee is aware, the United States submitted a reservation with respect to that provision to ensure that existing U.S. constitutional standards would satisfy U.S. obligations under that Article. Let me be clear that this reservation to Article 16 does not introduce any limitation on the geographic applicability of that article. The obligations in Article 16 apply beyond the sovereign territory of the United States to any territory under its jurisdiction in line with the interpretation I have just outlined.

Now, with respect to the application of the Convention at Guantanamo, in our last presentation to the Committee, the United States stated that Article 15 of the Convention is a treaty obligation and that the United States had to abide by that obligation in the Combatant Status Review Tribunals (also known as CSRTs) and Administrative Review Boards (also known as ARBs), which were administrative procedures established to review the status of law of war detainees at Guantanamo Bay. CSRTs and ARBs are no longer conducted, but the United States reaffirms its obligation to abide by Article 15 in the Periodic Review Board processes, which is a current discretionary, administrative process for the review of law of war detainees at Guantanamo, as well as in the military commissions.

In that regard, the Military Commissions Act of 2009 mandates that "no statement obtained by the use of torture or cruel, inhuman, or degrading treatment... shall be admissible in a military commission ... except against a person accused of torture or such treatment as evidence that the statement was made." Implementing this exclusionary rule in the context of reviewing or

prosecuting individuals detained in armed conflict complements and reinforces the prohibition on torture and the fair trial guarantees mandated by the law of armed conflict.

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Acting Legal Adviser Mary McLeod: Mr. Modvig, I now turn to your question about the applicability of the Convention during armed conflict. In terms of our international law obligations, during situations of armed conflict, the law of armed conflict is the *lex specialis* and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. Moreover, as the United States has already recognized, a time of war does not suspend the operation of the Convention Against Torture, which continues to apply even when a State is engaged in armed conflict. Article 2(2) of the Convention specifically provides that neither "a state of war [n]or a threat of war … may be invoked as a justification for torture." In addition, the law of armed conflict and the Convention contain many provisions that complement one another and are in many respects mutually reinforcing. For example, the obligations to prevent torture and cruel, inhuman or degrading treatment or punishment in the Convention remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict. Whether you are looking at human rights law or the law of armed conflict, the prohibition against torture and cruel treatment is categorical. There are no gaps.

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In closing, there can be no question that the clear position of the United States is that torture and cruel, inhuman, and degrading treatment or punishment are legally prohibited everywhere and at all times. There can also be no question that these prohibitions continue to apply even when the United States is engaged in armed conflict. These prohibitions exist under domestic and international law, including human rights law and the law of armed conflict. The United States remains dedicated to enforcing these prohibitions to ensure that there are no gaps, that there are no loopholes, in order to fulfill a primary purpose of the Convention—to recognize the inherent dignity of persons and right to be free from torture and cruel, inhuman, and degrading treatment or punishment.

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I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

1. Death Penalty

The United States abstained on the resolution on the death penalty at the 26th session of the HRC. U.N. Doc. A/HRC/26/2. The resolution was adopted on June 26, 2014 by a vote of 29 to 10, with 8 abstentions. The U.S. explanation of vote, delivered by Ambassador Harper, is excerpted below and available at *https://geneva.usmission.gov/2014/06/26/u-s-explanation-of-vote-human-rights-council-resolution-on-the-death-penalty/*.

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The United States is disappointed that it was not able to join consensus on this resolution.

We had hoped for a balanced and inclusive resolution that would better reflect the position of states that continue to apply the death penalty lawfully.

In particular, we cannot agree with the slant of this resolution in favor of a moratorium or abolition, nor with the generality expressed that use of the death penalty inevitably leads to violations of human rights.

We are deeply troubled whenever an individual subject to the death penalty is denied the procedural and substantive protections to which he or she is entitled, but we cannot accept the implication that such a denial of legal protections follows from use of the death penalty.

For this reason we supported the amendment that would have removed this problematic language.

International law does not prohibit capital punishment when imposed and carried out in a manner that is consistent with a state's international obligations.

We therefore urge all governments that employ the death penalty to do so in conformity with their international human rights obligations.

With respect to the imposition of the death penalty for offenses committed by persons below eighteen years of age, the United States Supreme Court has barred as unconstitutional the use of the death penalty in such circumstances.

We would likewise encourage all States to do the same, but interpret the references in the resolution to related provisions of the ICCPR and the Convention on the Rights of the Child as addressed to those States Parties who have accepted such obligation under those conventions.

As to the question of abolition of the death penalty or moratoriums on its use, the United States' position is equally well known.

The ICCPR, its Second Optional Protocol and other relevant conventions leave this question to be decided through the domestic democratic processes of each individual Member State.

We believe that these domestic processes may be enhanced by open debate on all sides of the issue and that this resolution can contribute to such debate.

For that reason we have chosen to abstain rather than oppose this resolution, despite its flaws.

It is our hope that the biennial high-level panels to be convened on the death penalty, as well as the Secretary General's 2015 supplement to his quinquennial report on capital punishment, will address all aspects of the issue with due consideration to national perspectives, given the wide divergence of views regarding its abolition or continued use both within and among nations.

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At the 69th session of the UN General Assembly, the United States again voted against the resolution calling for a moratorium on the use of the death penalty. U.N. Doc. A/RES/69/186. The resolution was adopted on December 18, 2014 by a vote of 117 for, 37 against and 34 abstentions. The U.S. explanation of vote on the resolution follows, and is also available at http://usun.state.gov/briefing/statements/234391.htm.

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There is wide divergence of views—both within and among nations—on the abolition of, or a moratorium on, the continued use of the death penalty. While we appreciate that this resolution sets forth policy objectives shared by advocates of an abolition of this form of punishment, we believe that the ultimate decision regarding these issues must be addressed through the domestic democratic processes of individual Member States and be consistent with their obligations under international law. This is the premise underlying Article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol to that Covenant, which is available to those States choosing to abolish this form of punishment. This premise is also reflected in the proposed amendment, which we support.

Capital punishment is not prohibited by international law. As set out in Article 6 of the Covenant, to which the United States is a party, the death penalty may be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime and when carried out pursuant to a final judgment rendered by a competent court and not contrary to the provisions of the Covenant, including the exacting procedural safeguards under Articles 14 and 15. U.S. and international law are also relevant to the manner in which the death penalty is carried out. The Eighth Amendment of the U.S. Constitution prohibits methods of execution that would constitute cruel and unusual punishment.

These and other protections are guaranteed by the U.S. Constitution and criminal statutes at both the federal and state levels. In recent years, the United States Supreme Court has further narrowed both the class of individuals on whom the death penalty may be imposed and the types of offenses that may be subject to the death penalty.

Just as the United States is committed to complying with its international obligations, we strongly urge other countries that employ the death penalty to do so only in full compliance with international law.

The United States also urges all States, and particularly the supporters of this resolution, to focus their attention toward addressing and preventing human rights violations that may result from the improperly imposed application of capital punishment. We strongly urge this body and Member States to ensure that capital punishment is not applied in an extrajudicial, summary or arbitrary manner. Capital defendants must be provided a fair trial before a competent, independent, and impartial tribunal established by law, with full due process guarantees. Moreover, through their legal processes, States should carefully evaluate both the class of defendants subject to the death penalty, as well as the crimes for which it may be imposed, in order to ensure that the use of capital punishment comports with their international obligations. Methods of execution designed to inflict undue pain or suffering must be strictly prohibited.

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2. Arbitrary Detention

On September 10, 2014, U.S. Ambassador-at-Large for War Crimes Issues Stephen Rapp addressed the 27th session of the HRC during a clustered interactive dialogue with the working group on arbitrary detention with respect to the working group's preliminary efforts to develop draft principles and guidelines concerning the right to challenge the

lawfulness of detention before a court, as contemplated in HRC resolution 20/16. Ambassador Rapp's statement is excerpted below and available at *https://geneva.usmission.gov/2014/09/12/united-states-engages-with-working-group-on-arbitrary-detention/.*

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The United States welcomes this opportunity to engage the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. We express deep appreciation for Mr. de Greiff's reporting on prosecutorial prioritization strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law. We also welcome the chance to engage the Working Group on Arbitrary Detention. We appreciate the Working Group's progress on preliminary draft principles and guidelines concerning the right to challenge the lawfulness of detention before a court.

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With respect to the Working Group's preliminary draft principles and guidelines, the United States strongly supports the right of detained persons to challenge the lawfulness of detention before a court and to obtain a judicial decision without delay. This right is reflected in the U.S. Constitution and has historical roots dating to the Magna Carta.

As the report details, legal systems vary in how they protect the rights of detainees and provide remedies when detainee rights are violated.

With this backdrop in mind, the United States encourages the Working Group to maintain the draft's appropriately high level of generality, rather than to attempt to articulate international obligations not accepted by all member nations. The United States will continue to review this preliminary draft and looks forward to contributing to this important work as it continues over the next year.

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In further response to the efforts of the Working Group on Arbitrary Detention to develop a set of basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to bring proceedings before a court, the United States submitted its preliminary observations to the Working Group on November 12, 2014. These include some preliminary concerns regarding the methodology and scope of the working group's preliminary draft principles, pertaining in particular to views expressed regarding territorial scope, applicability in situations of armed conflict, and derogation authority under Article 4 of the International Covenant on Civil and Political Rights. The United States' Observations are excerpted below (with footnotes omitted) and available in full at *www.state.gov/s/l/c8183.htm*.

The preliminary draft principles to which these Observations respond were included in a background paper issued by the Working Group for a stakeholders'

consultation held September 1-2, 2014, in Geneva. The background paper is available at *www.ohchr.org/Documents/Issues/Detention/BPConsultation2014.pdf*.

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Preliminary Concerns Regarding Methodology and Scope

Before commenting on the Working Group's preliminary draft principles, we would offer the following general comments ….

Methodology. …Bearing in mind that the particular means of domestic implementation has been left to the domestic law and processes of each State, the United States appreciates the high level of generality reflected in the Working Group's draft.

Recommendation: …[I]t would be useful for the Working Group to provide a set of basic principles and guidelines that reflects the actual practice of States in implementing these rights domestically, where it can be established that such State practice is consistent and commonly accepted by all States. It would be less helpful, and likely counter-productive to reaching consensus among States, for the Working Group to draw upon non-binding observations, recommendations and deliberations of treaty bodies and of the Working Group itself, many of which are highlighted in the Working Group's documentation thus far.

Territorial Scope. References have been made to the application of rights related to deprivation of liberty, particularly under ICCPR Article 9, in relation to detentions occurring outside the territory of a State. The U.S. position is well-known concerning the territorial scope of ICCPR obligations, and by extension corresponding rights set forth in the Universal Declaration of Human Rights. The long-held U.S. position is that the ICCPR applies only to individuals who are *both* within the territory of a State Party *and* within that State Party's jurisdiction. Universality in the recognition of these rights should not be confused with the territorial application by States. Differing views among States Parties and within the international community will not be resolved in the context of basic principles and guidelines, and silence will only complicate drafting of each principle. *See* Observations of the United States of America on the Human Rights Committee's Draft General Comment 35, June 10, 2014 (hereinafter "U.S. Observations on Draft General Comment 35"), and previous U.S. Observations cited therein.[*]

Recommendation: The best approach to treat differing views of States Parties on the scope of the ICCPR would be to restate the agreed language contained in ICCPR Article 2(1), which refers to "all individuals within [a State's] territory and subject to its jurisdiction."

The Law of Armed Conflict. In all situations of armed conflict, the United States is deeply committed to complying with its obligations under the law of armed conflict (also referred to as international humanitarian law or the law of war), and all other applicable international and domestic law. In this regard, it is important to clarify that the United States has not stated that the Covenant ceases to apply in wartime. Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application. However, the United States does not agree with the analysis or conclusions set forth in several paragraphs of the Working Group's Report regarding the applicability of Article 9 in situations of armed conflict,

[*] Editor's note: the U.S. observations on Draft General Comment 35 are discussed in section A.2.b, *supra*.

for the reasons set forth in the U.S. Observations to Draft General Comment 35. In particular, although the United States acknowledges that difficult questions arise regarding the applicability of international human rights law in situations of armed conflict, the Working Group's analysis does not accord sufficient weight to the well-established principle that international humanitarian law, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.

It is noteworthy that the Working Group report refers to the Commentary of the International Committee of the Red Cross, which recognizes that Article 75, paragraph 4 of Additional Protocol I to the Geneva Conventions of 1949 reproduces most of the fair trial guarantees provided for in international human rights instruments. Although the United States is not a Party to Additional Protocol I, we have stated that Article 75 sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, and thus is important to the international legal framework. Accordingly, the United States has affirmed that we will choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual detained in an international armed conflict, and expect all other nations to adhere to these principles as well. The Working Group report omits mention, however, that Article 75 does not include a right to challenge the legality of detention under the law of war. Rather, as the Commentary to paragraph 4 of Article 75 indicates, paragraph 4 is intended to ensure certain fundamental procedural guarantees to individuals in the power of a Party to the conflict who do not benefit from more favorable treatment under the 1949 Conventions or Protocol I and have been charged and convicted with a criminal offense related to the armed conflict. *See* ICRC Commentary para. 3081.

Recommendation: The Working Group should acknowledge that difficult questions arise regarding the applicability of international human rights law in situations of armed conflict, and that the well-established principle that international humanitarian law, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.

Derogation. The Working Group relies on its Deliberation No. 9 issued in 2012 stating that the prohibition against arbitrary detention and the right of anyone detained to challenge the legality of detention are non-derogable under both treaty law and customary international law, also citing the views of other human rights mechanisms, including the Human Rights Committee. The United States does not agree with this conclusion for the reasons set forth in the U.S. Observations to Draft General Comment 35. The United States shares the Working Group's objective of discouraging derogation of ICCPR rights to the extent possible, but believes that the text of ICCPR Article 4, and specifically the omission of Article 9 from the list of articles deemed non-derogable in Article 4(2), is sufficiently clear and should not be the subject of further elaboration in any basic principle or guideline on remedies and procedures, as envisioned by the Human Rights Council. …

Recommendation: The Working Group should refrain from stating categorically that Article 9 is non-derogable and should recognize that international humanitarian law provides the *lex specialis* in non-international armed conflicts as well as international armed conflicts….

Preliminary United States Comments on Draft Principles

A. GENERAL PRINCIPLES

Draft Principle 1. Liberty…

USG Comment: We recommend that this principle also reference arbitrary detention. It is not clear why this principle would only focus on the unlawful prong of Article 9(1)

without also addressing arbitrary detention. Arbitrary detention is generally unlawful in most legal systems.

Draft Principle 2. Universality…

USG Comment: As discussed above, the use of the term universality should not be confused with the territorial scope of these rights or expand the obligation of States in granting habeas relief beyond actions by governmental authorities. A better approach would be to say: "Any individual within a State's territory and subject to its jurisdiction who is deprived of liberty by or on behalf of a governmental authority at any level within that State has the right to bring proceedings before court to challenge the lawfulness of the deprivation of liberty." In reference to "all forms of deprivation of liberty," it is important to differentiate between conduct by state actors and non-state actors and to also bear in mind that there are inevitable differences in domestic legal frameworks, in terms of how States regulate decisions to detain, conditions of detention (such as solitary confinement or restrain devices), and alternatives to custody, such as monitoring devices. Consensus may prove difficult if such sweeping terms are used in basic principles that should be common to all States. That said, the United States generally agrees that the right under Article 9(4) to challenge the legality of detention through *habeas corpus* proceedings before a court or through other means applies to any form of detention by official action or pursuant to official authorization with the proviso that any such detention occurs within the scope of application of the ICCPR.

Draft Principle 3. Codification…

USG Comment: The United States agrees, consistent with ICCPR Article 9, that any deprivation of liberty must be on grounds established by law and in accordance with procedures established by law and that this would require the existence of laws and procedure in order to challenge the deprivation of liberty. This does not, however require codification. Rather ICCPR Article 2(2) only requires States to take the necessary steps to give effect to the rights recognized in the Covenant, where such laws or measures do not already exist. We appreciate that this draft principle is framed as a recommendation rather than a requirement. A better approach, however, would be to "encourage" States to codify these rights to the extent they do not already exist in domestic law or practice.

Draft Principle 4. Non-derogability…

USG Comment: Derogation is not an appropriate subject for basic principles and guidelines on remedies and procedures. The arguments advanced by the Working Group for restricting a State's derogation authority with respect to Article 9 go beyond the plain text of Article 4, are not generally agreed upon, and will not be resolved through a process intended to develop basic principles commonly shared by States.

B. PRINCIPLES RELATING TO COURT PROCEEDINGS

Draft Principle 5. The 'court': … should be a court of law. …

USG Comment: This principle is not grounded in the text of Article 9(4), which requires that a court reach its decisions "without delay" but is silent on how quickly any ordered release must occur. It also fails to take into account practical considerations that may arise in arranging the release of an individual, including when such release may require diplomatic coordination to facilitate repatriation. It also fails to take account that detention determined to be unlawful may not continue to be unlawful where certain

conditions are met, for example, a new trial correcting flaws in a prior proceeding. Such "conditional release" orders would not involve immediate release, nor would immediate release necessarily be appropriate.

Draft Principle 6. Ability to bring proceedings before the court…

USG Comment: The phrasing of this principle is unclear. Article 9 is explicit that the right to challenge the lawfulness of detention belongs to the person deprived of liberty. This draft appears to suggest that other persons may bring actions to challenge a detention's lawfulness as well. Although individual States, including the United States, may offer mechanisms for others to bring a challenge on behalf of a detained person who is incapacitated or otherwise unable to act on his or her own behalf, there are generally domestic law limitations on who would have standing to do so and whether any limitations on the detainee's ability to contact such individuals would be appropriate, limitations that are not governed by international law. If this is the intended focus of this principle, it would be better framed as a recommended best practice common among States and should delineate the permissible circumstances and relationship between the person bringing the action and the person detained for the consideration of other States.

Draft Principle 7. Multiple challenges…

USG Comment: This is another area that is not required by international law and best left to the individual legal systems of States to address. Not every lawful ground for deprivation of liberty requires multiple or periodic review, particularly where the circumstances have not or are unlikely to change. The United States does not agree that Article 9 would require multiple or periodic review for every type of deprivation of liberty. Entitlement to pursue a succession of *habeas* proceedings after "an appropriate period of time" finds no support in the text of Article 9(4) and would at best be a recommendation better left for domestic legal processes to address. Passage of time alone, without any change in circumstances, would not, in itself, justify re-litigation of the legal basis for detention. ICCPR Article 9 leaves to individual States Parties to decide the appropriate legal framework within their own constitutions and laws to give effect to and implement these rights. This is not to say that duration limitations, individualized determinations, and reassessments over time would not be reasonable and appropriate recommendations for States Parties to consider, to the extent they are legally available and appropriate in individual circumstances. But these would be better cast as recommended best practices rather than basic principles applicable in all circumstances.

Draft Principle 8. Appearance before the court…

USG Comment: The United States does not believe that this principle is grounded in the ICCPR text insofar as it mandates that an individual be brought physically before a court. Article 9(4) does not contain such an explicit requirement. In the course of *habeas* proceedings, a court in the United States with jurisdiction may order the actual or virtual presence of the individual, where appropriate. A better approach may be to frame this principle as a recommendation rather than a legal requirement.

Draft Principle 9. Standard of review…

USG Comment: The U.S. would not agree that a court's ability to review the factual basis of the lawfulness of detention would be unconstrained, or that the only limit on such review would be based on the reasonableness of a prior determination. In the United States there are a variety of possible constraints on a court's review of the factual basis of detention, including statutory limits in the criminal context, evidentiary

presumptions, and constraints imposed by the use of classified or privileged information. For example, when a detained immigrant challenges his or her detention in federal district court, that court may only review the lawfulness of present detention, not the underlying basis for the immigrant's removal order. Similarly, in the criminal context, courts do not have the unfettered ability to review the factual basis of a detained criminal's conviction.

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C. PRINCIPLES RELATING TO REMEDIES

Draft Principle 11. Release and compensation…

USG Comment: The United States suggests deleting "unconditional" for the reasons stated with respect to Draft Principle 5, as there may be circumstances in which some form of conditional release may be lawful and appropriate. If a court finds an unlawful deprivation of liberty, it may impose certain conditions for release, such as supervision or monitoring, or may remand the case to an administrative court for further review. This is commonly the case in immigration detention cases. Further, the United States understands the enforceable right to compensation within the scope of application of the ICCPR to mean the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

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3. Extrajudicial, Summary, or Arbitrary Executions

At the 69th session of the UN General Assembly, the United States joined consensus, after several years of abstaining in the past, on the resolution on extrajudicial, summary, or arbitrary executions. U.N. Doc. A/RES/69/182. The resolution was adopted on December 18, 2014. The U.S. explanation of position on the resolution follows.

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We wish to join the sponsors of the text in condemning extrajudicial, summary or arbitrary executions against all persons, irrespective of their status. We also thank the cosponsors for their flexibility in accommodating some of our concerns regarding distinctions between international human rights law and international humanitarian law that have previously caused us to abstain on this resolution. …[T]here are not one, but two bodies of law that regulate unlawful killings of individuals by governments—international human rights law and international humanitarian law. As noted by the resolution, these two bodies of law are complementary and mutually reinforce

one other and set forth two legal frameworks on this issue. We also recognize that determining what international law rules apply to any particular government action during an armed conflict is highly fact-specific. However, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are primarily found in international humanitarian law and we read this text on that basis.

We of course agree that all States have obligations to protect human rights and fundamental freedoms and should take effective action to combat all extrajudicial killings and punish the perpetrators and investigate suspected cases in accordance with international obligations. We also note that the text discusses the Standard Minimum Rules, which are non-binding and apply only to penal institutions. We agree that countries such as ours, which have capital punishment, should abide by their international obligations, including those related to due process, fair trial, and use of such punishment for only the most serious of crimes. We strongly agree with the language condemning ESAs targeting members of vulnerable groups, particularly members of the LGBT community and those targeted on account of their gender identity.

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4. Integrity of the judicial system

At the 25th session of the Human Rights Council, the United States voted against a Russian Federation-sponsored resolution entitled "Integrity of the Judicial System." U.N. Doc. A/HRC/RES/25/4. The resolution was adopted on March 27, 2014 by a vote of 27 in favor, 1 against, and 19 abstentions. Deputy Assistant Secretary Schriefer delivered the U.S. explanation of vote, excerpted below and available at:

https://geneva.usmission.gov/2014/03/27/eov-on-resolution-integrity-of-the-judicial-system/.

* * * *

The United States remains fully committed to the goals of promoting and strengthening the integrity of the judicial system in every nation. Within the United States, we have long had an independent judiciary that is supported by laws, regulations, and ethical codes that work in concert to ensure the judiciary remains impartial, competent, and not subject to improper influences. Moreover, our military tribunals follow established judicial procedures and applicable international law and are integrated into the civilian judicial system through the opportunity for appeal and judicial review at the highest levels of our independent judiciary.

We must highlight several major concerns with respect to the text of the resolution. Despite the resolution's overarching goal of promoting the integrity of the judicial system throughout the world, sensible requests to expand the focus of the text beyond military tribunals to the broader issues related to judicial independence and separation of powers have been refused. These requests included small wording revisions proposed by the United States and others to correct problematic language describing the relationship between military and civilian tribunals. The refusal to seriously consider these revisions calls into question whether the lead

sponsor was negotiating in good faith. Furthermore, despite many states' concerns about the program budget implications, the resolution mandates a large, expensive consultation that will cost the UN more than $290,000, even though it is unnecessary and does not address the interests of many states because of its very narrow focus. After first offering to fund the cost of the consultation, the lead sponsor has rescinded this offer and refuses to consider less expensive alternatives.

Finally, we must note that we are surprised to see the main sponsor a resolution touting the rule of law immediately following its blatant violation of international law and of Ukrainian sovereignty and territorial integrity.

For these reasons we cannot support this resolution. We will call a vote, and vote no.

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J. FREEDOM OF ASSEMBLY AND ASSOCIATION

At the 25th session of the HRC, Deputy Assistant Secretary Schriefer delivered a statement on the resolution on the protection of human rights in the context of peaceful protest. U.N. Doc. A/HRC/RES/25/38. Ms. Schriefer's statement is excerpted below and available at *https://geneva.usmission.gov/2014/03/28/the-right-to-protest-peacefully-is-an-essential-enabler-of-other-rights-and-freedoms/*.

* * * *

United States strongly supports this resolution L. 20 on peaceful protests. We will vote yes on the resolution and will vote no on the amendments. We ask others to join us in this vote.

As the lead sponsor of the annual resolution on Freedom of Association and Assembly, which is a consensus resolution, we view the ability to protest peacefully as an essential enabler of other rights and freedoms. Peaceful protests are often an important form of political expression—a form which is also sometimes politically divisive.

The amendments proposed today would restrict the ability to make such political expression and could have serious negative consequences for the enjoyment of these fundamental freedoms.

For example, the most insidious of the proposed amendments is L 50, which would restrict the ability of those to conduct peaceful protests for reasons of National Security.

National security is too often interpreted overly broadly and is used as a pretext to restrict protests which are essentially political in nature. …

… We find such restrictions incompatible with support for freedom of assembly, freedom of expression and other rights protected by the International Covenant on Civil and Political Rights and the Universal Declaration.

As a result, the United States will vote against these amendments and in favor of the resolution on peaceful protests. We urge others to join us.

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K. FREEDOM OF EXPRESSION

1. General

a. Protection of Journalists

At a panel discussion on safety of journalists at the 26th session of the HRC, on June 11, 2014, Ambassador Harper delivered the U.S. intervention, including the following:

> The United States thanks High Commissioner Navi Pillay and the panel members for their comments today. It is critically important to ensure full respect for the rights to freedom of opinion and expression, as well as the other human rights, of all journalists and other media professionals. We agree in particular with the need for states to make firm political commitments to protect those fundamental freedoms, as well as take clear and effective legislative measures to prevent threats and attacks against journalists, and accountability in all cases of attack. While we do not agree with all of the legal analysis in the report, including the characterization of freedom of expression as a collective right, we value the attention the report draws to the importance of protecting journalists.
>
> The United States raises media freedom issues in our dealings with governments at all levels. We push for the release of imprisoned journalists and call for justice when media professionals are killed with impunity. We also have an annual Free the Press campaign that coincides with World Press Freedom Day to highlight particular cases of imprisoned journalists. We provide direct assistance and training to journalists in challenging places, including in conflict areas, and we support independent media in closed societies around the world.

b. Freedom of opinion and expression

On March 27, 2014, at the 25th session of the HRC, the United States introduced a resolution that was adopted by consensus by the Council on "Freedom of opinion and expression," in order to renew the mandate of the special rapporteur on freedom of opinion and expression. U.N. Doc. A/HRC/RES/25/2. Deputy Assistant Secretary Schriefer delivered introductory remarks on the draft resolution, which are excerpted below and available at *https://geneva.usmission.gov/2014/03/27/human-rights-council-adopts-u-s-led-resolution-on-freedom-of-opinion-and-expression/*.

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The United States is pleased to introduce for adoption Resolution L.2/rev.1 on "Freedom of Opinion and Expression: mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression."

This resolution has 72 co-sponsors. As the resolution on this topic adopted by the Council did three years ago, the current resolution would extend the mandate of the Special Rapporteur for another period of three years.

Given the importance of the right to freedom of opinion and expression, the resolution recognizes that the effective exercise of this right is a critical component for the enjoyment of other human rights and fundamental freedoms, and that it constitutes a fundamental pillar of any democratic society.

Welcoming the work of the Special Rapporteur, the resolution urges all States to cooperate with and assist the Special Rapporteur in carrying out this important mandate, including by considering favorably requests for visits and by implementing recommendations.

An amendment to the text, L43, has been tabled by South Africa and others. It is acceptable to us. We thus accept the resolution tabled as L.43 and incorporate it as a revision into the text of the resolution under consideration. Thus the PP3 reads as follows.

Recalling Human Rights Council resolutions 5/1, on the institution-building of the Council, and 5/2 on the code of conduct for special procedures mandate holders of the Council, of 18 June 2007, and stressing that the mandate holder shall discharge his/her duties in accordance with those resolutions and the annexes thereto.

We urge the Council to adopt this resolution extending the mandate of the Special Rapporteur by consensus.

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2. Internet Freedom

On April 28, 2014, Secretary Kerry delivered remarks via video conference at the Freedom Online Coalition Conference held in Tallinn, Estonia. Secretary Kerry's remarks are excerpted below and available at *www.state.gov/secretary/remarks/2014/04/225290.htm*. The members of the Freedom Online Coalition, including the United States, adopted "Recommendations for Freedom Online," or the "Tallinn Agenda," available at *www.freedomonlinecoalition.com/wp-content/uploads/2014/04/FOC-recommendations-consensus.pdf*.

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The fact is that now we face a choice about how we organize ourselves as societies and how we manage this movement of information and control over it and search engines and access. All of these things are critical. And the choice is really a choice between those who demand dignity and respect for rights versus those who are prepared to deny it. The stand that we are now taking for Ukraine, for instance, for Estonia, and for our allies in Central and Eastern Europe, I hope signals which side the United States is on, despite the fact that people have had questions about the policies with respect to access and information on the internet.

But I want to remind you: The stakes in this very different world are as real today in the virtual world as in the visible world, the tangible world. And we need to continue to stand as we have for open markets, for open societies, and for an open internet. And I want to underscore the

word "open" because open and inclusive, with respect to the internet, really matters. It matters that you can interact and debate with people who live in different countries. It matters that you can spread ideas and connect with people, whoever they may be, who want to share those ideas. And it matters that you can blog about an election campaign, organize on Facebook, use Twitter to hold your government accountable. I mean, all of these things make all the difference in today's world. And imagine if I couldn't talk to you today simply because my government had shut down or censored the internet, or your government, or anybody in between was able to get between us in this transmission.

Now, I know it's almost impossible to fathom for those people who live in a free world that that would actually happen. We can sit around with our friends, we debate an issue, and even Google an answer in the course of a dinner conversation to bolster our argument. But here's something important for everybody to think about: All the facts in the world available in real time won't make a whit of difference if people don't have access, if there isn't a guarantee that everybody is able to access that information. And for millions of people today, that is the reality of the challenge that they face.

All you have to do is read the headlines and you can discern an absolutely unmistakable pattern.

The places where we face some of the greatest security challenges today are also the places where governments set up firewalls against basic freedoms online.

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… And when we stand up for freedom of expression anywhere and everywhere that it's threatened, including with our friends and our allies, that makes all the difference in the world. That's why we called on Turkey to unblock its citizens' access to Twitter and remove other barriers to free expression on the internet. There is no question in anybody's mind that this freedom of access is a fundamental kind of right and it is going to be fundamental to people everywhere who are going to demand that because they recognize that through it comes a kind of accountability that you can't have necessarily otherwise.

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So ultimately, what we're really talking about here tonight are two opposing visions. We believe in an open and inclusive internet with input from all and equal access to all. And we believe in giving people a voice from the bottom up. The authoritarian vision sees a free, open, inclusive internet as a threat to state power. So what do these states do? They use their power to threaten the internet, and it's about controlling information and access to it from the top down. For them, it's about creating a fragmented internet that divides us rather than unites us, that minimizes the voice of people and maximizes their ability to cloud the truth.

So my friends, that is absolutely what is at stake here – two different visions, two different futures. And that's why the work of the Freedom Online Coalition is so critical. It's so important. And the question now is: Where do we go from here?

Well, first, we need to affirm the simple truth that we all have a stake in how the internet is governed. Governments do have an important role. We acknowledge that. So do businesses, students, teachers, scientists, civil society leaders. Our principle is clear: If you have an interest

in how the internet works, you get to play a role in how it's governed. That's what global, multi-stakeholder internet governance is all about.

As the Net Mundial conference in Brazil reaffirmed just last week, which you referred to, governments, civil society, academia, and the private sector have to work together to manage the global digital environment. States must also work hand in hand with the private sector to protect and advance international cyber security. We all need to work together on efforts to reduce conflict and defend against cyber attacks on our digital infrastructure or intrusion into our businesses, into our lives.

But let me be clear—as in the physical space, cyber security cannot come at the expense of cyber privacy. And we all know this is a difficult challenge. But I am serious when I tell you that we are committed to discussing it in an absolutely inclusive and transparent manner, both at home and abroad. As President Obama has made clear, just because we can do something doesn't mean that we should do it. And that's why he ordered a thorough review of all our signals intelligence practices. And that's why he then, after examining it and debating it and openly engaging in a conversation about it, which is unlike most countries on the planet, he announced a set of concrete and meaningful reforms, including on electronic surveillance, in a world where we know there are terrorists and others who are seeking to do injury to all of us.

So our reforms are based on principles that we believe are universally applicable. First, rule of law—democracies must act according to clear, legal authorities, and their intelligence agencies must not exceed those authorities. Second, legitimate purpose—democracies should collect and share intelligence only for legitimate national security reasons and never to suppress or burden criticism or dissent. Third, oversight—judicial, legislative or other bodies such as independent inspectors general play a key role in ensuring that these activities fall within legal bounds. And finally, transparency—the principles governing such activities need to be understood so that free people can debate them and play their part in shaping these choices. And we believe these principles can positively help us to distinguish the legitimate practices of states governed by the rule of law from the legitimate practices of states that actually use surveillance to repress their people. And while I expect you to hold the United States to the standards that I've outlined, I also hope that you won't let the world forget the places where those who hold their government to standards go to jail rather than win prizes.

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3. Privacy

a. U.S. Submission to OHCHR on Right to Privacy in the Digital Age

As discussed in *Digest 2013* at 199-200, the United States has supported resolutions in the UN General Assembly reaffirming that privacy rights and the right to freedom of expression extend to on-line activity. At the end of 2013, in resolution 68/167, the General Assembly requested that the High Commissioner for Human Rights prepare a report on the right to privacy in the digital age. The United States responded to a February 2014 request from the Office of the High Commissioner for Human Rights ("OHCHR") for input from member states on privacy in the digital age. Excerpts follow

from the U.S. submission on the right to privacy in the digital age. The submission in its entirety is available at *www.ohchr.org/Documents/Issues/Privacy/United%20States.pdf*.

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While recent unauthorized disclosures and other allegations of the United States' intelligence activities have garnered attention and influenced the debate on privacy in the digital age, the United States has long recognized that unchecked surveillance programs can be abused, and that privacy and civil liberties need to be integral considerations for all law enforcement and intelligence practices. It is also essential to acknowledge the necessary role that intelligence and law enforcement activities play in protecting our national security and the security of our partners and allies and furthering the investigation and prosecution of criminal activity. As technology has advanced, lawful and appropriate government access to certain electronic communications has become more—not less—important to furthering those objectives. We recognize that a rule of law framework with transparent laws and effective and meaningful oversight (which can take different forms) is essential to ensure that electronic surveillance authorities are not abused, such as by being undertaken for the purpose of suppressing criticism or dissent or disadvantaging people based on their ethnicity, race, gender, or religion. Efforts to increase transparency about electronic surveillance activities—without unduly constraining important law enforcement and intelligence activities—will help ensure respect for privacy and civil liberties.

The right to protection of the law from arbitrary or unlawful interference with privacy is enshrined in the International Covenant on Civil and Political Rights (ICCPR) and protected under the U.S. Constitution and U.S. laws. The OHCHR's survey and UN General Assembly Resolution 68/167 use the shorthand "right to privacy." Article 17 of the ICCPR states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy..." and that "[e]veryone has the right to the protection of the law against such interference..." We read the use of "right to privacy," or "privacy rights," to be describing what is laid out in Article 17 of the ICCPR, which is not an absolute right to privacy but rather is a right to protection against unlawful or arbitrary interferences with privacy. The United States understands this requirement to mean that, to be consistent with Article 17, an interference with privacy must be in accordance with transparent laws and must not be arbitrary. Some commentators have indicated that aninterference under Article 17 has to be essential or necessary and be the least intrusive means to achieve a legitimate objective. Such a test goes beyond the text of Article 17, which only prohibits unlawful or arbitrary interferences, and is not supported by the travaux of the treaty. Because the ICCPR applies to governmental action, Article 17 applies to state actors, not to non-state actors. However, recognizing the impact that companies and other non-state actors can have on one's privacy, particularly in the digital age, we have included information about protections against non-state interferences with privacy in this response. The United States also notes its longstanding position that the ICCPR only applies to individuals who are both within the territory of the State Party and within that State Party's jurisdiction in line with Article 2(1) of the ICCPR.

With this understanding of the parameters of Article 17, we will first discuss our framework regarding electronic methods of criminal investigation, then discuss protections in

place with regards to electronic surveillance for intelligence purposes, and finally note policies and statutes that protect against non-state actor interference with privacy.

The United States notes that protection from unlawful or arbitrary interference with privacy is grounded in the Fourth Amendment of the U.S. Constitution and is also implemented by federal statutes. In addition, state and local laws and regulations provide myriad protections in this regard and states have rigorous processes in place to ensure that investigative activities are undertaken consistent with the Constitution.

The Fourth Amendment protects persons from unreasonable searches and seizures by the Government at both state and federal levels and protects the privacy of correspondence. The U.S. Supreme Court has defined search under the Fourth Amendment to be a government infringement of a person's reasonable expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 240-49 (1978). A person's reasonable expectation of privacy is the linchpin of the Fourth Amendment. Where there exists a reasonable expectation of privacy, the Constitution generally does not permit government violation of that reasonable expectation without probable cause to believe that a crime is occurring or that evidence of crime will be found. Furthermore, except in limited, well-defined circumstances, officers must obtain a search warrant, which must be authorized by a neutral and detached magistrate, before they can conduct a search or seizure that impinges upon a reasonable expectation of privacy. When officers seek a warrant, the Fourth Amendment requires that they must make a showing of probable cause before a neutral and detached magistrate, not an agent or arm of the investigating authority.

With regard to governmental use of electronic methods of criminal investigation, there are a number of specific statutory protections in place to avoid arbitrary interference with privacy. At the federal level, the U.S. Congress as early as 1934 recognized that there could be substantial privacy infringement through use of electronic devices to track the movements of persons or things and to intercept private communications. Such devices now include wiretaps and datataps (accessing the content of voice or data communications in real time), pen registers, and trap and trace devices (which can, among other things, record telephone numbers called from a particular phone and the numbers of telephones from which calls are made to a particular phone, respectively), and surreptitiously installed microphones. Note that there is a difference in constitutional and statutory protections afforded to "content" that is collected using devices, such as wiretaps, as opposed to non-content that is collected using devices, such as pen registers.

In 1968 Congress enacted the Wiretap Act, which has been subsequently modified to accommodate technological advances, to regulate the use of electronic audio listening. 18 U.S.C. sections 2510-21 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968-Wiretapping and Electronic Surveillance, Pub. L. No. 90-351, 82 Stat. 212). The Wiretap Act bans the use of certain electronic techniques by private citizens and requires government officials to obtain a court order before utilizing electronic techniques, such as wiretaps. Under the Wiretap Act, intercepting the content of communications is generally a two-step process. First, federal law enforcement must obtain internal approval to seek a court order authorizing interception from specified senior officials within the DOJ; state and local law enforcement must obtain similar approval from senior state or local prosecuting officials.

Once they have obtained internal approval, federal agents must then apply for and obtain an order from a federal court to intercept wire, oral, or electronic communications unless there is an emergency involving immediate danger of death or serious bodily injury to any person or when conspiratorial activities threaten national security interests or are characteristic of organized crime. In such emergency situations, law enforcement must obtain the approval of

high-level officials within the DOJ, or, for state and local governments, a high-level prosecutor, before beginning emergency interception. Furthermore, the government must obtain a court order authorizing and approving the emergency interception within 48 hours after interception occurs or begins to occur.

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Congress enacted the Electronic Communications Privacy Act (ECPA) in 1986 to address, among other matters, (i) access to stored wire and electronic communications and transactional records (the Wiretap Act applied to telephone calls) and (ii) the use of pen registers and trap and trace devices (See Titles II and III of ECPA, Pub. L. No. 99-508, 100 Stat. 1848). Title II of ECPA generally prohibits unauthorized access to or disclosure of stored wire and electronic communications, absent certain statutory exceptions. Title II of ECPA also provides for legal process that law enforcement must use to compel the production of such stored communications and transactional records. The pen register and trap and trace provisions of ECPA prohibit the installation or use of a pen register or trap or trace device, except as provided in the statute. Except in narrow, specified emergencies, law enforcement may not install a pen register or a trap and trace device without a prior court order.

After the September 2001 terrorist attacks, Congress passed the USA PATRIOT Act, which did several things that affected electronic methods. It updated federal anti-terrorism and criminal laws to bring them up to date with the modern technologies actually used by terrorists. It also provided terrorism investigators with important tools that were previously available in organized crime and drug trafficking investigations. …

With regards to electronic surveillance for intelligence purposes, in furtherance of our core values, U.S. intelligence collection programs and activities are subject to stringent and multilayered oversight mechanisms. We note at the outset that we understand that, in the wake of the unauthorized disclosures and other allegations of U.S. intelligence surveillance activities, some have raised human rights concerns, including privacy concerns, in the United States and in other countries. It is a bedrock concept that U.S. intelligence collection activities are authorized pursuant to a rule of law framework. Such activities occur pursuant to the U.S. Constitution and, within that democratic constitutional structure, a variety of statutes and other authorities, such as Executive Orders. It is essential to reiterate that all of the collection activities of U.S. intelligence agencies are carried out pursuant to a valid foreign intelligence or counterintelligence purpose; as a democratic nation, this is a requirement we take very seriously. Our intelligence priorities are set annually through an interagency process through which the leaders of our nation tell the intelligence community what information they need in the service of the nation, its citizens, and its interests. Further, the United States does not collect intelligence to suppress dissent, to provide a competitive advantage to U.S. companies or commercial sectors commercially, or to disadvantage any person on the basis of categories like ethnicity, race, gender, sexual orientation, or religious belief.

First, it is important to note that certain intelligence collection activities have long been overseen by the Foreign Intelligence Surveillance Court (FISC), as well as by Congress and oversight entities in the Executive Branch in order to ensure such activities meet applicable constitutional requirements and, accordingly, that privacy and civil liberties concerns are addressed. Intelligence collection overseas is also regulated and is carried out to meet foreign intelligence and counterintelligence objectives and not indiscriminately invade the privacy of foreign national. The 1978 Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 et seq.,

regulates, among other things, electronic surveillance and physical searches as defined by the statute. Titles I and III of FISA allow DOJ to obtain orders from the FISC if, inter alia, there is probable cause to believe that the target of the electronic surveillance or the physical search is a foreign power or an agent of a foreign power. 50 U.S.C. 1805 (a)(2)(A) and 1823(a)(3)(A). FISA also permits other types of surveillance activities, such as the installation and use of pen register and trap and trace devices. 50 U.S.C. 1842. FISA also permits the Attorney General to authorize the emergency employment of electronic surveillance and/or physical search if the Attorney General reasonably determines that an emergency situation exists, and he/she subsequently makes an application to the FISC within seven (7) days of the emergency authorization. 50 U.S.C. 1805(e) and 1824(e)(1). By law, FlSA and chapters 119, 121, and 206 of title 18 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and titles II and III of ECPA) are the exclusive means by which electronic surveillance, as defined in that act, and the interception of domestic wire, and oral or electronic communications, may be conducted, 50 U.S.C. 1809.

As noted, the FISC plays an important role in overseeing certain government collection activities conducted pursuant to FISA. It not only authorizes these activities, but it also plays a continuing and active role in ensuring that they are carried out appropriately. Moreover, if at any time the government discovers that an authority or approval granted by the FISC has been implemented in a manner that did not comply with the Court's authorization or approval, or with applicable law, the government must immediately notify the FISC and appropriate corrective measures must be taken. The FISC consists of 11 independent federal judges who must ensure that these critical foreign intelligence surveillance activities are authorized consistent with the rule of law. This court uses an ex parte process similar to the one that the government has long followed in seeking permission from other federal courts in ordinary criminal investigations to engage in wiretapping, pen register, and trap and trace surveillance, or to conduct searches. This longstanding process has been codified for decades in statutes and has been upheld repeatedly by U.S. courts.

It is important to note that electronic surveillance initially authorized by the FISC may later be subject to an adversarial process. For example, should the government use information obtained from electronic surveillance authorized under FISA against a defendant in a criminal prosecution, and if the defendant was either the target of the electronic surveillance or a person whose communications or activities were subject to electronic surveillance, then the government generally must notify both the defendant and the court of that fact. The defendant can then challenge the legality of the surveillance. See 50 U.S.C. § 1806(c)-(h). In this context, numerous judicial decisions have upheld the legality of surveillances authorized by the FISC.

In addition to this legal framework under FISA and the FISC, the Office of the Director of National Intelligence (DNI) has a dedicated Civil Liberties Protection Officer who actively oversees intelligence programs. Independent agency Inspectors General also review intelligence operations. The National Security Agency (NSA), moreover, has an internal compliance officer, whose job includes developing processes that all NSA personnel must follow to ensure that NSA is complying with the law, and its own Civil Liberties Protection Officer. The U.S. intelligence community is required to report to Congress on its programs and activities, where there are vigorous debates on these issues.

As is now well known, the signals intelligence programs disclosed and declassified last year are conducted with the approval—and under the supervision—of the independent FISC. This fact notwithstanding, the Obama Administration undertook a broad-ranging and unprecedented review of U.S. signals intelligence programs in the latter half of 2013 and early

2014. The review process drew on input from key stakeholders, including the President's Review Group on Intelligence and Communications Technologies (established by the President in August 2013), Congress, the tech community, civil society, foreign partners, the Privacy and Civil Liberties Oversight Board, and others. The review examined how, in light of new and changing technologies, we can use our intelligence capabilities in a way that optimally protects our national security, while respecting privacy and civil liberties, maintaining the public trust, supporting our foreign policy, and reducing the risk of unauthorized disclosures. In January 2014, President Obama announced several reforms and issued a Presidential Policy Directive on signals intelligence activities.

To that end, the United States is undertaking a series of concrete and substantial reforms to increase transparency of our signals intelligence collection programs, and to implement additional protections for individuals' privacy regardless of nationality. As stated in Presidential Policy Directive 28, appropriate safeguards shall apply to personal information of all individuals, regardless of nationality, collected from signals intelligence activities. To that end, the President directed that the personal information of non-U.S. persons collected through signals intelligence shall be retained or disseminated only if the retention or dissemination of comparable information of U.S. persons would be permissible. Signals intelligence collected in bulk may only be used for a specified set of purposes, which the DNI has made public.

In January, 2014, the President announced that he was "ordering a transition" that will end the "bulk metadata program as it currently exists, and establish a new mechanism that preserves the capabilities we need without the government holding this bulk metadata." The President announced two immediate changes to that program. First, under the program, the government "will only pursue phone calls that are two steps," rather than the previous three steps, removed from a selector (query term) associated with a terrorist organization. Second, during this transition period, queries can be made "only after a judicial finding or in case of a true emergency." The President also announced that he had instructed the Intelligence Community and the Attorney General to "develop options for a new approach that can match the capabilities and fill the gaps that the Section 215 program was designed to address without the government holding this metadata itself" and to report to the President by March 28, 2014. On March 27, 2014, the President further announced that, having considered the options presented to him by the Intelligence Community and the Attorney General, he will seek legislation to replace the Section 215 bulk telephony-metadata program. Under that replacement approach announced by the President, telephone companies would retain the bulk telephony metadata for the length of time they independently do today, and the government would obtain query results from that data pursuant to individual orders from the FISC. The President also reiterated "the importance of maintaining the capabilities" of the Section 215 program, and announced that the government would seek reauthorization of the program (with the President's two changes in January) by the FISC because the necessary legislation for the change announced in March is not yet in place.

The United States has in place a number of other statutes that protect privacy interests regarding collection of information in other contexts. The Privacy Act incorporates all of the Fair Information Practice Principles (FIPPs) that have long been a cornerstone of international instruments relating to informational privacy, including but not limited to the Organization for Economic Co-operation and Development (OECD) Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data. The Privacy Act requires federal agencies to provide public notice of its information collections, including the purpose and intended uses of those collections, and prevents them from using or disclosing information collected for one

purpose for an incompatible purpose, unless excepted by the Act. It also requires government agencies, subject to certain exemptions, to "maintain in [their] records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order of the President." 5 U.S.C. 552a (e)(1). The Computer Matching and Privacy Protection Act of 1988 specifically addresses the use by federal agencies of computer data. The Act regulates the computer matching of federal data for federal benefits eligibility or recouping delinquent debts. The government may not take adverse action based on such computer checks without giving individuals an opportunity to respond.

In addition, there are other U.S. laws that govern aspects of privacy. The E-Government Act of 2002 requires federal government agencies to conduct privacy impact assessments for electronic information systems and collections and, in general, make them publicly available. The Homeland Security Act of 2002 requires the appointment of a Chief Privacy Officer at the Department of Homeland Security. The Implementing Recommendations of the 9/11 Commission Act of 2007 requires similar appointments at other federal agencies. Additional guidance to federal agencies concerning implementation of privacy regulation comes from the Office of Management and Budget (OMB).

The United States also has a variety of statutes and policies in place that protect individuals' privacy with respect to non-state actors. In 2012, the White House issued a blueprint for privacy in the information age to give consumers clear guidance on what they should expect from those who handle their personal information, and set expectations for companies that use personal data. The Privacy Blueprint contains four key elements: 1) a Consumer Privacy Bill of Rights based on the FIPPs; 2) a call for government-convened multistakeholder processes to apply the FIPPs to particular business contexts; 3) support for effective enforcement by the Federal Trade Commission (FTC) and State Attorneys General; and 4) a commitment to the international interoperability of commercial privacy regimes.

The Blueprint recognizes that the existing consumer data privacy framework in the United States is flexible and effectively addresses many consumer data privacy challenges in the digital age. This framework consists of sectoral federal privacy laws, state laws that enhance the federal regime, industry best practices, vigorous enforcement by the FTC, executive agencies, and state prosecutors, and a network of chief privacy officers and other privacy professionals who develop privacy practices that adapt to changes in technology and business models and create a growing culture of privacy awareness within companies. However, federal data privacy statutes apply only to particular types of data (such as electronic communications) or specific sectors, such as healthcare, education, communications, and financial services or, in the case of online data collection, children. Because some personal data collected from individuals is not subject to comprehensive federal statutory protection, the Administration set forth the Consumer Privacy Bill of Rights to promote more consistent responses to privacy concerns across the wide range of environments in which individuals have access to networked technologies and in which a broad array of companies collect and use personal data. The Consumer Privacy Bill of Rights states clear baseline protections for consumers, providing for: 1) individual control; 2) transparency; 3) respect for context; 4) security; 5) access and accuracy; 6) focused collection; and 7) accountability. The document is based on the time-honored FIPPs, but applies the principles to the interactive and highly networked world we live in today, adapting them to the dynamic environment of the commercial Internet. The White House called for stakeholders from industry, civil society, and the technical community to apply the Consumer Privacy Bill of Rights to specific business contexts through voluntary, enforceable codes of conduct. Such

practices and frameworks have played a crucial role in advancing consumers' interests, particularly when they include robust accountability mechanisms and are subject to FTC enforcement.

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b. U.S. Intervention at HRC Panel on Privacy in the Digital Age

On Friday, September 12, 2014, David Sullivan delivered the intervention of the United States at the panel discussion convened at the 27th session of the HRC on the "Promotion and Protection of the Right to Privacy in the Digital Age." The U.S. intervention is excerpted below and available at *https://geneva.usmission.gov/2014/09/12/promotion-and-protection-of-the-right-to-privacy/*.

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We believe it is important to keep several principles in mind as we engage in these discussions. First, the foundation for this discussion must be the text of Article 17 of the ICCPR. The United States encourages discussion of those limiting principles expressly stated in Article 17—namely, legality and arbitrariness. With this in mind, we would be interested in the panelists' views on effective oversight of surveillance programs; on how to encourage transparency while recognizing the need for secrecy in some instances; and on the legitimate reasons for collecting and sharing information. We also welcome discussion of the meaningful distinctions and implications for privacy between collection of data and use of data, as well as between use of meta-data versus content, a topic which others have already touched on today.

Second, we agree that the privacy concerns of all individuals should be taken into consideration, regardless of nationality. However, many nations make legal distinctions between nationals and non-nationals in a variety of circumstances. When it comes to signals intelligence, we are exploring how to apply privacy protections enjoyed by U.S. persons to non-U.S. persons abroad. It is important to note that we are considering these steps as a matter of policy and that we have significant concerns regarding the expansive views expressed in the Report on the extraterritorial application of the ICCPR.

Finally, it is important to keep in mind the principle, affirmed by the Human Rights Council, that the rights that people have offline must also be protected online. Although technological developments deserve particular attention, discussions of privacy have implications both online and offline. Therefore, ongoing work on privacy should take account of the various ways it is protected and infringed upon around the world, not simply in the context of surveillance.

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c. UN General Assembly Resolution on Privacy in the Digital Age

On December 18, 2014, the UN General Assembly adopted by consensus a resolution on the right to privacy in the digital age. U.N. Doc. A/RES/69/166. The U.S. explanation of position on the draft resolution was delivered by Kelly L. Razzouk, Senior Human Rights Adviser, on November 25, 2014. Ms. Razzouk's statement is excerpted below and available at *http://usun.state.gov/briefing/statements/234418.htm*.

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We join consensus on today's resolution because the human rights it reaffirms—privacy rights and the right to freedom of expression, peaceful assembly, and association including their exercise online—as set forth in the International Covenant on Civil and Political Rights (the ICCPR) and protected under the U.S. Constitution and U.S. laws—are pillars of democracy here in the United States and globally.

The resolution recognizes the harassment and human rights abuses that human rights defenders face including through arbitrary interference with privacy. It is imperative that these individuals can use the Internet freely to promote human rights worldwide. We are pleased that further discussion on this topic will include the arbitrary use of surveillance to intimidate, harass and at times arrest individuals who are lawfully exercising their human rights. Communications should not be monitored in order to suppress criticism or dissent, or to put people at a disadvantage based on their ethnicity, race, gender, sexual orientation, or religion. We also welcome the resolution's recognition that concerns about security may justify the gathering of certain sensitive information, in a manner consistent with international human rights obligations.

We reaffirm our explanation of position that was provided when we joined consensus on this text last year. We also reaffirm those human rights instruments that we have long affirmed, in particular the ICCPR. We understand this resolution to be consistent with longstanding U.S. views regarding the ICCPR, including Articles 2, 17, and 19, and interpret it accordingly. Further, we reiterate that the appropriate standard applied under Article 17 of the ICCPR as to whether an interference with privacy is permissible is whether it is lawful and not arbitrary and welcome the resolution's reference to this key concept. An interference with privacy must be reasonable given the circumstances. Article 17 does not impose a standard of necessity and proportionality.

We hope that further work on this topic can touch on other areas relating to privacy rights, beyond the digital environment and beyond surveillance.

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L. FREEDOM OF RELIGION

1. U.S. Domestic Developments

a. Designations under the International Religious Freedom Act

On July 18, 2014, Secretary Kerry designated Burma, China, Eritrea, Iran, Democratic People's Republic of Korea, Saudi Arabia, Sudan, Turkmenistan, and Uzbekistan as "countries of particular concern" under § 402(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105–292), as amended. The nine states were so designated "for having engaged in or tolerated particularly severe violations of religious freedom." 79 Fed. Reg. 57,171 (Sept. 24, 2014). All the states had previously been designated except Turkmenistan. The presidential actions designated for each of those countries by the Secretary are listed in the Federal Register notice.

b. U.S. annual report on international religious freedom

On July 28, 2014, the Department of State released the 2013 International Religious Freedom Report, and transmitted the report to Congress pursuant to § 102(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105-292), as amended, 22 U.S.C. § 6412(b). The report is available at *state.gov/religiousfreedomreport/*. Secretary Kerry's remarks at the rollout of the 2013 report are available at *www.state.gov/secretary/remarks/2014/07/229857.htm*. Tom Malinowski Assistant Secretary for the Bureau of Democracy, Human Rights, and Labor also delivered remarks on the release of the report, which are available at *www.state.gov/r/pa/prs/ps/2014/07/229861.htm*. A State Department fact sheet summarizing key developments discussed in the 2013 report is available at *www.state.gov/r/pa/prs/ps/2014/07/229853.htm*.

2. Human Rights Council

On March 11, 2014, the United States participated in a discussion with the special rapporteur on freedom of religion or belief. The U.S. statement, delivered by Lisa Brodey, is excerpted below and available at *https://geneva.usmission.gov/2014/03/12/discussion-with-the-special-rapporteurs-on-freedom-of-religion-or-belief-and-on-human-rights-and-counter-terrorism/*.

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We strongly agree with the Special Rapporteur's observation that political authoritarianism is among the enabling factors for the spread of religious hatred, and that addressing religious hatred requires a climate of free communication and public discourse based on freedom of expression and freedom of religion.

Unfortunately, states with the greatest instances of religious hatred often react by further restricting the freedoms of expression and religion through measures such as incitement or blasphemy laws, which only further entrench authoritarianism and intolerance. We echo the Special Rapporteur's call for the repeal of blasphemy laws and other restrictions on the freedoms of religion and expression.

We appreciate the Special Rapporteur's detailed explanation of the Rabat Plan of Action, including the emphasis it places on preventive actions such as interfaith dialogue, speaking out against intolerance, and outreach to members of religious communities. HRC Resolution 16/18 also focuses on promoting such measures.

Nonetheless, many states still advocate for restrictions on speech, often justified under ICCPR Article 20(2). The Special Rapporteur's report helpfully highlights the counter-productive nature of such restrictive policies. The report further details the many ways in which other provisions of the ICCPR, as well as the language of Article 20(2) itself, limit the permissible scope of such restrictions.

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M. RULE OF LAW AND DEMOCRACY PROMOTION

1. U.S. Statements at the UN

On February 19, 2014, Ambassador Rosemary DiCarlo, U.S. Deputy Permanent Representative to the UN, delivered remarks at a Security Council debate on the rule of law. Ambassador DiCarlo's remarks follow.

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Thank you, Mr. President. The United States thanks Lithuania for taking the initiative to hold this thematic debate on the rule of law. We welcome this debate on this vitally important issue. We also thank the Secretary-General for his briefing.

Respect for the rule of law is critical for the establishment of stable, secure, and democratic post-conflict societies. But it takes hard work, sustained over a long period of time, to build a culture of respect for the rule of law in a post-conflict context. And it takes the support of the international community. As a result, it is important for us to consider what tools the United Nations and the Security Council can use to help foster the rule of law in nations emerging from conflict.

In the wake of conflict, UN involvement often comes in the form of peacekeeping operations. And peacekeeping operations are particularly well positioned to spearhead the strengthening of rule of law institutions. Peacekeeping missions should always include rule of law experts who can serve on the front lines of supporting national justice and accountability efforts.

For example, UNOCI in Cote d'Ivoire assisted the Government of National Reconciliation in restoring civilian policing presence throughout the country. With rule of law expertise, UNOCI helped restructure the internal security services, assisted the parties in the implementation of temporary and interim security measures in the northern part of the country, and participated in the new "Mixed Gendarme Brigades" and the Integrated Command Center. In Haiti, MINUSTAH's rule of law investment in the Haitian National Police has already yielded a larger force more capable of ensuring security, and ongoing support continues to move Haiti down the road toward self-sufficiency in this regard.

Against this backdrop, peacekeeping missions also can play an important role in supporting national and international efforts to bring to justice those responsible for war crimes, crimes against humanity, and genocide, including through support for apprehension of fugitives. In addition to peacekeeping, there is also a significant role for development programs to make contributions to the rule of law. For example, UNDP administers a rule of law program in Darfur to raise awareness of human rights and rule of law. It is also working with local leaders, organizations and authorities to help end violations of international human rights law. The goal is to restore people's confidence in both rule of law institutions and to gradually build a culture of rule of law and justice in the region.

In the Democratic Republic of the Congo, the UN—specifically UNDP—has assisted in the creation of mobile courts that have helped the country's justice system tackle the challenge of sexual and gender-based violence in the conflict-ridden east.

While it is important to consider the individual tools that are available, it is also important that the UN's rule of law activities take a holistic, integrated and balanced approach. The Secretary-General's institutional reforms in this respect are especially welcome. The strategic role of the Rule of Law Coordination and Resources Group chaired by the Deputy Secretary-General and the UN's Global Focal Point arrangement on the rule of law—where the Department of Peacekeeping Operations works with the UN Development Program—could help enhance coordination and lead to concrete results on the ground. We are encouraged that these UN entities are joining forces to develop and implement common police, justice and corrections programs. We hope that these efforts will remove the disconnect that sometimes exists between New York and the field. In this context, we understand that the Global Focal Point is now coordinating on rule of law issues in Mali and look forward to the outcome of this work.

Ultimately, national ownership is essential in successfully advancing the rule of law in a host country. The government, at all levels, must buy into the core tenets of the rule of law. This includes the central principle that governments are accountable to the law and that no person is above the law. Only through a commitment to the rule of law at the highest levels, a commitment which the people of a country understand, can rule of law permeate through all levels of society.

We support the United Nations doing its part in promoting the rule of law, and encourage it to foster a culture of accountability in all of its work.

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On October 10, 2014, Stephen Townley addressed the Sixth Committee (Legal) Session at the 69th General Assembly on Agenda Item 82: The Rule of Law at the National and International Levels. Mr. Townley's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/232953.htm*.

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Thank you, Mr. Chairman. The United States welcomes this opportunity to follow up on the 2012 high-level meeting of the General Assembly on the rule of law, as well as to discuss this year's particular topic: national practices in strengthening the rule of law through access to justice.

We welcome the Secretary General's report on strengthening and coordinating UN rule of law activities and were pleased that consideration of the report was deferred until this session of the General Assembly to permit its fuller analysis. We agree that rule of law is, as the report suggests, multifaceted, cutting across the UN, and we are interested to exchange views on the most appropriate institutional means for the General Assembly and its Committees to address the topic. We would also stress at the outset that any modalities for addressing rule of law must take into account the broad range of legitimate stakeholders. These stakeholders include not only UN components, but also civil society players, such as national bar associations, businesses, and academics.

That said, during the pendency of that discussion, we also believe that we should seek tangible, step-by-step progress in the various UN and UN-related forums where rule of law is currently discussed, whether formally or informally.

Thus, for instance, at the international level, we welcomed the issuance on August 7, 2014, by the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia of the verdict in Case 002/01. This marked an important step forward in efforts to secure justice and accountability for the people of Cambodia. But much more work remains to be done as the ECCC begins the second phase of Case 002; and the UN's effort to support the ECCC requires bolstering.

We all know the essential role of good governance and open and accountable institutions in ensuring inclusive and sustainable development. We welcome the recognition in the report of the Open Working Group on Sustainable Development Goals that "[g]ood governance and the rule of law at the national and international levels are essential for sustained, inclusive and equitable economic growth, sustainable development and the eradication of poverty and hunger." It is also critical to highlight the importance of access to justice without discrimination, so that all people, including vulnerable individuals and members of vulnerable groups, can enjoy full exercise of their rights and the benefits of development. We have heard member states from every region recognize the importance of these issues to development and we look forward to their prominence in the post-2015 development agenda.

At the national level, I am pleased to report that we have made progress on implementing our pledges from the 2012 high-level meeting over the course of the past year. While there is no formal reporting process on such pledges, we hope we can all seize appropriate opportunities to discuss the steps we each have taken. A number of our pledges related to improvements in addressing domestic violence, and I'd like to speak to our work on that issue since we made our pledges.

Just last month, the United States commemorated the twentieth anniversary since the passing of our landmark Violence Against Women Act, including by issuing a presidential proclamation on the subject. In March 2013, the law was reauthorized. Its protections were extended, as that Proclamation makes clear, to "make Native American communities safer and more secure and help ensure victims do not face discrimination based on sexual orientation or gender identity when they seek assistance. . . [and to] provide our law enforcement officials with better tools to investigate rape and increase access to housing so no woman has to choose between a violent home and no home at all. And … [the] Administration continues to build on the foundation of this legislation, launching new initiatives to reduce teen dating violence and to combat sexual assault on college campuses."

These are just a few of the forums where rule of law-related issues are currently discussed. We hope we can seize the opportunities those discussions present.

With this approach of step-by-step progress in mind, I would like to turn to the specific topic for this year's Sixth Committee discussion: national practices in strengthening the rule of law through access to justice. In particular, I would like to address the role of civil legal aid in access to justice in this, the 40th anniversary of the bipartisan passage and signing of the Legal Services Corporation Act, which is "the single largest funder of civil legal aid for low-income Americans, providing help and hope to countless individuals and families who are too often overlooked – and too often underserved."

We are proud to have supported the adoption of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems by the General Assembly, which was also one of our pledges from the 2012 high-level meeting, and efforts geared at their implementation, such as the conference on the topic in Johannesburg, South Africa this past June. Providing legal aid in criminal cases can help ensure the most vulnerable have adequate representation and that we continue our collective pursuit of equal justice for all. But legal aid can and should go beyond the criminal justice system. Civil legal aid to low-income individuals can make an enormous difference, both to the lives of the individuals and to the communities in which they live, by, for instance, promoting access to health and housing, education and employment, and fostering family stability and community well-being. To give a few examples, civil legal services can be provided to veterans to help them secure benefits for which they are eligible, or to prevent elder abuse and domestic violence, or to help keep children in school or remove barriers to employment for people with criminal records.

In particular, I'd like to focus on the example of domestic violence, a topic I have already addressed in connection with the follow-up to our pledges. …

The U.S. Violence Against Women Act provides for funding for civil legal aid to victims. Among the ways civil legal aid can help are: (1) preventing future violence by facilitating obtaining, renewing and enforcing protective orders in court; (2) securing or modifying child custody orders so that a mother and her children can legally and safely leave the batterer; or (3) resolving identity theft and other forms of financial exploitation perpetrated by abusers against survivors of domestic violence. Civil legal aid can thus help mitigate the terrible consequences of domestic violence. In fact, as Vice President Biden has remarked, "[r]esearch tells us that effective legal representation is the single most important factor in whether victims are able to escape this domestic violence cycle."

But U.S. work on civil legal aid for victims of domestic violence is just one example of the role such programs can play. While – like many of you, I'm sure – there are limits to what the U.S. government can fund and provide, we believe for these reasons that it is critical to

highlight the value of civil legal aid in access to justice. We would also be interested to hear more from others about their approaches in this area.

In conclusion, we look forward to continuing to follow up the 2012 high-level event, both in discussing how to take rule of law forward at the UN, but also in how we can make step-by-step progress, starting, perhaps, with issues like civil legal aid.

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2. Civil Society

On March 11, 2014, the United States delegation participated in a Human Rights Council panel on the promotion and protection of civil society space. Due to the Council's time constraints, Head of Delegation Paula Schriefer could not deliver the statement for the United States. The prepared statement on the importance of the promotion and protection of civil society space is excerpted below and available at *https://geneva.usmission.gov/2014/03/12/governments-that-create-space-for-civil-society-reap-democratic-dividends/*.

* * * *

The evidence is clear. Governments that create and protect space for citizens to pursue the rights to freedom of peaceful assembly and of association reap democratic dividends. An environment where civil society flourishes fosters dialogue, strengthens pluralism, and enhances tolerance and respect for dissenting views. We celebrate the diversity of civil society organizations, each hoping to improve the world in its own way. Civil society organizations can also be key contributors to economic development; a state that restricts their operations hinders its own overall progress.

The United States meets regularly and often with civil society organizations at home and overseas. These dialogues are invaluable. We improve our overall understanding of an issue by talking with those who know best the situation on the ground. We also strengthen our ability to address foreign policy goals. One good example illustrates the point. Secretary Kerry met with disabled persons' organizations to raise awareness regarding the Convention on the Rights of Persons with Disabilities. In addition, he talked to domestic and international groups on the margins of the UN High Level Dialogue on Disability and Development in September. We also convened a civil society dialogue with African NGOs to improve the Action Plan for the African Decade of Persons with Disabilities.

In September, on the margins of the General Assembly, President Obama convened a meeting with the international community to urge like-minded governments and civil society to work together to protect civil society. We are working to make progress on this objective, including multilaterally through the U.N. system, the Community of Democracies, and the Open Government Partnership. We continue our strong support for the work of the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association.

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On September 17, 2014, the U.S. delegation to the 27th session of the Human Rights Council participated in a general debate on human rights bodies and mechanisms. Kirsten Pappas delivered the statement by the U.S. delegation emphasizing the need for all states to foster an enabling environment for civil society. The U.S. statement is excerpted below and available at *https://geneva.usmission.gov/2014/09/22/u-s-encourages-all-states-to-create-an-enabling-environment-for-civil-society/*.

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We want to emphasize the importance of states' commitment to creating an enabling environment for civil society and encourage all states to work together and with relevant regional, UN, and civil society mechanisms in this effort. We all suffer when civil society actors are retaliated against for cooperating with this Council, special procedures mandate holders, the working group of the Universal Periodic Review, or any UN body.

Civil society actors play a number of tremendously important roles in the functioning of the Human Rights Council and its subsidiary bodies. Whether we are speaking about an NGO that conducts an outreach campaign to call states' attention to an urgent human rights situation somewhere in the world, an activist who travels here to Geneva to share his/her experiences with delegations and humanize the challenges a particular population is facing, or a watchdog organization that guards institutional norms and processes, civil society is essential to our work.

When civil society organizations are not permitted to share their point of view or feel they must censor themselves out of fear of what might happen to their staff, the Council's work and its credibility suffer.

The Secretary General outlines forty cases in sixteen countries of alleged reprisals against civil society actors in his 2014 annual report on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights. These cases of reprisals are alleged to be in response to individuals' interactions with the Office of the High Commissioner for Human Rights, the Human Rights Council, special procedures mandate holders, human rights treaty bodies, the universal periodic review mechanism, and/or one of several commissions of inquiry established by this Council.

As the Secretary General notes himself, the allegations vary in their nature, but include "a wide range of violations," against individual members of civil society, including those involving "threats, travel bans, and arbitrary detention to torture and, sadly, death." Communications about these allegations from UN human rights experts and special procedures mandate holders to eleven of the sixteen states named in the report have gone unanswered.

The United States believes that the member states of the Human Rights Council have a responsibility to defend the individuals and organizations that interact with the Council and its mechanisms. Today we call upon those states that have failed to respond to communications to do so immediately.

We regret that consideration of Human Rights Council resolution 24/24 was not concluded during the 68th General Assembly. We support resolution of this issue as soon as

possible. We reiterate our view that HRC resolutions are self-executing, in the sense that the General Assembly does not need to approve or endorse them.

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On September 26, 2014 at the 27th session of the HRC, Ambassador Harper delivered a statement for the United States delegation as co-sponsor of a resolution on civil society space. The resolution was adopted by consensus on September 26, 2014. U.N. Doc. A/HRC/RES/27/31. Ambassador Harper's statement is excerpted below and available at *https://geneva.usmission.gov/2014/09/26/debate-on-resolution-on-civil-society-space/*.

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The United States is proud to co-sponsor the Human Rights Council's second resolution on creating and maintaining, in law and in practice, a safe and enabling environment for civil society. This timely resolution underscores the important role civil society plays both in the promotion and protection of human rights, democracy, and the rule of law, and in providing expertise and advocacy within the UN system. It acknowledges that strong, vibrant civil societies are critical to having strong, successful countries. It acknowledges that governments are more responsive and effective when citizens are free to organize and work together across borders. We recognize the importance of states' commitments to creating an enabling environment for civil society and encourage all states to work together and with relevant regional, UN, and civil society mechanisms in this effort.

The United States thanks Ireland and the other core group members—Chile, Japan, Sierra Leone, and Tunisia—for the open and transparent negotiations they facilitated, and notes the spirit of flexibility and compromise that the core group demonstrated in those negotiations.

The United States regrets the decision by some states not to negotiate in good faith.

Mr. President, it is important that we rebut the erroneous narrative that some delegations have put forward, claiming that the process of negotiating this resolution was somehow irregular or unfair. That could not be further from the truth.

In fact, the process of negotiations led by the core group has been extremely open and transparent. They held some ten hours of informals in which dozens of states participated. It took some three meetings just to read through the text one time.

After tabling, the sponsors continued to engage in broad consultations and willingness to make amendments to the text. The process was open and balanced.

We will not allow the inaccurate narrative to be used to undermine the work and credibility of this Council.

For all the reasons we have stated, the United States will oppose the amendments before us today and vote in favor of the text. We urge all Council members to do the same.

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On September 23, 2014, President Obama issued a memorandum to U.S. executive departments and agencies on "Deepening United States Government Efforts To Collaborate With and Strengthen Civil Society." Daily Comp. Pres. Docs. 2014 DCPD No. 00696 pp. 1-4 (Sept. 23, 2014). The presidential memorandum directs agencies engaged abroad to "take actions that elevate and strengthen the role of civil society; challenge undue restrictions on civil society; and foster constructive engagement between governments and civil society." The presidential memorandum was intended to follow up on commitments made in a Joint Statement on the Promotion and Protection of Civil Society, concluded at the UN General Assembly, as well as the U.S. "Stand with Civil Society" initiative, launched in 2013. The White House issued a fact sheet on September 23, 2014 in conjunction with issuance of the presidential memorandum, which is available at *www.whitehouse.gov/the-press-office/2014/09/23/fact-sheet-us-support-civil-society*.

N. OTHER ISSUES

1. Right to Development Resolution at the Human Rights Council

On September 25, 2014, the UN Human Rights Council adopted a resolution entitled "The right to development." U.N. Doc. A/HRC/RES/27/2. The United States voted against the resolution. The U.S. explanation of vote, delivered by Ambassador Harper, appears below and is available at *https://geneva.usmission.gov/2014/09/25/explanation-of-vote-right-to-development/*.

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International development is a critical component of United States foreign policy. Still, we have still long-standing concerns about the notion of the right to development.

We have participated actively in the Working Group on the Right to Development in an effort to promote better implementation of development goals and to harmonize the various interpretations of the right to development.

This unbalanced resolution, which includes controversial and divisive language from General Assembly resolutions on this topic, does not reflect these differing viewpoints. We therefore request a vote on this resolution and will vote NO.

We have specific concerns about a number of the provisions in this resolution.

It calls for an additional two-day informal inter-sessional meeting of the Working Group without an agreement in place on how to make progress in those discussions.

It does not mention the importance of considering specific, measurable indicators of development in addition to criteria and sub-criteria in order to advance the goals of the Working Group.

It focuses inappropriately on institutions in discussing the right to development. These discussions, in our view, should focus on aspects of development that relate to human rights, universal rights that are held and enjoyed by individuals, and the obligations States owe to their citizens in that regard.

Also of concern to us is that the resolution dictates how the UN's specialized agencies should incorporate the topic of the right to development and inappropriately singles out the World Trade Organization for negative treatment.

We also cannot endorse language in the resolution that would prejudge intergovernmental negotiations and dictate a central role for the right to development in the post-2015 development agenda.

As we have noted previously, we are not prepared to join consensus on the possibility of negotiating a binding international agreement on the right to development.

We intend, however, to continue our constructive engagement with others on the topic of the right to development in the next session of the Working Group.

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2. Remotely Piloted Aircraft Resolution

On March 27, 2014, Deputy Assistant Secretary Schriefer delivered the U.S. explanation of vote on the resolution on "Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law." U.N. Doc. A/HRC/25/L.32. As explained by Ms. Schriefer, the United States voted against the resolution. The resolution was adopted by a vote of 27 in favor, 6 against, with 14 abstentions. U.N. Doc. A/HRC/25/22. The U.S. explanation of vote is excerpted below and available at *https://geneva.usmission.gov/2014/03/28/eov-on-resolution-on-the-use-of-remotely-piloted-aircraft-or-armed-drones-in-counter-terrorism-and-military-operations/*.

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While there is no question that the Human Rights Council plays an important role in promoting respect for human rights in the context of our collective efforts to counter terrorism, the United States has serious concerns about this resolution. We do not believe that the examination of specific weapons systems is a task for which the Human Rights Council is well suited, and we do not support efforts to take this body in that direction, much less in a resolution that in many key respects does little more than to duplicate work that is ongoing both under the auspices of the Council and in other venues.

With respect to our own counterterrorism operations, as we have stated publicly at the highest levels of our government, the United States is committed to ensuring that our actions, including those involving remotely piloted aircraft, are undertaken in accordance with all applicable domestic and international law and with the greatest possible transparency, consistent with our national security needs. At the international level, we have engaged in discussions about RPAs in the context of broader discussions about human rights and counterterrorism, and we are open to further such discussions. As you know, the United States is a traditional co-sponsor of the Human Rights Council and UN General Assembly counter-terrorism resolutions, which have both, in their most recent iterations, addressed issues relating to remotely piloted aircraft in operative paragraphs. We have hosted Special Rapporteur Ben Emmerson in Washington and discussed issues related to RPAs with him. And more broadly, we have been thoroughly engaged

in the Swiss-ICRC Initiative on Compliance with International Humanitarian Law, which we hope will provide a non-politicized forum in which experts, including military experts, can discuss law of war issues and exchange best practices.

But we do not support the text put forward today. For all its expertise on matters relating to human rights, this Council is not an arms control forum, and does not have the expertise to venture into areas that should be addressed in those settings. This resolution takes the Council too far in this direction.

We also wish to call attention to the broader context in which we are having this discussion. While we do not discount the importance of today's topic—which, as noted, is addressed in other Council and General Assembly resolutions, and on which two Special Rapporteurs have already reported and at least one of them is still working—we note that there is a broad range of other important topics in the realm of human rights and counter-terrorism that would benefit from the Council's increased focus. These include the use of force against peaceful protesters and the suppression of civil society or opposition voices on the pretext of countering terrorism; the labeling of human rights defenders as terrorists; and the detention of such individuals without minimum due process guarantees. We hope that in moving beyond this resolution we can also refocus the Council's attention on this critically important set of issues, which fall squarely within this Council's competency and expertise, and which the international community looks to this body to address.

In this context, and for the reasons noted, we will vote against this resolution and we urge others to do the same.

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3. HRC Resolution on Firearms

The United States abstained on a resolution on **the regulation of civilian acquisition, possession, and use of firearms** at the 26th session of the Human Rights Council. The resolution was adopted on June 26, 2014, by a vote of 44 in favor, 0 against, and 3 abstentions. U.N. Doc. A/HRC/RES/26/16. Ambassador Harper delivered a U.S. explanation of vote, excerpted below and available at https://geneva.usmission.gov/2014/06/26/domestic-firearms-regulation-is-a-matter-wholly-within-the-sovereign-powers-of-a-nation/.

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[L]et me first affirm the United States' unwavering commitment to the protection of innocent civilian life against all forms of violence.

The United States has supported innumerable resolutions in support of this commitment in this and other bodies and we agree that domestic regulatory action can help deter the criminal misuse of firearms, as evidenced by our existing domestic national laws regulating firearms possession and use.

Nevertheless, we do not believe that a State's regulation of the purely domestic acquisition, possession and use of firearms is an appropriate topic for international attention.

Domestic firearms regulation is a matter wholly within our sovereign powers as a nation, and as a result we do not believe the Human Rights Council—or any other international body — is the proper forum for this discussion.

Additionally, we do not regard the domestic actions contemplated by this resolution to be required by international human rights obligations.

As a general rule, a State's human rights obligations would not extend to regulating the acquisition, possession or use of firearms by private persons or non-state actors.

Rather we recognize that these measures, as contemplated by this resolution, fall within the sovereign responsibility that each government owes to its population through its domestic constitutional and legal processes.

We maintain that it is the sovereign and exclusive right of any state to regulate and control conventional arms within its territory, pursuant to its own legal or constitutional system.

In the United States, the Second Amendment to our Constitution protects an individual right to keep and bear arms.

The United States already has many laws and regulations to control firearms, at the national, state and local levels, consistent with our Constitution.

We do not interpret this resolution as giving any international body or its representatives a legitimate voice in the domestic regulation of firearms, a sovereign right that must be exercised by each State.

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4. Putative Right to Peace

The United States voted against a resolution on "promotion of the right to peace" at the 27th session of the Human Rights Council. The resolution was adopted on September 25, 2014, by a vote of 33 in favor, 9 against, and 5 abstentions. U.N. Doc. A/HRC/RES/27/17. Ambassador Harper delivered a U.S. explanation of vote, excerpted below and available at https://geneva.usmission.gov/2014/09/25/explanation-of-vote-right-to-peace/.

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First, the United States welcomes the efforts of Costa Rica in trying to find a consensus on this difficult issue. While we voted against the establishment of the Working Group, we have participated constructively in its first two sessions, and we will continue to do so in the final session called for by this resolution. We hope that there can still be a constructive path forward in affirming the relationship between human rights and peace.

However, as we have stated previously, the United States does not agree with attempts to develop a collective "right to peace" that would in any way modify or stifle the exercise of existing human rights.

The text before the Council today does not address our concerns and, therefore we must call a vote and vote against this resolution.

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Cross References

Nationality and Citizenship, **Chapter 1.A.**
Visa restrictions on human rights abusers in Venezuela, **Chapter 1.C.4.a.**
Asylum, refuge, and migrant protection issues, **Chapter 1.D.**
UN General Assembly action on North Korea's human rights record, **Chapter 3.C.2.f.**
Alien Tort Statute and Torture Victim Protection Act, **Chapter 5.A.**
UN Women, **Chapter 7.A.4.**
Service of process and attempt to compel a foreign sovereign to intervene, **Chapter 10.A.3.**
Internet governance, **Chapter 11.F.5.**
Corporate Responsibility Regimes, **Chapter 11.G.5.**
Sanctions, including relating to human rights violators, **Chapter 16.A.**
Atrocities prevention, **Chapter 17.C.2.**
International humanitarian law, **Chapter 18.A.3.**
Detainees, **Chapter 18.C.**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. UN Security Council

On October 16, 2014, after the UN General Assembly elected Angola, Malaysia, New Zealand, Spain, and Venezuela as non-permanent members of the UN Security Council for 2015-2016, Ambassador Samantha Power, U.S. Permanent Representative to the UN, delivered a statement, available at *http://usun.state.gov/briefing/statements/233035.htm*. Ambassador Power's statement includes the following regarding U.S. concerns about the election of Venezuela in particular:

> The UN Charter makes clear that candidates for membership on the Security Council should be contributors to the maintenance of international peace and security and support the other purposes of the UN, including promoting universal respect for human rights. Regional groups have a responsibility to put forward candidates that satisfy these criteria and fully support the principles of the UN Charter. This year, Venezuela ran unopposed for the 2015-2016 Latin American seat.
>
> Unfortunately, Venezuela's conduct at the UN has run counter to the spirit of the UN Charter and its violations of human rights at home are at odds with the Charter's letter. The United States will continue to call upon the government of Venezuela to respect the fundamental freedoms and universal human rights of its people.
>
> From ISIL and Ebola to Mali and the Central African Republic, the Security Council must meet its responsibilities by uniting to meet common threats. All members of the Council have an obligation to meet the expectations of those who have entrusted them with these critical responsibilities

2. Charter Committee

On October 14, 2014, John Arbogast, Counselor for Legal Affairs for the U.S. Mission to the UN, delivered remarks at the 69th General Assembly Sixth Committee (Legal) on the Report of the Special Committee on the Charter of the Role of the Organization. Mr. Arbogast's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/233274.htm*.

* * * *

Mr. Chairman, we welcome consideration of the report of the Charter Committee, which had its annual meeting in February. We appreciate the opportunity to provide a few observations on the Committee's recent work.

We believe the report records some positive movement in the work of the Charter Committee, particularly as it reflects a continuing examination of the matters with which the Committee should concern itself. The 2012 commemoration of the thirtieth anniversary of the Manila Declaration, dealing with the peaceful settlement of disputes, was again cited as an example of a timely undertaking that was appropriate for Committee consideration and on which it could agree. The "third country effects of sanctions" item on the Committee agenda, on the other hand, was again cited by many as an example of an item that had been overtaken by events and whose continued inclusion on the agenda makes little sense.

I will return to that matter in a minute, as the issue of third country effects provides a window into the areas of Special Committee efficiency and working methods. A key aspect of Committee efficiency is the fact that the Charter Committee has a number of longstanding proposals before it. We believe—as we have stated many times before—that many of the issues these proposals consider have been taken up and addressed elsewhere in the United Nations. There is also a considerable degree of overlap in these proposals. These are reasons why the Committee has shown little enthusiasm for acting on or discussing these proposals in depth.

It was heartening that during the 2012 Charter Committee session, two such longstanding proposals were withdrawn or set aside by their sponsors on the grounds that they were, in fact, outdated and had been overtaken by events elsewhere in the Organization. This was a welcome step toward the much-needed rationalization of the work of the Special Committee. It is hoped that other stagnant items on the Committee's agenda will be similarly scrutinized by sponsors and members alike, with a view toward keeping the Charter Committee relevant and potentially useful.

Such continuing review efforts are vital for the Special Committee as it goes forward. We urge that the Committee continue to remain focused on ways to improve its efficiency and productivity throughout its next session, including by giving serious consideration to such steps as biennial meetings and/or shortened sessions. The Committee needs to do its job by recognizing that these steps are reasonable and make good practical sense.

With regard to items on the Committee's agenda concerning international peace and security, the United States continues to believe that the Committee should not pursue activities in this area that would be duplicative or inconsistent with the roles of the principal organs of the

United Nations as set forth in the Charter. This includes consideration of a further revised working paper calling for a new, open-ended working group "to study the proper implementation of the Charter…with respect to the functional relationship of its organs." It also includes consideration of another revised, longstanding working paper that similarly calls inter alia for a Charter Committee legal study of General Assembly functions and powers.

In the area of sanctions, we note once again that positive developments have occurred elsewhere in the United Nations that are designed to ensure that the UN system of targeted sanctions remains a robust tool for combating threats to international peace and security. With respect to the aforementioned matter of third States affected by the application of sanctions, as stated in the Secretary-General's report A/69/119, "…the need to explore practical and effective measures of assistance to the affected third States has been reduced considerably because the shift from comprehensive to targeted sanctions has reduced the incidence of unintended harm to third States. In fact, no official appeals by third States to monitor or evaluate unintended adverse impacts on non-targeted countries have been conveyed to the Department of Economic and Social Affairs since June 2003."

Such being the case, and as touched on above, we believe that this is another prime example of an issue that the Special Committee—with an eye both on the current reality of the situation and the need to stay current in terms of the matters it considers—should decide no longer merits discussion in the Committee. This initiative has received increasing support in the Special Committee and we hope that this step can be taken in the near future.

Having said that, we would note a positive development regarding this issue reflected in resolution 68/115, the resolution on the Charter Committee that was adopted by the General Assembly in December. Paragraph 3(b) of that resolution requests the Special Committee to continue to consider the third State-related sanctions issue in an appropriate manner and framework, including—and I quote—"the frequency of its consideration." What that additional language reflects is a balance between the views of those who believe that this issue is no longer appropriate for Committee consideration and those who believe that the issue should be kept on the Special Committee's agenda in the event of changed circumstances in future. The language reflects a compromise which would permit the issue to remain on the agenda (at least for now), while dispatching with the need to have the Committee consider it—and have the Secretary-General produce reports on it—every year, even though there have been no pertinent developments concerning it.

Accordingly, in the spirit of compromise reflected in the GA resolution, we believe that the triennalization of this issue, at a minimum, should be discussed and hopefully agreed at the next meeting of the Special Committee.

On the question of the General Assembly requesting an advisory opinion on the use of force from the International Court of Justice, we have consistently stated that the United States does not support that proposal.

With respect to proposals regarding new subjects that might warrant consideration by the Special Committee, we continue to be cautious about adding new items to the Committee's agenda. While the United States is not opposed in principle to exploring new items, it is our position that they should be practical, non-political, and not duplicate efforts elsewhere in the UN system.

In this regard, we refer to the proposals made at the Committee's last meeting to have the Committee request the Secretariat to update the 1992 Handbook on the Peaceful Settlement of Disputes between States, and to establish a website also dedicated to the peaceful settlement of

disputes. We are of the view that such new, labor-intensive exercises would not be the best use of scarce Secretariat resources, and at the end of the day would not, in any event, offer much value-added given the wealth of relevant websites and other online tools that make such information so much more readily available than in the past.

Finally, we welcome the Secretary-General's report A/69/159, regarding the Repertory of Practice of United Nations Organs and the Repertoire of the Practice of the Security Council. We commend the Secretary-General's ongoing efforts to reduce the backlog in preparing these works. Both publications provide a useful resource on the practice of United Nations organs, and we much appreciate the Secretariat's hard work on them.

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3. Israel's Participation in the UN

On February 11, 2014, Ambassador Power delivered a statement on Israel's participation in the "JUSCANZ" caucus in the UN Third Committee. Ambassador Power's statement follows and is also available at *http://usun.state.gov/briefing/statements/221567.htm*.

> Today, for the first time, Israel participated in one of the core coordinating groups focused on human rights and social policy at the United Nations. Israel's participation in the "JUSCANZ" caucus in the United Nation's Third Committee is an important step toward securing Israel's full participation across the UN system.
>
> The United States has long been a tireless advocate for Israel's full participation and inclusion at the UN. Today's inclusion, coupled with our successful efforts to secure Israel's membership in the Western European and Others Group (WEOG) last November in Geneva, are important steps in the right direction. Israel is now able to fully participate in the main regional and core coordinating groups in New York and Geneva where much of the behind-the-scenes work at the UN gets done.
>
> While more work remains, the United States will combat every effort to undermine Israel's legitimacy as a full and equal member of the community of nations, including by ending the various forms of structural discrimination against Israel throughout the UN system.

4. UN Women

On September 16, 2014, Terri Robl, U.S. Deputy Representative to ECOSOC, addressed the UN Women Executive Board in New York. Ms. Robl's remarks are excerpted below and are available at *http://usun.state.gov/briefing/statements/231792.htm*. For background on UN Women, see *Digest 2010* at 323-24.

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…The United States strongly supports UN Women's strategic priorities and welcomes its accomplishments to date.

UN Women's leadership within the UN system is beginning to produce impressive outcomes. We especially welcome UN Women's leadership and advocacy on the importance of women's and girls' empowerment and gender equality as central to our shared development goals, especially as we continue deliberations on the post-2015 development agenda.

We are very pleased by the initial results of the System Wide Action Plan, which seeks to introduce a gender perspective into all UN political programs. We are heartened by the reports of substantial improvement in the performance of the United Nations system on gender mainstreaming through this plan. According to reports, in just its second year of effective implementation, advancements occurred in 14 of the 15 performance indicators, including notable steps forward in gender-responsive auditing, performance management, program review and knowledge generation.

We are satisfied to note UN Women's increasing engagement in humanitarian activities, including the training of field advisors and we would like to see UN Women's valuable contributions to the Secretary General's humanitarian situation reports continue. We welcome the gender study that UN Women is conducting for the humanitarian segment of ECOSOC and are pleased it is also collaborating with women's groups and civil society on the upcoming World Humanitarian Summit. The United States supports UN Women's inclusion as a "Standing Invitee" to Inter-Agency Standing Committee meetings based on UN Women's significant and increasing humanitarian activities. We believe that an increasingly closer partnership between the two will enhance the efforts of both organizations.

We commend UN Women's continuing dedication to ending gender-based violence. We are proud to be supporting UN Women's projects to address such violence in Mozambique and Tanzania, as well as through the Safe Cities Initiative in India, with two significant voluntary contributions. We look forward to the results of the Global Study on Women, Peace and Security.

UN Women's work to advance the status of indigenous women and girls is another area we would like to highlight. We welcome contributions to the planning for next week's World Conference on Indigenous Peoples and look forward to the high-level side event it is hosting at the International Forum on Indigenous Women.

We welcome UN Women's ongoing collaboration with Justice Rapid Response to train gender experts and place them on a roster for rapid deployment to investigate gender-based crimes during conflict. The experts trained in these courses come from all regions of the world, and those who successfully complete the training will become part of a special joint JRR-UN Women roster, making them available for rapid deployment at the request of Governments, as well as the United Nations, the International Criminal Court, and other international institutions with jurisdiction to carry out such investigations. There have already been several successful rapid deployments of these experts to Commissions of Inquiry for Syria and North Korea, and UN Women has matched every request it has received for support. We will continue to emphasize the need for further investments in such a creative tool.

Regarding evaluation, the United States strongly supports efforts to make UN Women's programs ever more effective and closely tailored to their objectives. Given our commitment to UN Women's success, we underscore our view that the basis for success lies in a methodologically sound, rigorous, and systemic evaluation of programs. We thank UN Women, therefore, for integrating a meta-analysis into its Corporate Evaluation plan. This is a useful way to review findings from decentralized evaluations and identify common threads.

Sufficient investment in monitoring and evaluation and other knowledge management systems, within existing resources, is critical to the success of future programs. We note that systemic weaknesses have been uncovered in UN Women's monitoring and evaluation practices, and ask UN Women to outline the steps being taken to address these issues. In addition, UN Women should consistently use measurable results frameworks based on realistic goals and objectives.

We also stress our continuing appreciation for UN Women's commitment to manage its funds and administer its programs with the greatest possible level of transparency. The United States greatly values the work of the UN system's auditors in providing oversight to UN Women. UN Women's speedy implementation of the Executive Board's decision to make all internal audit reports publicly available is a positive step toward increasing organizational transparency and accountability. This practice will undoubtedly bring further insight into the operations of UN Women and allow us to better address critical systemic weaknesses. We take approving note of UN Women's dedication to timely implementation of this decision.

We commend UN Women for its work to implement the regional architecture, including by developing performance indicators for it. As UN Women continues to implement the regional architecture, it should also establish effective oversight controls and provide staff with proper training on delegation of authority and risk management. Doing so will make the regional architecture more successful and sustainable.

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B. PALESTINIAN MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS

See Chapter 4 for a discussion of the United States response to Palestinian attempts to accede to treaties.

C. INTERNATIONAL COURT OF JUSTICE

On February 8, 2014, Secretary of State John Kerry issued a press statement on the nomination of Joan E. Donoghue to the International Court of Justice. Secretary Kerry's statement is excerpted below and available at www.state.gov/secretary/remarks/2014/02/221485.htm.

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I am delighted to announce the formal nomination of Joan E. Donoghue by the U.S. National Group to serve a second term as Judge on the International Court of Justice, an institution that plays a vital role in international dispute resolution and in the development of international law.

Judge Donoghue has had a long and distinguished career in international law.

From 2007 to 2010, she was the State Department's senior career lawyer, serving as the Acting Legal Adviser for the first six months of the Obama Administration. She has taught at several U.S. law schools and has lectured widely on international law and adjudication.

Since joining the Court in 2010, Judge Donoghue has demonstrated exceptional intelligence, integrity and independence in addressing the diverse and complex issues that come before the Court. Her knowledge, temperament, and commitment to the rule of law make her an outstanding choice for this important position.

I strongly support her election for a second term.

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Judge Donoghue was re-elected to the ICJ on November 6, 2014 in elections held in the UN General Assembly and Security Council. The Department of State issued a media note on November 7, 2014 congratulating Judge Donoghue and Mohamed Bennouna from Morocco, Kirill Gevorgian from Russia, and James Crawford from Australia, who were also elected as ICJ judges. The November 7 media note, available at *www.state.gov/r/pa/prs/ps/2014/11/233853.htm*, also states:

> The United States continues to strongly support the ICJ as part of our commitment to promoting international peace, conflict resolution, rule of law, and justice. Judge Donoghue's exemplary background reflects the importance and seriousness that the United States places on the ICJ and its work.

D. INTERNATIONAL LAW COMMISSION

1. ILC's Work on Expulsion of Aliens, Protection of Persons in the Event of Disasters, and Other Topics

On October 28, 2014, Mary McLeod, Acting Legal Adviser for the U.S. Department of State, addressed the UN General Assembly Sixth Committee session on the report of the International Law Commission ("ILC") on the work of its 66th session. Ms. McLeod's remarks, addressing the topics of "Expulsion of Aliens" and "Protection of Persons in the Event of Disasters," as well as other topics, are excerpted below and available at *http://usun.state.gov/briefing/statements/234021.htm*.

* * * *

With respect to the topic of "Expulsion of Aliens," the United States congratulates the International Law Commission and, in particular, Special Rapporteur Maurice Kamto, for completing its work on the topic through the adoption on second reading of a set of 31 draft articles, together with commentaries.

Earlier this year, the United States submitted extensive comments on the draft articles as adopted on first reading, as did many other Governments.[*] In many respects, the Commission appears to have given serious consideration to concerns expressed by Governments, and in particular we are pleased to see that the final draft articles reflect several of our suggestions.

We also appreciate that the Commission expressly acknowledges at several points throughout the commentary that much of this project reflects progressive development. Indeed, the opening paragraph to the general commentary correctly indicates that "the entire subject area does not have a foundation in customary international law or in the provisions of international conventions of a universal nature."

Even with this characterization, however, we continue to have significant concerns about several of the draft articles in their final form, and maintain our view that the draft articles, even as an aspirational document, do not overall strike the proper balance between the important goal of protecting aliens and the State's sovereign prerogative, responsibility and ability to control admission to its territory and to enforce immigration laws.

I would refer colleagues to our full written comments available on the ILC website, as many of them are still applicable, but will highlight a few of our most significant concerns. We still do not agree with the discussion of disguised expulsion contained in Articles 2 and 10 as drafted. For example, we do not believe "tolerance" of the actions of non-state actors generally gives rise to state responsibility. Article 12 on circumvention of extradition is overly vague and fails to account for a State's prerogative to use a variety of legal mechanisms to effect transfers of criminals wanted by a foreign country. In addition, Articles 23 and 24 are still problematic to the extent they extend *non-refoulement* protections to situations beyond what reflects established international law and beyond what the United States views as desirable law.

In some instances where the Commission did make laudable changes, they did not go far enough. For instance, while the text of Article 14 on nondiscrimination has improved, the Commentary still suggests an overbroad limitation on States' ability to treat groups differently with respect to expulsion where there is a rational basis for doing so. Additionally, although the Commission decided to limit Article 23's *non-refoulement* obligation to threats to life rather than also threats to freedom, the list of grounds on which such threats could be based still goes far beyond those contained in the Refugee Convention and its Protocol, without any clear justification in law or practice.

We also note that the Commission has addressed concerns with numerous articles that appeared to conflict with widely-adopted conventions by converting them to "without prejudice" provisions. While this solution largely resolves these legal concerns, it also highlights the extent to which existing treaties already cover many of the subjects addressed by these draft articles, reducing the imperative for an additional instrument in this field.

At the same time, many of the proposals for progressive development are clearly controversial and would need to be subjected to thorough governmental discussion and negotiation before any such proposed rule could be recognized as a rule of international law. Article 27, on the suspensive effect of an appeal, and Article 29, which would create an

[*] Editor's note: The U.S. comments referred to by the Acting Legal Adviser are discussed in Section 7.D.5., *infra*.

unprecedented right of admission, are just two examples of proposals that would require significant additional consideration by States.

Given this range of concerns, and in light of previous comments by the U.S. and other governments, we would have strongly preferred that the Commission issue these in a different form, such as guidelines or principles. We do not believe that the draft articles should be considered as the basis for negotiation of a new convention in this field, as no such instrument is needed given the several multilateral treaties that already exist in this field. Rather, we believe these draft articles should be brought to the attention of states for their further consideration.

Mr. Chairman, on the topic of "Protection of Persons in the Event of Disasters," the United States appreciates the work of the Commission and in particular the efforts of the special rapporteur, Mr. Eduardo Valencia-Ospina, on the 21 draft articles and commentaries adopted on first reading this summer.

We look forward to providing written comments and observations on the draft articles and commentary by 2016 in response to the Commission's request. In the meantime, we remain concerned that several of the draft articles appear to be attempts to progressively develop the law without being clearly identified as such. For example, we do not accept the assertion in Draft Article 11, entitled "Duty to reduce the risk of disasters," that each state has an obligation under international law to take the necessary and appropriate measures to prevent, mitigate, and prepare for disasters. While the United States appreciates the efforts the Commission has made to document laudable individual and multilateral measures taken by states to reduce the risk of disasters, we do not believe that these efforts establish widespread state practice undertaken out of a sense of legal obligation.

Mr. Chairman, with respect to other decisions and conclusions of the Commission, let me make brief remarks about two additional topics.

First, with respect to the topic of "Crimes Against Humanity," the United States looks forward to a thorough discussion of the topic now that the Commission has added it to its active agenda. We support and very much welcome the appointment of Sean Murphy as Special Rapporteur and the considerable expertise that Professor Murphy will bring to bear in thinking critically about the difficult questions that this topic implicates.

As the description of this topic noted, the widespread adoption of certain multilateral treaties regarding serious international crimes—such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—has been a valuable contribution to international law, including by promoting the repression of such offenses and creating a basis for accountability. Because crimes against humanity have been perpetrated in various places around the world, the United States believes that careful consideration and discussion of draft articles for a convention on the prevention and punishment of crimes against humanity could also be valuable, and we look forward to following the ILC's work on this subject now that it is on its active agenda.

This topic's importance is matched by the difficulty of many of the legal issues that it implicates, and we urge that all of these issues be thoroughly discussed and carefully considered in light of States' views as this process moves forward.

Second, Mr. Chairman, we note the addition of the topic of *jus cogens* to the Commission's long-term work programme. We thank Professor Tladi for his work to identify a number of very important issues in his clear and concise syllabus describing the topic, and we thank him also for his informative description of the procedural history of the Commission's consideration of this topic. As he notes, the Commission considered addressing this topic in

1993, but decided not to do so. The chair of the working group that considered the proposal, Derek Bowett, expressed doubt that addressing the topic would serve a useful purpose at that stage, in light of the insufficient practice that existed on the topic. We believe the time is still not yet ripe for the Commission to address this topic.

The Commission is currently working on two topics that address key sources of international law—subsequent agreements and subsequent practice in relation to the interpretation of treaties, and the identification of customary international law. These sources implicate many issues that would also be relevant to consideration of *jus cogens*. For example, the Commission is currently considering whether and how silence by a treaty party may constitute practice for purposes of establishing acceptance of an interpretation of a treaty. Likewise, the Commission is currently considering what actions constitute practice for the purposes of customary international law, how to describe the rule that such practice must be "general," whether any particular duration of practice is required to form a customary rule, and the relationship between practice and *opinio juris*. Such issues are closely enough related to *jus cogens* that the original proposal for the Commission's topic of customary international law left open whether it would include *jus cogens*, and only after launching the project has the Commission decided not to include it. Indeed, the first report of the special rapporteur on customary international law indicated that "one's view as to the relationship between *jus cogens* and customary international law depends, essentially, on the conception that one has of the latter".

While the international law rules regarding formation of *jus cogens* norms may differ from these other sources, many concepts that the Commission is already considering are of relevance to a study of *jus cogens*. We are concerned that having three overlapping ILC projects addressing sources, all proceeding in parallel, risks confusion and inconsistency, and at a minimum would be inefficient.

In addition, it is not clear that practice on this topic has developed sufficiently since 1993 to justify a conclusion different than the one reached at that time. The syllabus for the topic presents a helpful discussion of some important issues, including an overview of the International Court of Justice's treatment of *jus cogens* in certain cases. But the syllabus references few examples of State practice since 1993 that would support the conclusion that the situation has changed and that this topic is now ripe for consideration.

Accordingly, we do not believe it would be productive for the Commission to add this topic to its active agenda at the present time.

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2. ILC's Work on the Obligation to Extradite or Prosecute, Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, Protection of the Atmosphere, and Immunity of State Officials from Foreign Criminal Jurisdiction

On October 31, 2014, Mark Simonoff, Minister Counselor for Legal Affairs for the U.S. Mission to the UN, addressed the 69th General Assembly Sixth Committee on the work of the International Law Commission ("ILC"). Mr. Simonoff discussed the ILC's work on "The Obligation to Extradite or Prosecute," "Subsequent Agreements and Subsequent

Practice in relation to the Interpretation of Treaties," "Protection of the Atmosphere," and "Immunity of State Officials from Foreign Criminal Jurisdiction." Mr. Simonoff's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/234013.htm*.

* * * *

With respect to the topic entitled "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)," we would like to thank the Commission for its final report. The report ably recounts the extensive and useful work by the Commission, which included a survey of the diverse array of treaty instruments containing such an obligation, a typology of the extradite or prosecute provisions contained in multilateral instruments, the implementation of these provisions, an analysis of gaps in the existing treaty regime and of the relationship of the obligation to extradite or prosecute with other obligations, and a discussion of important developments such as the International Court's 2012 judgment on *Questions Relating to the Obligation to Prosecute or Extradite*.

As we have explained before, while we consider extradite or prosecute provisions to be an integral and vital aspect of our collective efforts to deny offenders, including terrorists, a safe haven, and to fight impunity for such crimes as genocide, war crimes and torture, there is no obligation under customary international law to extradite or prosecute individuals for offenses not covered by treaties containing such an obligation. Rather, as the Commission notes in its Report, efforts in this area should focus on specific gaps in the existing treaty regimes. Accordingly, we commend the Commission for its report, which provides an appropriate conclusion for this project.

Mr. Chairman, turning to the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties," we would like to thank Special Rapporteur Georg Nolte and the Commission for their extensive and valuable work on this topic.

In reviewing the Special Rapporteur's second report as well as the draft conclusions and commentary provisionally adopted by the Commission, the United States welcomes the situating of the topic in the framework of the rules on treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, as well as the recognition of the need to distinguish between the interpretation of a treaty and the rules on amendment of a treaty as reflected under Article 39. While we believe that more work may need to be done on that distinction, we are pleased to see the attention given to the issue.

Mr. Chairman, while the United States welcomes much of the language in the Commission's draft conclusions, we continue to have some concerns. We will touch on some of those issues now, beginning with one general point. In studying the conclusions and commentary, it appears that in a number of cases the conclusions rely too heavily on the commentary to flesh out the meaning of the black letter rule set forth in the draft conclusions. We are concerned that this results in undesirable ambiguity in the meaning of the conclusions, which is only clarified in the commentary. Since these conclusions may well be read by practitioners and perhaps even reproduced without the commentary, we believe the better practice is to ensure that important limitations and explanations are included in the conclusions themselves. In addition, the Commission might consider including in an introductory

commentary a statement that the commentary is integral for understanding the meaning of the conclusions.

Draft Conclusion 9 as adopted by the Commission illustrates this point. Paragraph 2 of that conclusion provides that the number of parties that must engage in a subsequent practice to establish an agreement as to the interpretation of a treaty may vary and that silence by a party may constitute acceptance of the practice. However, the draft Conclusion fails to make clear that in one way or another—be it by engaging in the consistent practice or by acceptance of the practice of others—all the parties to the treaty must manifest their agreement with the interpretation at issue. For that important clarification, one must study the accompanying commentary. Similarly, a reader must look to the commentary to find the important caution that a State's acceptance of a practice by way of silence or inaction "is not easily established." The United States would have preferred to see both of these points made clearly in the conclusions themselves.

Mr. Chairman, with respect to the Commission's draft Conclusion 10 on decisions adopted within the framework of a Conference of States Parties, we are concerned that the draft conclusion and commentary may suggest that the work of such Conferences generally involves acts that may constitute subsequent agreements or subsequent practice in the interpretation of a treaty. Subject to the terms of the treaty at issue, it is possible that a COP may produce a decision that constitutes a subsequent agreement of the parties or may engage in actions giving rise to subsequent practice, where such a decision or action reflects the agreement of all the treaty's parties (and not just those present at the COP). However, these results are by far the exception, not the rule, with regard to the activities of COPs. We believe that it is important that the fairly general language of draft Conclusion 10 be modified to indicate that these results are neither widespread nor easily demonstrated.

Mr. Chairman, before concluding on this topic, the United States would like to make a related comment about the Special Rapporteur's pending requests to States regarding whether the practice of an international organization may contribute to the interpretation of a treaty and whether pronouncements or other action by a treaty body give rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty. The United States looks forward to providing information to the Special Rapporteur on both of these issues. For now, we note that this project is concerned with subsequent agreements and subsequent practice as they relate to the rules set forth in the 1969 Vienna Convention and not the 1986 Vienna Convention. As such, for this project it is only the States Parties to a treaty that can enter into a subsequent agreement or engage in relevant subsequent practice. While it is possible for those parties to act through other bodies, like a plenary organ of the international organization or a COP as discussed a moment ago, it is the agreement of all the States Parties to the treaty at issue that must be demonstrated.

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Mr. Chairman, on the topic of "Protection of the Atmosphere," we have previously expressed concerns about the suitability of the topic. We fear that those concerns have been borne out in the first report of the Special Rapporteur, issued earlier this year.

Our original concerns—which were shared by a number of other countries—ran along two main lines.

First, we did not believe that the topic was a useful one for the Commission to address, since various long-standing instruments already provide not only general guidance to States in their development, refinement, and implementation of treaty regimes, but in many instances very specific guidance tailored to discrete problems relating to atmospheric protection. As such, we were concerned that any exercise to extract broad legal rules from environmental agreements concluded in particularized areas would be infeasible and unwarranted, and potentially quite harmful if doing so undermined carefully-negotiated differentiation among regimes.

Second, we believed that such an exercise, and the topic more generally, was likely to complicate rather than facilitate future negotiations and thus to inhibit State progress in the environmental area.

Accordingly, we opposed inclusion of this topic on the Commission's agenda. Our concerns were somewhat alleviated when the Commission issued an understanding in 2013 that framed the topic narrowly. This understanding was apparently designed to limit the scope of work to areas where there might be some utility and to prevent the work from straying into areas where it might do harm.

Unfortunately, as is clear from the first report by the Special Rapporteur, and from the Commission's debate during its Sixty-Sixth Session, the Special Rapporteur did not adhere to the 2013 understanding. Indeed, the report evinced a desire to recharacterize the understanding altogether, and generally took an expansive view of the topic.

While we welcome the fact that the draft guidelines proposed in the first report were not sent to the drafting committee, we remain seriously concerned about the direction this topic appears to be taking.

We urge the Special Rapporteur, in his next report, to adhere to the letter and the spirit of the understanding that forms the basis for this work. A strict adherence to that understanding can help ensure that the Commission's work on this topic may provide some value to States, while minimizing the risk that it will complicate and inhibit important ongoing and future negotiations on issues of global concern. We look forward to seeing revisions along those lines.

Mr. Chairman, turning to the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, we commend Special Rapporteur Concepción Escobar Hernández for the progress she has made on this important and difficult topic. We commend also the thoughtful contributions by the members of the ILC.

To date, the ILC has produced draft articles and commentary addressing the scope of the topic, addressing immunity *ratione personae*, and addressing some aspects of immunity *ratione materiae*.

As I pointed out last year, one of the challenges of this topic as it relates to immunity *ratione personae* has to do with the small number of criminal cases brought against foreign officials, and particularly against heads of State, heads of government, and foreign ministers—the officials sometimes collectively referred to as the "troika." The federal government of the United States has never brought a criminal case against a member of the troika. Nor do we believe that any state government within the United States has brought such a case.

The draft articles on immunity *ratione personae* provide for broad immunity for the troika. Indeed, the draft articles provide for absolute immunity for the troika during the term of office for all acts in a private or official capacity, regardless of whether they occurred during or before the term in office. Immunity for a sitting head of state for acts prior to taking office is

consistent with state practice in the United States in civil cases against heads of state. For example, in a case brought in the United States [*Habyarimana v. Kagame*, 696 F.3d 1029 (10th Cir. 2012)], the Executive Branch submitted a suggestion of immunity on behalf President Kagame of Rwanda with respect to allegations against him that predated his presidency, and the courts agreed. We note that the Special Rapporteur has not yet turned to exceptions, and we suggest that waiver may be the only exception for immunity *ratione personae*.

With respect to immunity *ratione materiae*, the ILC has drafted an article stating that State officials acting as such enjoy immunity from the exercise of foreign criminal jurisdiction. In doing so, the ILC has posited that immunity *ratione materiae* exists and is enjoyed by individuals who—according to the definition of "State official"—either represent the State or exercise State functions. This definition, as well as the phrase "acting as such," can be understood to mean that the acts for which immunity *ratione materiae* is available are those in which a State official either represents the State or—far more broadly—exercises State functions. Comment 11 to Article 2(e) says that "State functions" are to be understood to mean all the activities carried out by the State. This would appear to express a broad view of immunity *ratione materiae*—subject, of course, to exceptions and procedural requirements. Yet Comment 15 disclaims that the definition of "State official" has any bearing on the type of acts covered by immunity, and the acts covered by immunity are to be taken up at a later date. It will be important to resolve this ambiguity.

The other major areas yet to be addressed are exceptions to immunity and procedural aspects of immunity. Very broad immunity can be limited by exceptions or by strict procedural requirements. Accordingly, it is apparent that despite the impressive progress made by the Commission to date, a great deal of difficult ground remains to be covered.

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3. ILC's Work on Identification of Customary International Law, Provisional Application of Treaties, Protection of the Environment in Relation to Armed Conflicts, and Most-Favored-Nation Clause

On November 5, 2014, Stephen Townley, Counselor for Legal Affairs for the U.S. mission to the UN, delivered remarks at the 69th General Assembly Sixth Committee on the work of the International Law Commission ("ILC") during its 66th Session. In particular, Mr. Townley addressed the ILC's work on the following topics: "Identification of Customary International Law," "Provisional Application of Treaties," "Protection of the Environment in Relation to Armed Conflicts," and "Most-Favored-Nation Clause." Mr. Townley's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/233960.htm*.

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Mr. Chairman, with respect to the topic "Identification of Customary International Law," the United States thanks the Special Rapporteur, Sir Michael Wood, for his very impressive second report. That report reflects a tremendous amount of research and careful analysis, and is therefore

a very significant contribution to the understanding of this important topic. We also appreciate the Draft Conclusions provisionally adopted by the Drafting Committee in July based upon Sir Michael's work.

We particularly welcome the clear and unambiguous incorporation into Draft Conclusion 2 of the "two-element approach" for identifying a rule of customary international law. We hope the commentary eventually developed will underscore both the importance of identifying actual practice (as distinct, for example, from statements about practice) and the fact that the two-element approach applies across all fields, as was done in the Special Rapporteur's second report.

While we believe that the Special Rapporteur and Drafting Committee have very successfully addressed a number of the key issues, we would like to raise a few concerns in the hope that we can contribute to improvement of the Commission's work on this important topic.

The United States is particularly concerned about the possible implications of the language in Draft Conclusion 4 that "it is primarily the practice of States that contributes to the formation…of rules of customary international law." We are concerned that the inclusion of the word "primarily" may be interpreted as meaning that the practice of non-state actors, including non-governmental organizations, corporations, and even natural persons, may be of relevance to a customary international law analysis. If the intent is to include such actors, we believe such an approach is misguided and unsustainable under any fair reading of customary international law. If the intent is to indicate that, in addition to the practice of States, in some circumstances the practice of international organizations may contribute to the formation of custom, we believe it would be helpful to state this much more clearly, as the current language is too ambiguous and open-ended. The Drafting Committee could consider re-drafting Paragraph 1 of Conclusion 4 to state that "The practice of States may constitute a general practice that, as one element, contributes to the formation, or expression, of rules of customary international law." Such a formulation properly emphasizes the centrality of States in the formation of this source of law, without creating confusion as to the relevance of other actors.

In addition, we are concerned that the treatment of international organizations together with States in Draft Conclusion 4 may be taken to suggest that these actors play the same roles with respect to the formation of custom, obscuring, in particular, significant limitations on the role of international organizations in this regard. For these reasons, we welcome the recognition by the Special Rapporteur and the Drafting Committee that more work needs to be done on the subject of the role of international organizations in the formation of custom.

In that regard, Paragraph 2 could be rephrased to provide that, in addition to State practice, the practice of international organizations may contribute—in some defined circumstances—to the formation of customary international law, perhaps with a cross-reference to a later Draft Conclusion that addresses the issue in greater detail. While we are not persuaded as yet that the practice of international organizations is of general relevance to the identification of custom, we are open to the possibility that there may be circumstances in which some activities of international organizations may contribute to the formation of customary international law. We, therefore, look forward to the Special Rapporteur's future work on this issue.

Mr. Chairman, the United States notes that the Special Rapporteur and the Drafting Committee decided that the issue of "specially affected States" would not be addressed at this stage in the process. We believe that the role of the practice of such States in the identification of customary international law should be recognized and addressed in the final product of this

exercise, so as to reflect accurately international law, given the well-established jurisprudence on this point. For similar reasons, we welcome the Special Rapporteur's indication that he intends to cover the issue of "persistent objectors" in his third report and we look forward to that topic being addressed in the draft conclusions.

Mr. Chairman, with regard to question of what acts may constitute practice, the United States agrees that "[p]ractice may take a wide range of forms," including physical acts, verbal acts and—in some circumstances—inaction, as stated in Draft Conclusion 6. However, we believe that this conclusion could be strengthened by clarifying that whether any of the listed acts constitute State practice that would contribute to the formation of customary international law in any particular case would depend on the rule at issue and the context involved.

Mr. Chairman, that leads me to two final points of a more general nature. The first is that we understand that no definitive decision has yet been made as to whether this project should be in the form of draft conclusions and commentary and we support waiting until the end of the process before any such decision is made. If the final product of this exercise is to be conclusions and commentary, it will be important that the conclusions themselves be stated with sufficient clarity and completeness that they accurately reflect the relevant rule, since leaving important qualifications to the commentary risks them being far less accessible for practitioners and decision-makers.

An example is Draft Conclusion 8, which provides that "[t]o establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent." The Draft Conclusion contains no sense of what is meant by "sufficiently" widespread and representative; indeed, someone might take the view that the practice of just a few States from different regions of the world is "sufficient." We believe that so important a question as the extent of practice that is required for a customary rule to form should be addressed in the body of the conclusion and not simply left to the commentary. Moreover, we would suggest that consideration be given to incorporating the standard articulated by the International Court of Justice in the *North Sea Continental Shelf* judgment of "extensive and virtually uniform" practice, as that provides much greater guidance regarding the international law requirement.

Our second point of a general nature relates to the broader context in which customary international law is formed. Most cooperation and interaction among States—even when it produces similar patterns of conduct—does *not* result in practice of sufficient density and extent, or of appropriate character, to give rise to rules of customary international law. Only when the strict requirements for extensive and virtually uniform practice of States, including that of any specially affected States, in conjunction with *opinio juris* are met is customary international law formed. As such, the creation of customary international law is not to be inferred lightly, a point that may be lost in the current formulation of these Draft Conclusions. Satisfying such requirements, and recognizing the rule on the persistent objector, are critical to give effect to a central foundation of international law, which is that States generally may not be bound to legal obligations without their consent. In this connection, we believe that the Commission's work on this topic would benefit from further analysis of the cases in which a customary rule was found not to have developed due to the absence of the requisite practice or *opinio juris*, to help better illustrate the relatively high threshold required to establish that a rule of customary law has been formed.

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Mr. Chairman, turning to the topic of "Provisional Application of Treaties," the United States thanks Special Rapporteur Juan Manuel Gómez-Robledo for his second report and appreciates the many ways in which it reflects the views from States during the past year, as well as substantial additional work on the subject. That said, we think that the Special Rapporteur was correct in not proposing draft conclusions or guidelines at this stage, as a number of issues covered by the report require additional views and study by States and within the Commission, as reflected in the many and varying views expressed during the debate within the Commission this summer.

As the United States has indicated previously, we believe the meaning of "provisional application" is well-settled—"provisional application" means that States agree to apply a treaty, or certain provisions, as legally binding prior to the treaty's entry into force, with the distinction being that these obligations can be more easily terminated. Therefore, we were pleased with the repeated recognition in the second report that "the provisional application of a treaty undoubtedly creates a legal relationship and therefore has legal effects" and that these effects go beyond the obligation not to defeat the object and purpose of a treaty.

The United States also believes that—whatever the final form of the ILC's work on this topic—it should be fully consistent with Article 25 of the Vienna Convention on the Law of Treaties, in order to provide useful guidance on the use and consequences of provisional application. For this reason, we would like a more thorough explanation of the report's suggestion that a party seeking to terminate provisional application of a treaty may not do so arbitrarily and must explain its decision, as Article 25 does not include those requirements.

Mr. Chairman, the United States disagrees with certain aspects of the second report, including the suggestion that international law rules regarding the unilateral acts of States (and the Commission's work on the subject) have general relevance to the subject of provisional application of treaties. While the United States agrees that States may in some, limited cases unilaterally undertake to apply a treaty provisionally, we disagree that that is the appropriate framework for analyzing the vast majority of cases of provisional application. In most cases, provisional application creates a treaty-based regime between or among States, not just obligations for one State.

On a related point, the second report asserts that "the form in which the intention to apply a treaty provisionally is expressed will have direct impact on the scope of the rights and obligations assumed by the State in question." That statement is not correct as a general matter; the form by which the State's intention is expressed does not have an impact on the scope of the rights and obligations, any more than the form by which a State ratifies or accedes to a treaty. Rather, what may affect those rights and obligations is the text of the treaty or other instrument that allows for provisional application, as well as any text associated with a State's acceptance of provisional application. The one exception would appear to be the unusual circumstance where provisional application is truly the result of a unilateral act. However, in that case, the State's obligations would not be altered, but only the rights it would have vis-à-vis other States.

The United States also doubts the conclusion that "the intention to apply a treaty provisionally may be communicated … tacitly." The practice cited by the Special Rapporteur for this assertion does not involve "tacit" acceptance of provisional application of a treaty as we would understand it. Rather, it involves a treaty in which States expressly agreed that its provisions would be applied provisionally as of a specified date, but which allowed States to opt out of that provisional application obligation by notifying the depositary in writing. As a general proposition, the same requirements that apply to a State's consent to a treaty, including those

reflected in Article 11 of the Vienna Convention of the Law of Treaties, also apply to its consent to apply a treaty provisionally.

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On the topic of "Protection of the Environment in Relation to Armed Conflicts," the United States notes with interest Special Rapporteur Marie Jacobsson's completion of the first report addressing the first temporal phase, the period before an armed conflict. The United States recognizes the deleterious effects armed conflict can have on the environment, and we believe this is an issue of great importance. Indeed, we reaffirm that protection of the environment during armed conflict is important for a broad range of reasons, including civilian health, economic welfare, and ecology. We also reaffirm the importance of applicable rules of armed conflict that have the effect of protecting the environment.

However, we are concerned with the first report's effort to determine "principles and concepts" of international law that may continue to apply during an armed conflict. As a threshold matter, we view efforts to identify, extract, and apply broad concepts from international environmental law as less useful to the topic than assessing the provisions within the law of armed conflict related to the protection of the environment. In addition, it seems inevitable that this approach would unnecessarily draw the Commission into issues regarding the concurrent application of bodies of law other than the law of armed conflict during armed conflict that will be very difficult to navigate successfully. Further, the manner in which the first report characterizes some of these concepts, including the so-called "principles of prevention and precaution," do not in our view reflect international law. Moreover, the first report invokes the concept of "sustainable development" and addresses several issues—such as indigenous peoples and environmental rights—that appear less useful for identifying legal protections of the environment with respect to armed conflict.

Notwithstanding such concerns, we welcome the Special Rapporteur's decision to focus her second report on identifying existing rules and principles of the law of armed conflict related to the protection of the environment, which may reflect how concepts and principles relevant in peacetime have been adapted to circumstances of armed conflict. We note, however, that the task of identifying existing rules could prove less helpful for the topic should the ILC attempt to determine whether provisions of certain treaties reflect customary international law. We welcome the Special Rapporteur's recognition that it is "not the task of the Commission to modify . . . existing legal regimes" and believe this is an important principle for it to follow as it pursues its work on this topic.

Mr. Chairman, with respect to the "Most-Favored-Nation Clause" topic, we appreciate the extensive research and analysis undertaken by the Study Group, and wish to recognize Professor Donald McRae in particular for his stewardship of this project as Chair of the Study Group, as well as the other members of the Commission who have made important contributions in helping to illuminate the underlying issues.

We support the Study Group's decision not to prepare new draft articles or revise the 1978 draft articles, and instead to summarize its study and description of current jurisprudence in a final report. Most favored nation clauses are a product of specific treaty negotiation and tend to differ considerably in their language, structure, and scope. They also are dependent on other provisions in the specific treaty in which they are located, and thus resist a uniform approach. We continue to encourage the Study Group in its endeavors to study and describe current

jurisprudence on questions related to the scope of most favored nation clauses in the context of dispute resolution, while heeding the distinctions between the investment and trade contexts. This research can serve as a useful resource for governments and practitioners who have an interest in this area. We look forward to seeing the final report.

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4. ILC's Work on Responsibility of International Organizations

John Arbogast, Counselor for Legal Affairs for the U.S. Mission to the UN, commented on the work of the ILC on the responsibility of international organizations at the 69th General Assembly Sixth Committee session on October 23, 2014. Mr. Arbogast's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/234020.htm*.

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As we have said before, we are pleased that the General Commentary introducing the draft Articles recognizes the scarcity of practice in this area and that many rules contained in these draft articles fall into the category of progressive development rather than codification of the law. Indeed, we agree with the Commission's assessment that the provisions of the present draft articles do not reflect the current law in this area to the same degree as the corresponding provisions on state responsibility. That assessment must be kept in mind when considering the cross-references from these draft articles to the articles and commentary on state responsibility, and whether these draft articles sufficiently reflect the differences between international organizations and states.

We also agree with the General Commentary that there exists great diversity among international organizations, which of course operate at the global, regional, sub-regional, and even bilateral levels, with important structural differences, and an extraordinary range of functions, powers, and capabilities, typically driven by each organization's unique charter. Given these differences, the principles described in some of the draft articles—for example, those addressing countermeasures and self-defense—likely do not apply generally to international organizations in the same way that they generally apply to states. Indeed, for all of the draft articles, the *lex specialis* rule set forth in Article 64 is of extraordinary importance. Moreover, in connection with this rule, there may be differences in the way rules on responsibility operate as between an international organization and its members, as opposed to how those rules operate for the international organization in other settings.

We continue to believe that the draft articles should not be transformed into a Convention.

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5. ILC Draft Articles on the Expulsion of Aliens

On March 7, 2014, the United States provided its comments on the draft articles on expulsion of aliens, in response to a request from the UN Secretariat. The comments include general, introductory observations as well as specific article-by-article comments. The U.S. comments are available in full at *www.state.gov/s/l/c8183.htm*. Excerpted below are the general observations by the United States regarding the draft articles.

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The United States appreciates the opportunity to provide written comments on the International Law Commission's Draft Articles on the Expulsion of Aliens, and associated Commentary, which were adopted on first reading in July 2012. These Draft Articles address an important area of international relations, one that implicates both the core sovereign prerogative of every State to control the presence of non-nationals in its territory and the protection of those persons from mistreatment in the course of carrying out removals. The United States recognizes and appreciates the efforts of the Commission, and in particular Special Rapporteur, Maurice Kamto, to take into account the views of States and divergent practices found within national legal systems.

At the same time, the United States has a number of general concerns with the Draft Articles. First, these Draft Articles do not seek merely to codify existing law, but instead are an effort by the Commission to progressively develop international law on several significant issues. Key aspects of the Draft Articles, such as their expansion of non-refoulement protections, deviate significantly from the provisions of widely-adhered-to human rights treaties and from national laws and jurisprudence. While there are a few instances in which the Commentary recognizes that aspects of the Draft Articles reflect progressive development, these are insufficient and leave the incorrect impression that all the other provisions within the Draft Articles reflect codification. The Draft Articles even risk generating confusion with respect to existing rules of law by combining in the same provision elements from existing rules with elements that reflect proposals for progressive development of the law.

Second, although there are elements within these Draft Articles to which the United States would not object, or might even support, we do not believe that, viewed as whole, they currently strike a proper balance in dealing with the competing interests in this field, especially to the extent they advocate certain protections for individuals that unduly restrain States' prerogative and responsibility to control admission to, and unlawful presence in, their territories.

Third, we remain skeptical of the wisdom and utility of seeking to augment in this manner well-settled, universal rules of law that exist in broadly ratified human rights conventions. Those existing conventions, including the various conventions containing non-refoulement provisions, already provide the legal basis for achieving key objectives of these Draft Articles. Problems of mistreatment of persons in this area largely arise not from the lack of legal instruments, but the failure to abide by those instruments, a problem that these Draft Articles do not and cannot solve.

In light of the above concerns, the United States does not believe that this project should ultimately take the form of Draft Articles. Given that several multilateral treaties already exist in this field, we question how much support would exist for negotiating a new convention based on these Draft Articles. Therefore, we recommend the Commission consider converting these Draft Articles into another more appropriate form, such as principles or guidelines. If these do remain as Draft Articles, the United States strongly recommends that the Commentary include a clear statement at the outset that they substantially reflect proposals for progressive development of the law and should not, as a whole, be relied upon as codification of existing law.

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6. ILC's Work on the Formation and Evidence of Customary International Law

The United States also responded to a request from the ILC for information on its views relating to the formation of customary international law ("CIL") and the types of evidence for CIL. That response, submitted in June 2014, is excerpted below and available at *www.state.gov/s/l/c8183.htm*.

* * * *

This response includes selected statements in which some part of the United States' analysis regarding the formation or evidence of CIL is explained. Each example below reflects our view in the specific situation addressed, based on past circumstances and the state of the law as it existed at that time. This list does not capture every instance in which the United States has expressed its views regarding the formation and evidence of CIL generally or taken a position on whether a specific rule constitutes a rule of CIL. In preparing this response, we have focused on views of the Executive branch of the U.S. government that have not already been cited by the Special Rapporteur in the preliminary report on this topic, which we believe will be of most use to the Commission in its work.

This response draws extensively from the Digest of United States Practice in International Law, which is produced annually by the State Department's Office of the Legal Adviser. …

Examples of United States Government Statements Relating to the Formation and Evidence of Customary International Law

1. **Statement by the Government of the United States in the United Nations General Assembly's Sixth Committee on the** Report of the International Law Commission on the Work of its Sixty-Fourth Session, November 5, 2012 (addressing the Commission's work on the obligation to extradite or prosecute), *available at* http://usun.state.gov/briefing/statements/200301.htm .

2. Submission of the United States of America, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23 (2012), *available at* http://www.state.gov/documents/organization/201834.pdf.
3. Response of the Government of the United States of America to the Inter-American Commission on Human Rights regarding juveniles sentenced to life without parole (April 2007), *available at* http://2001-2009.state.gov/s/l/2007/112681.htm.
4. Counter-Memorial of Respondent United States of America, *Glamis Gold, Ltd. v. United States of America* (2006), at Part IV(A) and IV(C), *available at* http://www.state.gov/documents/organization/73686.pdf.
5. Written Statement of the Government of the United States of America concerning the Request of the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, June 20, 1995, at pp. 8-9, *available at* http://www.icj-cij.org/docket/files/95/8700.pdf.

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E. OTHER ORGANIZATIONS

1. Organization of American States

The State Department issued a fact sheet after the Organization of American States ("OAS") concluded its 44th General Assembly in Asuncion, Paraguay in June 2014. The June 20, 2014 fact sheet summarizes key outcomes of the 44th General Assembly and is available at *www.state.gov/r/pa/prs/ps/2014/06/227405.htm*.

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Advances on OAS Reform and Strategic Vision: The United States and its partners in the Americas forged a resolution on a new strategic vision statement declaring the OAS "the hemispheric political forum inclusive of all the countries of the Americas, committed to the strengthening of democracy, the promotion and protection of human rights, the advancement of integral development, and the fostering of multidimensional security, all equal and interdependent, with justice and social inclusion, for the benefit of the peoples of the Americas."

As part of our shared efforts to advance the implementation of this vision, the United States welcomes the decision of the General Assembly to develop supporting guidelines, strategic objectives, and work plans. The United States also looks forward to the presentation of a Management Modernization Plan by the Secretary General for consideration by a Special General Assembly later this year.

Support for Financing of the 2015 OAS Program Budget: As a concrete manifestation of our continued support for the OAS and its important work in the Americas, the United States endorsed the General Assembly's approval of a 1.5% increase to the Organization's 2015 program budget.

As the largest financial contributor to the OAS, the United States is firmly committed to supporting an Organization that values accountability to its member states and transparency in its operating procedures. We look forward to working with other member states to consolidate this process, adjust the current OAS scale of assessments, and transform the OAS into a more vibrant and efficient institution that supports the core values of its founding Charter, representative democracy, the exercise of human rights, security for those most vulnerable and sustainable development for all.

Strengthening the Inter-American Human Rights System: The United States, working with key partners, also supported a resolution that reaffirms the importance of working together to further strengthen the independent Inter-American Commission on Human Rights (Commission), through continued dialogue among member states, within the Commission, and with civil society. Consistent with the OAS Charter, the United States remains committed to strengthening the Commission's work and its critical role in advancing the promotion and protection of human rights throughout the Americas. We are proud of our record of support for the work of the Commission and its Rapporteurs, including the important efforts of the Special Rapporteurship for Freedom of Expression.

Support for Civil Society and Freedom of Association and Assembly: The United States welcomed the adoption of the Strategy for Strengthening Civil Society Participation in OAS Activities, which details specific steps for ensuring greater participation of civil society organizations in the work of the OAS.

The General Assembly, with strong backing from the United States, also decided to enhance OAS efforts to exchange regional experiences, viewpoints, and good practices on the protection of human rights defenders in the Americas. This mandate serves to complement the resolution previously introduced by the United States and adopted by the 2011 OAS General Assembly, "Promotion of the Rights to Freedom of Assembly and of Association in the Americas" (AG/RES. 2680).

U.S. Support for Social Inclusion: The United States actively supported OAS efforts to promote respect for the human rights of people of African descent, including recognition of the International Decade for People of African descent in the Americas and the exchange of best practices to promote inclusion. The U.S. co-sponsored a resolution focused on promoting the rights of persons with disabilities, emphasizing access to education, training and employment opportunities. The United States was also in the forefront of a renewed OAS effort to promote respect for the rights of indigenous peoples and reaffirmed support for the human rights of Lesbian, Gay, Bisexual, and Transgender and Intersex (LGBTI) persons.

Support for the OAS Mission to Support the Peace Process in Colombia (OAS/MAPP): Reflecting strong support for the important and ongoing work of the OAS Mission to Support the Peace Process (OAS/MAPP) in Colombia, the United States announced a new contribution in support of the OAS/MAPP Mission in the amount of $420,000. This will enable the OAS/MAPP Mission to advance its efforts in the areas of land restitution; reparation, truth and reconciliation; justice, peace, and transitional justice; and disarmament, demobilization, and reintegration. The OAS/MAPP Mission was established in 2004, with the strong support of the United States.

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2. Foreign Missions Act Applicable to International Organizations

On January 8, 2014, Under Secretary of State for Management Patrick Kennedy made the determination under Section 209(a) of the Foreign Missions Act ("FMA"), 22 U.S.C. 4309(a), that all provisions of the FMA should apply to international organizations. 79 Fed. Reg. 2926 (Jan. 16, 2014). Excerpts follow from the Federal Register notice of the determination.

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Section 209(a) of the Foreign Missions Act (22 U.S.C. 4309(a)) (hereinafter "the Act'") authorizes the Secretary of State to make any provision of the Act applicable with respect to international organizations to the same extent that it is applicable with respect to foreign missions when he determines that such application is necessary to carry out the policy set forth in section 201(b) of the Act (22 U.S.C. 4301(b)) and to further the objectives set forth in section 204(b) of the Act (22 U.S.C. 4304(b)).

Section 209(b) of the Act (22 U.S.C. 4309(b)) defines "international organization" as (1) a public international organization designated as such pursuant to the International Organizations Immunities Act (22 U.S.C. Sec. 288 et seq.) or a public international organization created pursuant to a treaty or other international agreement as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs; and (2) an official mission (other than a U.S. mission) to such a public international organization, including any real property of such an organization or mission and including the personnel of such an organization or mission.

… I hereby determine that the application of all provisions of the FMA to international organizations, as that term is defined in section 209(b), is necessary to facilitate the secure and efficient operation of public international organizations and the official missions to such organizations, to assist in obtaining benefits, privileges and immunities for these organizations, and to require their observance of corresponding obligations in accordance with international law. It will also further the objectives set forth in section 204(b) of the Act as it will assist in protecting the interests of the United States.

Furthermore, I determine that the principal offices of an international organization used for diplomatic or related purposes, and annexes to such offices (including ancillary offices and support facilities), and the site and any building on such site which is used for such purposes constitute a "chancery'" for purposes of section 206 of the Act (22 U.S.C. 4306).

This action supersedes the determinations under the Foreign Missions Act relating to permanent missions to the United Nations made by the Acting Secretary of State on December 7, 1982, and by the Secretary of State on June 6, 1983.

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Cross References

Visa Determinations for proposed UN representatives, **Chapter 1.C.4.b.**
Palestinian Authority efforts to accede to treaties, **Chapter 4.A.1.**
ILC Draft Articles on Effects of Armed Conflict on Treaties, **Chapter 4.A.4.**
ILC's Work on Provisional Application of Treaties, **Chapter 4.A.5.**
Immunity of the UN, **Chapter 10.E.**
The UN Environment Programme ("UNEP"), **Chapter 13.A.2.**
Middle East peace process, **Chapter 17.A.**
UN peacekeeping reform, **Chapter 17.B.7.**
U.S. contributions to UN peacekeeping, **Chapter 17.B.8.**
Article 51 notifications to the UN, **Chapter 18.A.1.b.c.**

CHAPTER 8

International Claims and State Responsibility

A. INTERNATIONAL LAW COMMISSION

See Chapter 7.D.

B. IRAN CLAIMS

1. Iran-U.S. Claims Tribunal

On July 2, 2014, the Iran-U.S. Claims Tribunal issued a final award in *Iran v. United States (Case A/15(IV))* awarding damages to Iran of $268,161.77, plus pre-judgment interest of $574,306.37. On August 1, 2014, the United States requested a correction to the award because three of Iran's claims that were dismissed as settled were errantly included in the Tribunal's assessment of damages. The Tribunal issued a decision on this request on March 5, 2015, correcting the award to remove those three claims from the damages assessment, reducing the damages awarded by $1,702.08, and reducing the pre-judgment interest by $3,430.16.

In this case, Iran alleged that the United States violated its obligation under the Algiers Accords to terminate all litigation against Iran in U.S. courts that came within the Tribunal's jurisdiction. Iran's claim was for $1.7 million plus pre-judgment interest. The award is available on the Tribunal's website, *www.iusct.net*.

The Tribunal's award of only a fraction of Iran's requested damages appears to have resulted from the Tribunal's application of the normal evidentiary standards applied in international arbitration to quantum of damages, as reflected in the Tribunal's prior award (Partial Award 590) in *Case A/15(IV)*. Iran's primary claim of damages was based on attorney's fees incurred by its U.S.-based law firm, Shack & Kimball, as a result of alleged activities undertaken by Shack & Kimball in cases that, Iran asserts, should have been terminated. Iran also claimed "unallocated litigation costs" incurred by Shack & Kimball. As evidence of such fees and costs, Iran did not submit any

of the law firm's invoices. Rather, Iran submitted only an affidavit from Thomas Shack, one of the partners of Shack & Kimball, and a settlement agreement between Iran and Mr. Shack. The Tribunal found that it could not award any of the requested damages based on such evidence.

However, when the Tribunal turned to supposed "monitoring" expenses incurred by Shack & Kimball—for which there was also no contemporaneous evidence as to quantum—the Tribunal loosened its standard, finding that it could award Iran $70,000 as a "reasonable approximation" of Iran's damages for "monitoring" fees. This amount was far below what Iran had requested, and does not appear to have been derived from any evidence or argument presented by Iran. In dissent, Judge Charles N. Brower described the award of "monitoring" expenses as, "baseless," "a windfall," and a "giveaway," particularly as it constitutes an impermissible *ex aequo et bono* award. Dissenting Judge Thomas O. Johnson wrote,

> Because there is literally no evidence upon which to base an approximation of compensable monitoring costs, this part of the Award makes no sense on its own terms. It might make sense as an award *ex aequo et bono*, but we do not have the authority to render such an award…. Iran [] chose not to provide this Tribunal with the invoices and billing records that would allow us to determine—or at least reasonably estimate—Shack & Kimball's monitoring expenses. Under these circumstances, an award of no compensation would not be 'grossly unfair,' as the Majority states, but rather the proper and logical consequence of Iran's choices, as Claimant, not to provide the Tribunal with evidence, or argument, or even a claim, that might help the Tribunal to approximate Shack & Kimball monitoring expenses.

Excerpts follow from the Tribunal's award .

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153. The Tribunal finds the absence of primary documentation, such as accounting and billing records, to support the Shack & Kimball Evidence (in particular the Settlement Agreement) problematic.

154. It is undisputed that, at a certain point, the Shack & Kimball invoices and billing documents were in the possession of, or at least available to, Iran. However, at the Hearing, Mr. Shack stated that he never turned all of the "billing statements" over to Iran because "[w]e were never requested to do [so]."

155. Mr. Shack states in the 2004 Shack Affidavit that he has relied upon accounting records in calculating legal expenses. Neither Mr. Shack nor Iran submitted these accounting records to the Tribunal.

156. Iran presented its Statement of Claim in Case No. A15 (IV) on 25 October 1982. Thus, at least as early as 1982, Iran was aware that it required evidence to substantiate its claim in these Cases. Iran therefore should have secured the relevant invoices and billing records and made them available so that the Respondent and the Tribunal might have been in a better position to verify the accuracy of Mr. Shack's statements. While the Tribunal may take into account difficulties in the production of evidence, in this instance, the destruction (or loss) of the invoices and billing records lies with Iran. In addition, Mr. Shack, Iran's witness, possesses (or recently possessed) relevant accounting and billing records. Iran has not explained why it never asked him to turn them over to it so they could be submitted to the Tribunal. In this connection, it should be noted that Section 3 of the 1992 Settlement Agreement provides that, "[u]pon dismissal of the litigation, [Shack and Kimball] and [Thomas Shack] will provide every remaining accounting document in its possession which underlies the individual statements [of Shack & Kimball charges owed for legal services rendered], including computer print outs, spread sheet compilation, and summary analysis." The Tribunal will take into account all these circumstances, where appropriate, in determining any compensation to be awarded Iran for services rendered by Shack & Kimball.

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206. [Regarding claims for specific litigation expenses,] [a]s noted above, the absence of primary documentation, such as accounting and billing records, including invoices, to support the Settlement Agreement (and other Shack & Kimball Evidence) –is problematic. This is especially so with regard to the substantiation of specific litigation expenses, in respect of which Partial Award No. 590 has established a rigorous standard of proof, requiring Iran to show "what expenses it incurred with respect to each specific case and what was the particular justification for the specific sums it spent."

207. The Tribunal is persuaded that Shack & Kimball has made appearances and filings on behalf of Iran in court proceedings that the United States should have terminated or halted pursuant to the Algiers Declarations. However, in light of the strict standard of proof set by Partial Award No. 590 mentioned above, Iran's failure to produce crucial primary evidence that was available to it and to its witness, Mr. Shack, excludes the possibility of the Tribunal making an approximation of any specific litigation expenses that Iran may have incurred as a result of those appearances and filings. That evidence, if proffered by Iran or Mr. Shack, would have assisted the Tribunal in determining the nature of the services provided by Shack & Kimball, the United States court cases to which they related, and the associated amounts the firm billed to Iran.

208. In light of the foregoing, Iran's claim for Shack & Kimball specific litigation expenses is dismissed for want of proof.

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213. Necessarily, then, Iran's claim for unallocated litigation costs, which, as Iran concedes, is for attorney expenses that "cannot be allocated to specific cases," does not meet the requirements that Iran must satisfy to prove its losses under Partial Award No. 590. Partial Award No. 590 provides that only litigation expenses that fulfill those requirements are compensable; further, Partial Award No. 590 leaves open the possibility that monitoring

expenses are compensable. What it does not do, however, is provide for the compensability of litigation expenses that fall in neither of those two categories, such as the unallocated litigation costs.

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227. [With respect to monitoring fees], [a]s an initial matter, unlike with respect to the substantiation of Iran's specific litigation expenses, Partial Award No. 590 has established no rigorous standard of proof with respect to the substantiation of Iran's monitoring expenses.

228. Iran has submitted contemporaneous evidence showing that, during the period here relevant, Shack & Kimball provided to Iran, among others, services relating to: (i) United States court litigation that was the subject of the United States' termination obligation, including monitoring of suspended claims; (ii) United States court litigation that was not the subject of the United States' termination obligation; (iii) litigation before the Tribunal; and (iv) the return to Iran of Iranian assets located in the United States. Further, it is undisputed that Iran made payments to Shack & Kimball for services rendered.

229. Iran, however, has not submitted any contemporaneous or other adequate evidence that would allow the Tribunal to determine the precise extent of Shack & Kimball's monitoring activities or, even less, how much Iran paid Shack & Kimball specifically for monitoring activities rather than other activities performed by the firm. Indeed, Iran has not even indicated the amount it seeks for monitoring activities performed by Shack & Kimball.

230. It is well-established in international law that difficulties in calculating damages should not deprive a claimant whose interests have been injured from obtaining compensation. This principle has been endorsed in recent decisions of international arbitral tribunals. Thus, for example, in *Vivendi v. Argentina*, the tribunal said: "it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred." In *Tecmed v. Mexico*, the tribunal stated that "any difficulty in determining the compensation does not prevent the assessment of such compensation where the existence of damage is certain." Further, investment jurisprudence has recognized the authority of international arbitral tribunals to determine equitably (*i.e.*, in equity *intra legem*) the amount of damages—and, in the process, to resort to approximations—where circumstances do not permit a precise calculation.

231. Likewise, it is also well-established in the jurisprudence of this Tribunal that, when circumstances make it difficult or impossible to precisely quantify compensation, the Tribunal may "exercise its discretion to 'determine equitably' the amount involved." In so doing, the Tribunal has "a wide margin of appreciation to make reasonable approximations." In addition to *Starrett Housing Corp. v. Iran*, the relevant Tribunal jurisprudence includes *Eastman Kodak Co. v. Iran*; *Seismograph Service Corp. v. National Iranian Oil Co.*; *William J. Levitt v. Iran*; *Thomas Earl Payne v. Iran*; *American International Group, Inc. v. Iran*; and *Economy Forms Corp. v. Iran*. In none of these cases did the Tribunal decide, or was deemed to have decided, *ex aequo et bono—i.e.*, in equity *contra legem*. The circumstances of the present Cases show similarities to those extant in *William J. Levitt v. Iran*, in which the Tribunal approximated the amount it awarded on a claim for legal fees incurred in preparation for a certain housing project in Iran. In that case, the evidence did not permit the Tribunal to attribute the entire amount claimed to the housing project. While the claimant had produced evidence of payment of the total amount of legal fees claimed, it failed "to produce evidence detailing the legal services for which these sums were paid or even specifying the matters in connection with which they were

expended"; specifically, it failed "to produce the relevant invoices or to explain why they could not have been produced." In those circumstances, the Tribunal attributed approximately one-third of the legal fees to the housing project and awarded the related amount to the claimant.

232. As noted, in the present Cases, while Iran has proven the *fact* that Shack & Kimball provided monitoring services to it, it has not proven the precise *extent* and *value* of those services. The lack of conclusive evidence on these points therefore makes it impossible for the Tribunal to determine the precise extent of the losses that Iran has suffered. Consistent with the principles set forth above, however, given that Iran has proven the fact of its losses, its failure to prove their exact extent should not preclude it from recovering damages altogether. To exclude any recovery in these circumstances would be grossly unfair. The Tribunal has resorted to approximation to award compensation where the claimant had proven the fact that it had incurred losses but failed to produce, and to explain why it did not produce, evidence that would have allowed the Tribunal to determine the precise extent of those losses.

233. Consequently, the Tribunal will determine equitably the extent of the losses Iran has suffered as a result of the monitoring of suspended claims by Shack & Kimball. In so doing, the Tribunal will make its best approximation of those losses, taking into account all relevant evidence as well as all the circumstances, including Iran's conduct in this arbitration.

234. With respect to the latter, the Tribunal has already noted that Shack & Kimball invoices and billing documents were available to Iran and could have been produced by it; further, Mr. Shack, Iran's witness, admittedly possesses (or recently possessed) relevant accounting and billing records, which he could have produced in support of his affidavits. This evidence, if proffered by Iran or Mr. Shack, would have assisted the Tribunal in determining the extent of the monitoring services provided by Shack & Kimball and the related amounts the firm billed to Iran; moreover, it would likely have lessened (or perhaps even obviated) the need for the Tribunal to resort to approximations. Furthermore, production by Mr. Shack of the primary documentation in his possession might have enhanced the weight of his affidavit and Hearing testimony. In these circumstances, given Iran's and its witness' failure to produce primary documentation available to them, the Tribunal is justified in exercising conservative judgment in making an approximation of Iran's losses.

235. Shack & Kimball acted as Iran's general counsel in the United States from February 1979 through early 1983. The Tribunal is persuaded that, in this capacity, the firm, while providing Iran with assorted legal services, spent a significant amount of time on the monitoring of suspended claims before as well as after 19 July 1981. Moreover, contemporaneous evidence shows that, between July and November 1981, Shack & Kimball billed Iran a total of U.S.$427,397.47 for services rendered as general counsel. Shack & Kimball continued to provide legal services to Iran after that date. It is further undisputed that Iran paid Shack & Kimball invoices for services rendered.

236. After taking into account all relevant considerations, the Tribunal deems it fair and reasonable in the circumstances to award Iran U.S.$70,000 in compensation for monitoring services performed by Shack & Kimball. In determining this amount, the Tribunal, exercising conservative judgment, has, *inter alia*, considered that the amount Iran claimed in general litigation expenses covered, not only monitoring expenses, but also unallocated litigation expenses.

* * * *

2. *McKesson v. Iran*

In *McKesson Corp. v. Islamic Republic of Iran*, the United States filed its "Final Brief for the United States as Amicus Curiae" on January 6, 2014, addressing whether international law requires an award of attorneys' fees in this case. United States briefs filed previously in this case addressed the act of state doctrine and the applicability of the commercial activity exception in the Foreign Sovereign Immunity Act and are discussed in *Digest 2011* at 139 and 292 and *Digest 2012* at 128 and 290.

The United States argued in its 2014 amicus brief that international law does not dictate whether an award of attorneys' fees is appropriate in this case. The brief includes four main arguments. Excerpts follow (with footnotes omitted) from the section of the brief presenting the first argument, that international law should not provide the basis for determining whether to award attorneys' fees where Iranian law provided the underlying cause of action in the case. The brief in its entirety is available at *www.state.gov/s/l/c8183.htm*. Using this same reasoning, the Court of Appeals for the District of Columbia Circuit decided that international law principles should not provide the basis for such a determination. *McKesson Corp. v. Iran*, 753 F.3d 239 (D.C. Cir. 2014).

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* * * *

This Court should likewise recognize that international law is indifferent, and irrelevant, to an award of attorneys' fees that is otherwise authorized and appropriate under another governing source of legal authority. That conclusion is particularly relevant here, both because (as explained below) no international law rule exists that compels the award of attorneys' fees in these circumstances, and because this Court previously held—in two decisions—that international law does not provide a cause of action against Iran. See *McKesson VI*, 672 F.3d at 1078-1080 (Iranian law provides cause of action); *id*. at 1075-1078 (customary international law does not provide a cause of action); *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-491 (D.C. Cir. 2008) (*McKesson V*) (Treaty of Amity, as construed under U.S. law, does not independently provide a cause of action). Where Iranian law and not international law provides a cause of action, it would be inappropriate to look to international law principles in determining whether to award attorneys' fees.

Nor would there be a basis to conclude that international law rules concerning an award of attorneys' fees—if there are any such rules—were applicable through the Treaty of Amity. Notably, the district court did not rely on such a theory. Instead, as discussed below, the court incorrectly assessed that general principles of law, as reflected in the domestic legal systems of other nations, support an award of attorneys' fees to a prevailing party.

This Court previously held that Article VI, paragraph 2 of the Treaty of Amity, as incorporated in Iranian law, provides the rule of decision in this case. The treaty there provides that property of a national of the other State Party "shall not be taken * * * without the prompt payment of just compensation," which "shall represent the full equivalent of the property taken." *McKesson VI*, 672 F.3d at 1080 (quoting treaty). That language is silent concerning attorneys'

fees, including whether they can or should be included as a measure of damages or as an ancillary award.

The district court asserted, apparently in dicta, that the Treaty of Amity "authorizes awarding legal costs to a party prevailing on an expropriation claim" because it "expressly provides that a party whose property has been expropriated shall receive a remedy which is 'in no case less than that required by international law.'" JA 929 (quoting Treaty of Amity, art. IV, cl. 2). That misreads the language of the treaty, which provides that the requirements of international law govern the "protection and security" afforded to property of the other country's nationals. See *McKesson VI*, 672 F.3d at 1080 ("Property * * * shall receive the most constant protection and security * * *, in no case less than that required by international law.") (quoting treaty). The treaty does not define the standard of compensation by reference to international law.

The treaty's silence is at most ambiguous about the availability of attorneys' fees under international law, just as it was concerning the availability of interest. See *McKesson VI*, 672 F.3d at 1084 (holding that Iranian law, not international law, governs the award of interest: "the standard for 'full compensation' prescribed by the Treaty is ambiguous regarding the award of interest").

* * * *

C. HOLOCAUST ERA CLAIMS

As described in an April 9, 2014 State Department press statement, available at *www.state.gov/r/pa/prs/ps/2014/04/224621.htm*, the United States and France engaged in negotiations in 2014 regarding compensation for victims who were deported by rail from France to Nazi labor and death camps during the Holocaust, as well as their families. The United States federal government urged state legislatures to defer pursuing separate initiatives in deference to the American-French efforts to reach an agreement.

On December 5, 2014, the State Department issued a fact sheet describing the agreement to be signed for compensation reached by the United States and France. The fact sheet is excerpted below and available at *www.state.gov/r/pa/prs/ps/2014/12/234709.htm*. The text of the agreement will be made public following approval by the French parliament and entry into force.

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* * * *

The United States and France have reached an agreement for substantial compensation in connection with the wrongs suffered by Holocaust victims deported from France. The United States and France plan to sign the agreement Monday, December 8th. The centerpiece of the agreement is a $60 million lump sum payment by France to the United States, to pay out to eligible claimants. France recognizes that Americans and other foreigners deported during the Holocaust have not been able to gain access to the French pension program, and has agreed to

compensate them through this agreement. In exchange for the lump sum, the U.S. Government would undertake an international obligation to recognize and affirmatively protect the immunity of France and its instrumentalities with regard to Holocaust deportation claims in the United States, and to act as necessary to ensure an enduring legal peace.

The agreement is expected to result in payments to several thousand U.S. citizens and others around the world. The U.S. Government will be solely responsible for distributing the funds among eligible claimants. There are three categories of claimants.

First, those who survived deportation from France and are nationals of a country other than France (with the exception of those from countries covered by bilateral agreements with France: Belgium, Poland, the United Kingdom, and former Czechoslovakia) will be eligible to apply. It is estimated that each of these eligible survivors would receive a payment of over one hundred thousand dollars.

Second, spouses of those who were deported from France and are nationals of a country other than France (or one of the four countries mentioned above) will be eligible to apply. It is estimated that each spouse would receive a payment of tens of thousands of dollars.

Third, estates "standing in the shoes" of survivors or spouses who died after the end of World War II would be eligible to apply for compensation on their behalf. These estates would need to show that the deported survivor or the surviving spouse was a national of a country other than France (or one of the four countries mentioned above). The amount of payments to the estates of survivors and spouses would depend upon the year when the survivor or spouse died.

The French Parliament must approve the agreement before it enters into force, and before any payments can be made. Following entry into force, the United States will publish a notice of the program, including the information needed for the filing of claims. Claimants will then be afforded an adequate period of time to file their claims through a fair and streamlined procedure.

French citizens, who are not covered by this agreement, may continue to apply under the French pension program, even if they have never applied before, or applied and were turned down. Moreover, all individuals who were minors at the time of the deportation and lost a parent who was deported and died during the Holocaust are eligible for a pension or lump sum payment through a French program created for such orphans of any nationality. France has already paid over $60 million to over 1,000 eligible orphans in the United States, and additional amounts to orphans from Israel and other countries. Others who lost one or both parents may apply.

* * * *

On December 8, 2014, after the United States and France signed the agreement establishing the compensation fund for holocaust victims deported from France, the two countries issued a Joint Statement, available at *www.state.gov/r/pa/prs/ps/2014/12/234822.htm*, in which they stated:

> This fund will supplement the schemes established by France since 1946 for reparation and compensation of the victims of anti-Semitic persecutions led by the German occupation authorities and the Vichy regime. In this year marked by the commemoration of the 70th anniversary of the Allied landings in Normandy and Provence, this agreement further strengthens the historic friendship and ties between our two countries.

D. IRAQ CLAIMS

1. Referral Letter of October 7, 2014

As discussed in *Digest 2012* at 279, and *Digest 2013* at 248-49, the State Department referred to the Foreign Claims Settlement Commission ("Commission") for adjudication a category of claims within the scope of the Claims Settlement Agreement between the United States and Iraq, Sept. 2, 2010, T.I.A.S. No. 11-522 ("CSA"). On October 7, 2014, the State Department referred additional categories of claims within the 2010 Claims Settlement Agreement to the Commission. The October 7, 2014 referral letter from Acting Legal Adviser Mary McLeod to the Commission is excerpted below and available at *www.justice.gov/sites/default/files/pages/attachments/2014/10/21/iraq_claims_second_referral_10-7-2014.pdf*. The Federal Register Notice announcing the commencement of this new Iraq claims program appeared on October 23, 2014 and identified the categories of claims as described in the October 7, 2014 referral. 79 Fed. Reg. 63,439 (Oct. 23, 2014). The Commission set a deadline of October 23, 2015 for the filing of claims. Further information about the Iraq claims programs is available at *www.justice.gov/fcsc/current-programs*.

* * * *

…The Commission is requested to make determinations with respect to the three categories described below, in accordance with the provisions of 22 U.S.C. § 1621 *et seq.* and the Claims Settlement Agreement.

Category A: This category shall consist of claims by U.S. nationals for hostage-taking[14] by Iraq[15] in violation of international law prior to October 7, 2004, provided that the claimant was not a plaintiff in pending litigation against Iraq for hostage taking[16] at the time of the entry into force of the Claims Settlement Agreement and has not received compensation under the Claims Settlement Agreement from the U.S. Department of State. …

[14] For purposes of this referral, hostage-taking would include unlawful detention by Iraq that resulted in an inability to leave Iraq or Kuwait after Iraq invaded Kuwait on August 2, 1990.

[15] For purposes of this referral, "Iraq" shall mean the Republic of Iraq, the Government of the Republic of Iraq, any agency or instrumentality of the Republic of Iraq, and any official, employee or agent of the Republic of Iraq acting within the scope of his or her office, employment or agency.

[16] For purposes of this category, pending litigation against Iraq for hostage taking refers to the following matters: *Acree v. Iraq*, D.D.C. 02-cv-00632 and 06-cv-00723, *Hill v. Iraq*, D.D.C. 99-cv-03346, *Vine v. Iraq*, D.D.C. 0 l-cv-02674; *Seyam (Islamic Society of Wichita) v. Iraq*, D.D.C. 03-cv-00888; *Simon v. Iraq*, D.D.C. 03-cv-00691.

Category B: This category shall consist of claims of U.S. nationals for death while being held hostage by Iraq in violation of international law prior to October 7, 2004. …

Category C: This category shall consist of claims of U.S. nationals for any personal injury resulting from physical harm to the claimant caused by Iraq in violation of international law prior to October 7, 2004, provided that the claimant: 1) had pending litigation against Iraq arising out of acts other than hostage taking; 2) has not already been compensated pursuant to the Claims Settlement Agreement; and 3) does not have a valid claim under and has not received compensation pursuant to category B of this referral.…

* * * *

2. Claims Under the November 2012 Referral

The Commission issued proposed decisions in all 28 of the claims it received under the 2012 referral in 2014. Some claimants had objections to the decisions still pending as of May 2015, but in those decisions that had become final, the Commission awarded a total of $11,000,000. Decisions are available at *www.justice.gov/fcsc/final-opinions-and-orders-5#s3*.

The category of claims referred to the Commission in November 2012 consists of claims of U.S. nationals for compensation for serious personal injuries knowingly inflicted upon them by Iraq in addition to amounts already recovered under the CSA for claims of hostage-taking, provided that (1) the claimant had already received compensation under the CSA from the Department of State for his or her claim of hostage-taking, and such compensation did not include economic loss based on a judgment against Iraq, and (2) the severity of the serious personal injury suffered is a special circumstance warranting additional compensation. The referral letter states that "serious personal injury" may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault.

Some of the key Commission decisions on the Iraq claims under the 2012 referral are discussed below.

a. Claim IRQ-I-005

In the first claim to be decided in the Iraq Claims Program, the Commission's decision articulates a detailed standard for determining which claims would be compensable because the severity of the serious personal injury suffered is a special circumstance warranting additional compensation. Excerpts follow (with footnotes omitted) from the final decision in Claim No. IRQ-I-005, Decision No. IRQ-I-001.

_____

* * * *

Claimant's attorney makes two arguments …First, he argues that the Referral "clearly and unambiguously encompasses claims for serious personal injury without any requirement that such injury arise out of wrongful conduct separate from that of the hostage experience itself." Under this argument, the Proposed Decision erred by requiring a discrete act as a necessary condition for a finding of "serious personal injury." Second, he argues that the Proposed Decision erred in concluding that Claimant was fully compensated by the State Department for his injuries. He contends that this conclusion effectively ignored the word "generally" in the Referral's indication that the State Department's compensation "encompassed physical, mental, and emotional injuries generally associated with captivity or detention" (emphasis added).

DISCUSSION

I. Definition of "Serious Personal Injury"

To decide this claim requires that we first determine whether Claimant suffered a "serious personal injury" within the meaning of the 2012 Referral. By itself, the use of a phrase like "serious personal injury" might be thought to give us complete discretion to determine whether the Claimant's personal injury is "serious." Here, however, the State Department provided further elucidation of the phrase, and that is where we begin our analysis. The relevant sentence in the Referral—which we will refer to as the "explanatory sentence"—provides that "For the purposes of this referral, 'serious personal injury' may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault."

We begin by noting that the explanatory sentence must have some meaning; it must have some effect on our determinations of whether an injury is "serious" for purposes of the Referral. Therefore, to determine the meaning of "serious personal injury" requires that we understand and interpret that sentence.

The Proposed Decision understood the explanatory sentence as helping to define the contours of the meaning of the phrase "serious personal injury." In particular, the Proposed Decision explained that the permissive nature of the phrase "may include" implied that the list in the explanatory sentence was not to be treated as exclusive. At the same time, the Proposed Decision noted that the explanatory sentence did not reference types of injuries, but instead listed types of acts that could cause injury. This approach to describing injuries suggests that determining whether an injury is "serious" for purposes of the Referral requires some consideration of the act that caused the injury. It was against this backdrop that the Proposed Decision concluded that, to be a "serious personal injury," the injury had to have resulted from one of the four acts specifically enumerated in the Referral or some other act of a similar type or similar level of brutality or cruelty. Claimant's arguments must thus be seen through the lens of language that on the one hand is permissive while on the other hand has the distinctive feature of connecting the "serious" nature of an injury to particular acts.

Claimant's primary argument is textual: the Referral, he says, "clearly and unambiguously encompasses claims for serious personal injury without any requirement that such injury arise out of wrongful conduct separate from that of the hostage experience itself." …

The problem with this argument is twofold. First, the Proposed Decision specifically held that "serious personal injuries" would not be limited to the four acts enumerated in the explanatory sentence. We thus explicitly interpreted "include" as a word of "extension or enlargement" and not as the equivalent of "include only." Second, it was not the words "may include" that led the Proposed Decision to require a discrete act as a condition of a finding that an injury was serious. It was the fact that the explanatory sentence tied the phrase "serious

personal injury" to discrete acts. The question then is not "limitation" versus "enlargement" vis-à-vis injuries caused by the four acts listed in the explanatory sentence, since both the Proposed Decision's reading and Claimant's interpretation treat "include" as a term of "enlargement." The question is simply how much "enlargement" and of what type. To answer that question, the plain meaning of the term "include" provides no help. What the Proposed Decision did find important was the Referral's reference to specific acts that cause injuries, and we continue to see the reference to acts as the linchpin of the explanatory sentence's meaning. The one thing that the language strongly implies is that we must "consider not just the injury itself, but how the injury arose[]" in determining whether an injury is a "serious personal injury" within the Referral's meaning.

… Each of the acts enumerated in the explanatory sentence evokes an extremely high level of brutality and culpability. If, as Claimant contends, we were given free rein to decide in each and every case whether there is a "serious personal injury," it seems highly unlikely that the State Department would have listed these four acts, which seem like easy cases for showing that an injury is "serious." Rather, it seems more likely that there was some sense in which the State Department meant to imply the broad principle of *ejusdem generis*, as if to say, "when we say 'serious personal injury,' look at the acts that cause injury, and these are examples of the type of acts that are bad enough to lead to a serious personal injury."

Claimant's second response is that the hostage-taking itself can count as the act that causes the serious personal injury. He says, "the fact that a serious personal injury 'may include' injury arising from certain types of acts that are separate and distinct from the act of hostage-taking does not mean that it 'cannot include' injury arising from the hostage-taking itself." This argument raises precisely the question posed by the facts of this claim. Here, Claimant's injuries arose solely from his having been a hostage. Indeed, Claimant's injuries occurred in circumstances in which he was never even under the direct custody of Iraqi officials; he was a hostage solely due to Iraq's restrictions on U.S. nationals leaving Kuwait and Iraq.

In the specific context of this program, this argument has to be wrong. The Referral limits this program to those who have already received compensation from the State Department "for his or her claim of hostage-taking . . . ." Clearly, then, every potential claimant was the victim of hostage-taking. Thus, under Claimant's reading, every claimant falling within the jurisdictional terms of the Referral would have been the victim of a relevant act within the meaning of the explanatory sentence, rendering the sentence's reference to specific acts superfluous.

* * * *

Finally, our interpretation of the phrase "serious personal injury" is supported by the way the United Nations Compensation Commission ("UNCC") used the same phrase. As in this program, the UNCC addressed claims arising out of Iraq's occupation of Kuwait in 1990-91, and the State Department was likely aware of the UNCC's use of that phrase. The UNCC's Governing Council held that

> 1. "Serious personal injury" means:
> (a) Dismemberment;
> (b) Permanent or temporary significant disfigurement, such as substantial change in one's outward appearance;
> (c) Permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;

(d) Any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such recovery.

2. For purposes of recovery before the Compensation Commission, "serious personal injury" also includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of a manifestly wellfounded fear for one's life or of being taken hostage or illegally detained.

Decision Taken by the Governing Council of the United Nations Compensation Commission During its Second Session, at the 15th Meeting, Held on 18 October 1991, S/AC.26/1991/3, at 2 (Oct. 23, 1991).

Significantly, the 2012 Referral's explanatory sentence closely tracks the language in paragraph 2 of the UNCC's decision, and yet at the same time has differences with that language. This further buttresses our conclusion by creating negative implications about the meaning of the explanatory sentence in two distinct ways. First, the explanatory sentence, like paragraph 2 but unlike paragraph 1 of the UNCC's definition, lists acts not injuries. The absence of any language listing any specific injuries in the Referral's explanatory sentence suggests that our focus should be on acts not injuries—indeed, it suggests that injuries unconnected to specific acts may have been consciously omitted from the Referral. Moreover, the Referral's requirement that the Commission separately consider whether the "severity" of the injury "constitutes a special circumstance warranting additional compensation" also suggests that the level (i.e., severity) of the injury alone is not what the State Department wanted us to consider determinative of whether an injury satisfies the "serious personal injury" requirement. Second, paragraph 2 of the UNCC definition specifically lists hostage-taking, whereas the Referral's explanatory sentence does not. This suggests that hostage-taking may have been consciously excluded from the list of acts in the explanatory sentence and that any injuries caused solely by hostage-taking thus cannot be "serious personal injuries" within the meaning of the Referral. Of course, even if the State Department were unaware of the UNCC's definition, we could still make these negative inferences from the text; but given the remarkable similarities in the language and the fact that the UNCC adjudicated claims out of the same basic factual circumstances, the State Department was likely aware of the UNCC's definition, making the inferences even stronger here.

II. Injuries "Generally Associated" with Hostage-Taking or Unlawful Detention

Claimant's second argument is that the Proposed Decision erred by concluding that the State Department payment Claimant has already received—$800,000—fully compensated him for his injuries. He focuses on the word "generally" in the language in footnote 3 of the Referral, which indicates that the State Department compensation "encompassed physical, mental, and emotional injuries generally associated with such captivity or detention" (emphasis added). He argues that the Proposed Decision "ignores the ordinary meaning of the word 'generally' and indeed, reads the word completely out of The Referral." …

This argument has two types of problems: textual and practical. The textual problem is that this footnote is not the operative language of the Referral; it is merely a description of the harm for which the State Department has already compensated claimants. So, even if Claimant has not been compensated for injuries that are not "generally associated with" hostage-taking (an issue on which we make no finding), that does not mean he is entitled to compensation in this program. The legal question remains simply whether he suffered a "serious personal injury" within the meaning of the Referral. …

Accepting Claimant's argument would make this claims program nearly impossible to administer. Rather than focusing on how an injury was sustained, Claimant's approach would require the Commission to undertake a case-by-case analysis to determine whether a given claimant's injuries (including emotional injuries) were sufficiently unusual compared to those "generally associated with" the hostage experience. The task would be made even more difficult by the fact that claimants in this program experienced widely varying circumstances of captivity. …

* * * *

b. Claim IRQ-I-001

In Claim IRQ-I-001, claimant demonstrated that Iraqi officials repeatedly and brutally beat him, subjected him to numerous instances of harsh interrogation, imprisoned him in inhumane conditions, and forced him to listen to fellow captives being beaten, leading to physical and emotional injuries such that the Commission awarded him $1.5 million in additional compensation. In arriving at its decision, the Commission considered the appropriate level of compensation for personal injuries under international law. After reviewing a variety of sources, the Commission listed the factors that it would apply when determining appropriate compensation for all successful claimants. These factors were applied in all subsequent decisions in the Iraq program. Excerpts follow from the proposed decision in Claim No. IRQ-I-001, Decision No. IRQ-I-005.

* * * *

Assessing the value of intangible, non-economic damages is particularly difficult and cannot be done using a precise, mathematical formula. Claim No. LIB-II-002, Decision No. LIB-II-002, at 4-5 (2011) (Final Decision) (citing Claim No. LIB-II-002, Decision No. LIB-II-002, at 9-10 (2009) (Proposed Decision)); see also 2 Dan B. Dobbs, *Dobbs' Law of Remedies* ¶ 8.3(6) (2nd ed. 1993); I Marjorie M. Whiteman, *Damages in International Law* 777-78 (1937)). Furthermore, assessing the relative value of personal injury claims is especially challenging where, as here, the claimants have alleged both physical and mental injuries, of varying number and degree, arising from highly individual circumstances.

The Claims Settlement Agreement itself says nothing about the appropriate level of compensation. The Referral sets a recommended maximum of $1.5 million per claim, but says nothing else. 2012 Referral, supra, ¶ 4. The Referral also makes clear that this compensation is not to include compensation for any injuries generally associated with the hostage experience, injuries for which the State Department has already paid the Claimant.

Under international law, compensation for personal injuries varies greatly, and there is no consistent formula applied by international courts and tribunals in determining the appropriate amount. Chester Brown, *A Common Law of International Adjudication* 206 (2007). Nonetheless, certain factors have been frequently cited in making this determination or in assessing the relative value of such claims. For instance, Whiteman cites, *inter alia*, "the nature and seriousness of the injury to the claimant, [and] the extent of impairment of the health and earning

capacity of the claimant . . . ." I Marjorie M. Whiteman, *Damages in International Law* 628 (1937). Awards have generally been higher where the claimant's suffering was permanent or persisted for many years. See *id*. at 588-92. Tribunals have also considered the seriousness and the manner of the wrong committed by the offending state, see Dinah Shelton, *Remedies in International Human Rights Law* 295 (2006); A.H. Feller, *The Mexican Claims Commissions* 296 (1935); *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, Case No. 2, Judgment of July 1, 1999, 3 ITLOS Rep. 10, ¶¶ 171-172, as well as the existence of multiple causes of action in a single claim, see, e.g., J.G. de Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico* 271 (1938).

In determining the appropriate level of compensation under the 2012 Referral, the Commission will thus consider, in addition to the State Department's recommendation, such factors as the severity of the initial injury or injuries; the number and type of injuries suffered; whether the claimant was hospitalized as a result of his or her injuries, and if so, how long (including all relevant periods of hospitalization in the years since the incident); the number and type of any subsequent surgical procedures; the degree of permanent impairment, taking into account any disability ratings, if available; the impact of the injury or injuries on claimant's daily activities; the nature and extent of any disfigurement to the claimant's outward appearance; whether the claimant witnessed the intentional infliction of serious harm on his or her spouse, child or parent, or close friends or colleagues; and the seriousness of the degree of misconduct on the part of Iraq.

Claimant does not specify how much compensation he seeks, but he argues that the Commission should award him more than the State Department's recommended maximum of $1.5 million. Claimant contends that he is entitled to a greater amount because of the brutal and repeated nature of the acts that caused his injuries, the length of time he was subjected to attack (40 days), and the (now) more than 23 years of mental pain and anguish he has suffered. He emphasizes that, under the Referral, "damage awards are by no means limited to 'physical injury' and . . . mental and emotional injuries are *expressly* deemed compensable" (emphasis in original). Further, he says that he suffered treatment similar to the Gulf War POWs; and, according to Claimant, the State Department awarded those POWs amounts "well in excess of the amount now recommended by the State Department" under the 2012 Referral. Claimant notes that the State Department's recommendation "is not binding and that the Commission will give independent consideration to the dollar amounts to be awarded . . . ." For these reasons, Claimant contends that an award in excess of $1.5 million is warranted in this claim.

The Commission recognizes that Claimant suffered countless serious personal injuries throughout his ordeal, and the nature and seriousness of these injuries clearly entailed suffering that few can imagine. The deliberate cruelty of the Iraqi military in detaining Claimant and his colleagues, including the intentional infliction of enormous physical and mental suffering, represents some of the most egregious conduct alleged in this claims program. Moreover, the sworn statements of Claimant's treating physicians make it clear that he has endured, and will likely continue to endure, significant emotional trauma for the rest of his life. Claimant rightly points out that the $1.5 million mentioned in the Referral is merely a recommended maximum and that it does not bind this Commission, and he may be correct that the Gulf War POWs received more than the $1.5 million recommended maximum.

Nevertheless, having weighed all of the relevant factors, we conclude that Claimant is entitled to $1.5 million. The State Department set a $1.5 million recommended maximum in this Program knowing that Claimant was among the eligible claimants. We can thus infer that the

State Department did not intend the POW awards (which, according to Claimant, were made by the State Department itself) to serve as a rationale for this Commission to make awards greater than $1.5 million in this Program. Moreover, Claimant, whose attorney represented some of the POWs both in their court case against Iraq and before the State Department, declares that those amounts are confidential and has thus not provided us with any concrete information about the awards the POWs received. Nor do we have any information about the full array of injuries that the POWs suffered at the hands of Iraq. We are therefore in no position to make the comparative assessment Claimant asks us to make. Since we have neither an explicit indication in the Referral that the POW awards were to be considered, nor any information about the specific injuries suffered and awards received by the POWs, we will not use the POW awards as a factor for assessing the appropriate level of compensation to be awarded in this Program.

Accordingly, the Claimant is entitled to an award of $1,500,000.00 and this amount, not including the amount already received from the Department of State, constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

* * * *

c. Claim IRQ-I-003

In Claim No. IRQ-I-003, the Commission considered arguments against its use of a continuum approach in interpreting the State Department's recommended cap (*i.e.* awarding the cap amount to the most severely injured claimants, and awarding less compensation, in varying amounts, for those whose injuries were not as severe). Claimant in this case argued that the Commission should first determine appropriate compensation, regardless of the amount, and then reduce the awards to the recommended cap when they exceeded that amount. The Commission awarded claimant $500,000 when he sought $1 million. The Commission rejected claimant's argument, upholding the continuum approach in its final decision in Claim No. IRQ-I-003, Decision No. IRQ-I-006. Excerpts follow from the final decision (with footnotes omitted).

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* * * *

I. There Is No Uniform, Universal Test For Measuring Compensation For Noneconomic Personal Injuries

Claimant contends that the first step in the "proper methodology" is to "determine the award to which each claimant would be entitled in the absence of the cap . . . ." The problem with this argument is that he has offered no comprehensive and compelling way to do this. This is not surprising: as the Commission and other international-law authorities have noted numerous times, there is no consistent test for measuring compensation for the types of personal injuries at issue here. The amount of compensation awarded for noneconomic personal injuries has varied dramatically based on the institution making the awards and other contextual factors, and there is

simply no true Archimedean point from which we can determine what Claimant refers to as his "actual damages."

When Claimant argues that the Commission should "simply cap[] the amount that can be awarded in any given case," he assumes that there is some specific amount to which a claimant would be entitled in the absence of the Referral's recommended maximum. But this is simply not the case. In a claim for compensation for noneconomic harm, there is no uniform, universal way to determine "actual damages." …

Claimant contends that the Commission should look to damage awards in U.S. courts as an external anchor against which to measure compensation in this program. We disagree. Our enabling statute, the International Claims Settlement Act of 1949 ("ICSA"), instructs us to apply, in the following order, "the provisions of the applicable claims agreement" and "the applicable principles of international law, justice and equity." 22 U.S.C. § 1623(a)(2) (2012). One important consequence of following the strictures of our enabling statute is that we have no mandate to base compensation amounts in this program on damage awards in U.S. courts, even if the nature and severity of the injuries are similar. We thus do not seek an anchor for determining concrete damage awards or, as Claimant would have it, "actual damages," in U.S. domestic cases.

* * * *

II. The Proposed Decision's "Continuum" Approach
is the Best Interpretation of the 2012 Referral

Even if we were to assume that there is some abstract amount, presumably greater than $1.5 million, to which most or all of the Claimants in this program would be entitled in the absence of the Referral's recommended maximum, that does not mean that the 2012 Referral's language mandates a cut-off approach. It merely raises the question of how to interpret the Referral's language.

Having carefully examined the Referral's text and context, and relevant extrinsic evidence about its meaning, we are convinced that the continuum approach we implicitly adopted in the Proposed Decision better comports with the Referral's meaning than the cut-off approach Claimant proposes. While the text is ambiguous, both the context surrounding the State Department's use of the recommended-maximum language and all the extrinsic evidence we have suggest that we should award compensation in this program based on the relative severity of the injuries along a continuum from zero to $1.5 million.

Text. The Referral's language is ambiguous as to whether to adopt the Proposed Decision's continuum approach or Claimant's proposed cut-off approach. The relevant sentence reads in full as follows: "If the Commission decides to award compensation for claims that meet these criteria, we recommend that the Commission award up to but no more than $1.5 million per claim." 2012 Referral ¶4 (emphasis added). Claimant argues that the "up to but no more than" language favors the cut-off approach: "Nothing in the language of the Department's recommendation," Claimant writes, "suggests that the Department wanted the Commission to reduce the amount of compensation to which an individual might be entitled in the absence of the $1.5 million ceiling to an amount below that ceiling." The problem with this argument, however, is that it can work the other way around too. That is, nothing in the language of the State Department's recommendation suggests the State Department wanted the Commission to adopt the Claimant's recommended "cut-off" approach. Linguistically, "up to but no more than" provides no real guidance as to how to determine awards within the range from zero and $1.5 million. To be sure, it does not preclude Claimant's reading. It just does not decide the question.

Context. Although the text is ambiguous, the background context surrounding the State Department's choice of the "up to but no more than" language strongly suggests that it intended that the Commission adopt a continuum approach. Before the 2012 Iraq Referral at issue here, the State Department used this exact same phrase ("up to but no more than") in a prior referral letter, and just before the 2012 Iraq Referral, the Commission had issued several decisions interpreting the phrase in that prior referral as establishing a continuum. The State Department then used the same phrase again in the 2012 Iraq Referral, undoubtedly knowing how the Commission had interpreted it. This suggests that the State Department was aware that the language could be read to mean a continuum approach and most likely intended the Commission to take such an approach in this program.

Specifically, in January 2009, the State Department referred several sets of claims to the Commission. This was the second set of claims referred pursuant to the Libya Claims Settlement Agreement, and we call that referral the "2009 Libya II Referral." One set of claims, Category D of that referral, was for additional compensation for physical injuries, above an initial $3 million award that all successful physical-injury claimants had received under the first Libya program. Like this program, that category comprised claims for additional compensation for a subset of a predefined group of claimants who had already received some compensation. There, the group consisted of those who had already received $3 million for their physical injuries and the subset consisted of those whose injuries were severe enough to warrant additional compensation; here, the group consists of those to whom the State Department provided compensation for their hostage-taking claim and the subset consists of those who suffered "serious personal injuries." Also like here, it is safe to assume that, although the State Department may not have had detailed knowledge of all the injuries, it did know ahead of time that there would be a range of injuries.

In the 2009 Libya II Referral, the State Department used the same "up to but no more than" language as is used here. Category D provided that, "[i]f the Commission decides to award additional compensation for claims that meet these criteria, we recommend that the Commission award *up to but no more* than an additional $7 million per claim (offering the possibility that some injury cases will be compensated at the $10 million level of the wrongful death claims processed by the Department of State)." 2009 Libya II Referral at 2 (emphasis added).
After assessing the full range of injuries, the Commission awarded compensation in Category D claims using a continuum approach, ranging from zero to the recommended maximum, based on the severity of the injuries. …The State Department was almost certainly aware of the Commission's Category D decisions and, with that knowledge, used the exact same "up to but no more than" language here. Under the so-called Prior Construction Canon, we can presume both that the State Department knew about, and that it intended to adopt, the meaning we gave to the "up to but no more than" language in the Libya II Category D cases. See, *e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates as a general matter, the intent to incorporate the administrative and judicial interpretations as well."). …

Our approach in the 2009 Libya II Category D program also provides a response to Claimant's argument that the State Department would have clearly directed the Commission to use a continuum approach. …In view of the Libya II Category D decisions, Claimant's negative-implication argument cuts against his position. It makes more sense to say that, if the State Department had wanted Claimant's proposed cut-off approach, it would not have used the same "up to but no more than" phrasing that the Commission had previously interpreted as mandating

a continuum approach. The State Department's choice of the same language thus counsels the same continuum approach we used in adjudicating Category D claims from the 2009 Libya II Referral.

Extrinsic Evidence. Claimant makes several arguments that evidence extrinsic to the Referral supports his proposed cut-off approach, but none of them undercuts our view that the continuum approach better comports with the text, context and State Department's likely intent. Claimant argues that State Department awards to POWs who were held in Iraq in early 1991 indicate that the State Department believed many of the claimants in this program suffered "actual damages" of more than $1.5 million. The State Department allegedly provided the POWs with significantly more than the $1.5 million recommended maximum even though the POWs allegedly suffered injuries no more severe than (and in some cases, less severe than) two of the claimants in this program, the claimants in Claim Nos. IRQ-I-001 and IRQ-I-002. Thus, Claimant argues, the State Department must have recognized that the "actual damages" of those two claimants would, in the absence of the recommended maximum, necessitate awards of greater than $1.5 million. Measuring the "actual damages" of the rest of the claimants in this program by comparing with the amount the POWs received would then entitle numerous claimants in this program to more than $1.5 million (again, in the absence of the recommended maximum). Thus, Claimant argues, it makes no sense to create a zero to $1.5 million continuum for all of the claimants in this program when the State Department itself implicitly recognized that many of the claimants in this program would have deserved far more in the absence of the recommended maximum.

The fundamental problem with this argument is that we have no mandate to consider the POW award amount. This amount, to the Commission's knowledge, has not been made public, and the State Department never instructed the Commission to take it into account in making awards in this program. When the State Department wants the Commission to know and consider amounts it has previously awarded, it knows how to inform us accordingly. …

Given that the State Department was fully aware of how much it awarded to the POWs, its silence here speaks volumes. It strongly suggests that the State Department did not intend for the Commission to look to that amount when determining compensation in this program. …

* * * *

Finally, Claimant argues that "case law construing statutorily imposed caps on awards in similar contexts" informs the meaning of the "up to but no more than" language in the Referral. Claimant points to a Court of Federal Claims decision interpreting the National Childhood Injury Vaccine Act of 1986 ("Vaccine Act") and several federal district court cases interpreting the Civil Rights Act of 1991…

Decisions interpreting these statutes do not help decide the continuum versus cutoff question here. For one, in both statutes, the language is subtly different from the Referral. The Vaccine Act uses the language "not to exceed" and the Civil Rights Act of 1991 uses "shall not exceed." Neither uses the Referral's phrase "up to but not more than." In particular, the prepositional phrase "up to" admits more easily of awards being less than the recommended maximum than the phrases "not to exceed" and "does not exceed." By itself, this by no means decides the question, but it reminds us that our goal here is to interpret the specific language in the Referral, not to think about the recommended maximum as a cap in some abstract sense.

More important than the specific differences in the language, however, is the fact that we have no evidence that the State Department was aware of these federal trial court interpretations of completely unrelated statutes. …

Ultimately, we must interpret the Referral, a document drafted by the State Department for this program, and we think it far more likely that the "up to but no more than" language in the Referral is premised on the Commission's earlier interpretation of that language in the Libya II program. In sum, therefore, the Referral's recommendation to award "up to but no more than $1.5 million per claim" is best understood to recommend the creation of a continuum from zero to $1.5 million, with amounts to be awarded within that range based on an assessment of claimant's injuries within this program.

* * * *

d. Claim IRQ-I-021

In Claim No. IRQ-I-021, Decision No. IRQ-I-020 (Proposed Decision), the Commission established criteria under international law that it would apply in determining the veracity of sworn statements of the claimants, their friends and family members, or other individuals. In this claim, as in many others, particularly those involving psychological injuries, there was no concrete evidence of the injuries sustained in Iraq or Kuwait. The proposed decision in Claim No. IRQ-I-021 is excerpted below (with footnotes omitted).

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* * * *

Given that the only direct evidence of physical assault comes solely from Claimant's sworn statements and those of his family members, we begin our analysis with an evaluation of those statements. In circumstances where, as here, a claim relies heavily on written declarations, certain factors must be considered in determining how much weight to place on them. See generally Claim No. IRQ-I-010, Decision No. IRQ-I- 022 (Proposed Decision) (2014). These may include, for example, the length of time between the incident and the statement, see *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 137 (Sept. 2, 1998), and whether the declarant is a party interested in the outcome of the proceedings or has a special relationship with the claimant, see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 312, 317 (Cambridge University Press 2006) (1953). Sworn statements will carry much greater weight when there has been an opportunity for cross-examination. See *Akayesu*, Case No. ICT-96-4-T, ¶ 137; Cheng, *supra*, at 314. In such cases, live, compelling testimony by the claimant can do much to support a claim. See, e.g., Claim No. LIB-I-007, Decision No. LIB-I-024 (2011) (Final Decision). The clarity and detail of the declarations should also be considered, as should the existence of corroborating declarations and other evidence. See *Partial Award: Prisoners of War—Eritrea's Claim* 17, 26 R.I.A.A. 23, 42 (Eri.-Eth. Cl. Comm'n 2003).

The various declarations submitted by Claimant concerning his alleged physical assault are, in most respects, consistent. One notable exception, however, is the question of where the alleged physical assault occurred. In Claimant's wife's declaration, she expresses surprise that Claimant's 2004 declaration stated that the alleged assault occurred at the safe house where he was first apprehended. His wife states that Claimant had always told her that it had occurred at a

local police station after his seizure. In his 2013 supplemental declaration, Claimant confirms this, noting that he had been in error in the earlier declaration. He attributes this confusion to memory problems he experienced after his release; his wife confirms these problems, noting that Claimant's memory "has gotten progressively worse[,] and he has frequently gotten dates, names, places and events confused in his mind."

The Commission recognizes that " '[a]llowance must be made for infirmities of memory[.]' " Cheng, *supra*, at 316 (quoting *Studer (U.S.) v. Gr. Brit*., 6 R. Int'l Arb. Awards 149, 152 (Gr. Brit-U.S. Arbitral Trib. 1925)). This inconsistency is therefore not necessarily dispositive to this claim. It does, however, heighten the importance of other corroborative evidence. This is especially true given that all of the declarations referencing the alleged assault—with the exception of Claimant's 2004 declaration that contains the alleged error—were sworn in 2013. It is also notable that the narrative of the assault in each of these declarations comes from a single source: Claimant himself. Moreover, all of the declarants are members of Claimant's immediate family. Under these circumstances, the Commission must look to other evidence to support a finding of serious personal injury arising from the alleged physical assault.

Evidence of physical injuries can be evidence of an assault, and Claimant has submitted medical records to show that he has suffered various physical injuries. Claimant alleges the assault led to injuries in six different parts of his body: (1) his diaphragm; (2) the location of a previous hernia; (3) his tailbone; (4) his teeth; (5) his left pinky; and (6) his head, including a spot over his eye where he received a "nasty scar" and hearing loss in his right ear. For each of these alleged injuries, however, there is either no medical evidence to establish that the injury occurred or, if there is, no medical evidence that it was caused by an assault.

* * * *

Other evidence in the record, while supporting Claimant's assertions about his captivity generally, raises further questions about his allegations of having been seriously beaten. For example, Claimant has submitted two contemporaneous newspaper articles published shortly after his release. Both verify his hostage experience but mention no medical problems other than the ulcer condition that apparently was the basis for his release. There is no indication that Claimant was beaten. Moreover, according to one of the articles, a friend who spoke with Claimant over the phone just after his release, when he was still in Amman, Jordan, said that Claimant "sounded good; he said he felt good[.]" The friend also relayed that Claimant "was reasonably well treated . . . ." Significantly, the friend also noted that Claimant "'sounded very upbeat,'" and that he "thought about remaining in England to visit cousins. 'That's when [the friend] knew . . . [Claimant] hadn't suffered any serious consequences.'"

Finally, Claimant has not submitted any declarations, recent or otherwise, from any of the non-family members who were present during his ordeal and/or could verify his assertion that he suffered a brutal beating by Iraqi soldiers. He has not submitted a declaration from either of his two companions in the safe house, nor has he submitted any declarations from any of the other hostages who were with him at the Kuwaiti hotel in the days immediately after the alleged assault, the Mansour Melia Hotel in Baghdad in the days after that, or the chemical weapons complex near Samarra, any of whom might be able to say something about the nature and seriousness of his injuries. While the absence of these documents is not dispositive, such documentation could have provided much-needed support for Claimant's allegation that he was seriously beaten by Iraqi soldiers upon his capture in Kuwait and suffered permanent or semi-permanent injuries.

In sum, on the present record, Claimant has not provided evidence sufficient to establish that he suffered injuries from an aggravated physical assault, or any other discrete act comparable in brutality or cruelty, during his captivity in Iraq. Accordingly, the Commission concludes that Claimant has not satisfied his burden of proving that he suffered a "serious personal injury" within the meaning of the 2012 Referral. While the Commission sympathizes with all that Claimant has experienced both during and since his captivity in Iraq, in the absence of further evidence substantiating his claim, the claim must be and is hereby denied.

* * * *

3. UN Compensation Commission

On December 18, 2014, U.S. Deputy Permanent Representative to the UN in Geneva Peter Mulrean delivered remarks at the 14th special session of the UN Compensation Commission ("UNCC") Governing Council. For background on the UNCC, see *Digest 2013* at 249-50. As stated by Mr. Mulrean, the United States supported Iraq's request to suspend its payment obligations to the UNCC until January 2016. Mr. Mulrean's remarks are excerpted below and available at *https://geneva.usmission.gov/2014/12/18/us-statement-at-14th-special-session-of-the-uncc-governing-council/*.

* * * *

The United States appreciates that both Iraq and Kuwait have sent eminent representatives from their capitals for this Special Session. We share the deep concern of the government of Iraq regarding its present security situation, and we are undertaking significant efforts to assist Iraq to overcome the multiple challenges it faces. We understand the requests that Iraq has made regarding its UNCC obligations, and we are in favor of helping Iraq.

We have listened very carefully to the representative of Kuwait. For us a key question about Iraq's requests is whether Kuwait and Iraq have reached accord on these proposals. It is heartening to hear that they have. Kuwait deserves much appreciation from the international community for taking a constructive and helpful approach to Iraq during its time of crisis. In fact, it is an extremely positive symbol of how far the relations of these two countries have come since the events of the early 1990s that led to the creation of the UNCC.

In the present extraordinary circumstances, and given that there appears to be agreement between Iraq and Kuwait, the United States supports adoption by the Governing Council of a decision to suspend Iraq's payment obligations for one year until January 1, 2016, when the payment obligations would resume.

It is important that Iraq's obligations under the relevant Security Council resolutions remain until all outstanding claims payments have been made. Until recently, we expected the remaining payments of approximately $4.6 billion to be completed during 2015. Under this proposal, the conclusion of the UNCC's mandate will be deferred. That is acceptable to us, as long as there is a definite expectation and a reasonable timing for Iraq to resume and complete its

payments. It remains important, as we have said at previous Governing Council meetings, to use UN resources wisely, and to accomplish the orderly wind-down of the UNCC and fulfillment of its mandate, even if that event will now be delayed by one year.

In sum, based on the accord between Iraq and Kuwait, we support Iraq's requests for both the deferral of payments and the release of funds for the months of October, November and December. We hope that other Council members will do the same.

* * * *

E. LIBYA CLAIMS

On November 21, 2014, a district court granted the U.S. motion to dismiss claims brought by the half-siblings of a victim of a 1972 terrorist attack in Israel that was carried out with material support from Libyan authorities. *Robles v. Kerry*, No. 14-79 (D.D.C. 2014). The victim's full siblings had obtained $10 million from the State Department pursuant to the Libya claims settlement program. For background on the Libya claims program, see *Digest 2008* at 399-410 and *Digest 2009* at 273-74. The Foreign Claims Settlement Commission, to whom the State Department had referred the Libya claims, determined that because the maximum per-death payment of $10 million had already been paid to the victim's siblings, the Commission lacked jurisdiction over the claim by the victim's half-siblings. The half-siblings then filed the suit in federal district court, seeking a declaratory judgment that the denial of their claims to compensation violates due process and an order that the State Department provide them with compensation. Excerpts follow (with footnotes omitted) from the district court's grant of the U.S. government's motion to dismiss.

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* * * *

"[T]o make out a violation of [procedural] due process, the plaintiff must show the Government deprived her of a 'liberty or property interest' to which she had a 'legitimate claim of entitlement,' and that 'the procedures attendant upon that deprivation were constitutionally [in]sufficient.'" *Roberts v. United States*, 741 F.3d 152, 161 (D.C. Cir. 2014) (citation omitted). A governmental authority "creates a [protected property] interest . . . by establishing 'substantive predicates' to govern official decision-making and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462 (1989) (internal citation omitted). That is, in addition to discretion-limiting substantive predicates, the applicable statutes or regulations must contain "explicitly mandatory language, *i.e.*, specific directives to the decision-maker that if the regulations' substantive predicates are present, a particular outcome must follow . . . ." *Id*. at 463 (internal quotation marks and citation omitted), accord *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997).

This Court's review of the statutes and regulations has not revealed "explicitly mandatory language" requiring the Commission (or State Department) to issue an award to any eligible claimant. *Ky. Dep't of Corr.*, 490 U.S. at 463.15 The Executive Order directing the Secretary of State to implement the Claims Settlement Agreement provides only that the Secretary "shall provide for procedures" for processing claims. Exec. Order No. 13,477, 73 Fed. Reg. at 65,965. The notice announcing the Commission's adjudication program outlines various eligibility criteria, but contains no requirement that "if the . . . substantive predicates are present, a particular outcome must follow . . . ." *Ky. Dep't of Corr.*, 490 U.S. at 463 (emphasis added). Indeed, the notice provides that "the Commission will . . . certify to the Secretary of the Treasury those claims that it finds to be valid"; the notice does not require the Commission to validate any claim or class of claims. 74 Fed. Reg. at 32,194 (emphasis added). Nor is any language in the Claims Settlement Agreement or claim filing instructions availing. See generally Claims Settlement Agreement; Foreign Claims Settlement Commission Libya Claims Program (Referral Dated Jan. 15, 2009) Instructions for Completing Statement of Claim, Pls.' Ex. 2, ECF No. 12-2. In any event, the complaint does not direct this Court to any mandatory language and therefore fails to state a plausible claim that Plaintiffs were denied procedural due process. *Iqbal*, 556 U.S. at 678.

Accordingly, Plaintiffs fail to state a claim for a declaratory judgment that the State Department's denial of monetary relief "violates the Fifth Amendment . . . and 42 U.S.C. § 1983." Compl. 9.…

Plaintiffs likewise fail to state a claim for $10 million in monetary relief under 22 U.S.C. § 1623(a)(1)(C) because that statute does not provide any such entitlement. Rather, the statute merely sets forth the Commission's jurisdiction:

> The Commission shall have jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or of any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C). To the extent Plaintiffs rely on an implied right of action, they must demonstrate that the statute "displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). But Defendants persuasively explain that there is no evidence of such intent; to the contrary, the statute explicitly provides that Commission decisions are not subject to judicial review. See 22 U.S.C. § 1623(h). Defendants further contend that an implied right of action against the State Department would be difficult to reconcile with the fact that this statute imposes no obligations on that agency at all; the statute provides only that the Commission can hear claims "referred . . . by the Secretary of State." *Id.* § 1623(a)(1)(C).

* * * *

F. CHALLENGE TO DECISION NOT TO ESPOUSE CLAIMS

In 2013, the United States filed a motion to dismiss claims brought in U.S. district court challenging both the U.S. government policy of providing assistance to Vietnam despite its government's nationalization of individuals' property as well as the U.S. government declining to espouse claims against the government of Vietnam on behalf of

Vietnamese-Americans whose property had been nationalized. *Tran et al. v. U.S. Dept. of State*, No. 13-646 (E.D. La. 2014). The district court issued its decision, excerpted below (with footnotes omitted), on May 9, 2014, granting the U.S. motion to dismiss.

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* * * *

Plaintiffs are naturalized Vietnamese-Americans and a national Vietnamese-American non-profit organization who seek class action declaratory and injunctive relief against Defendants, who are agencies and officials of the United States government. Plaintiffs assert that on or before April 1975 they were citizens of the Republic of South Vietnam and owned real property before Communist forces took control of the country. They subsequently fled to the United States at various times. They left their property behind, which they claim was seized by the Vietnamese government and nationalized. Plaintiffs allege two causes of action. First, they argue that Defendants have violated federal law by providing assistance to Vietnam. Second, they argue Defendants have discriminated against them in violation of the 14th Amendment Equal Protection Clause and the 5th Amendment Due Process Clause.

Defendants seek dismissal, arguing the Court is barred from hearing the case because Plaintiffs lack standing, Plaintiffs' claims are political questions, and the statute of limitations has expired for Plaintiffs' Constitutional claims. Accordingly, and for the reasons articulated below IT IS ORDERED that Defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Rec. Doc. No. 55) is GRANTED and Plaintiffs' claims are DISMISSED.

Law and Analysis

I. Statutory Claims

Plaintiffs point to 22 U.S.C. § 2370(e)(1) as prohibiting the grant of aid by the United States to certain foreign countries who have expropriated the property of United States citizens. That provision however was subsequently superseded by 22 U.S.C. § 2370a. See *Talenti v. Clinton*, 102 F.3d 573, 575 (D.C. Cir. 1996). The Court therefore analyzes Plaintiffs' claims under § 2370a. § 2370a provides in relevant part:

> (a) Prohibition
>
> None of the funds made available to carry out this Act, the Foreign Assistance Act of 1961 [22 U.S.C.A. 2151 et seq.], or the Arms Export Control Act [22 U.S.C.A. 2751 et seq.] may be provided to a government or any agency or instrumentality thereof, if the government of such country (other than a country described if subsection (d) of this section)—
>
> (1) has on or after January 1, 1956—
>
> (A) nationalized or expropriated the property of any United States person . . .

However the prohibition on aid contains a waiver provision, which reads "[t]he President may waive the prohibitions in subsections (a) and (b) of this section for a country, on an annual basis, if the President determines and so notifies Congress that it is in the national interest to do so." 22 U.S.C. § 2370a (g).

Separate and apart from the prohibition in § 2370a, Plaintiffs also point to 22 U.S.C. § 2370(f)(1) …

Summarizing the two provisions restricting aid that Plaintiffs rely on, two principles are clear: (1) Both statutes require the suspension of U.S. foreign aid to countries if certain conditions are met, *i.e*. a country has expropriated Americans' property or a country is

communist; and (2) Both statutes can be unilaterally disregarded by the President upon a finding that continuing to provide the aid is in the national interest, so long as the President reports this finding to Congress.

Defendants, in their Opposition, do not appear to dispute that Plaintiffs' land was expropriated by the government of Vietnam, or that Vietnam remains a communist country. Thus, the Court assumes for purposes of the instant motion that the statutory conditions to halt aid are present.

Turning to the waiver provisions, the President has delegated his authority to waive the aid restrictions to the Secretary of State. See Executive Order 12163, 44 Fed. Reg. 56673 (Sept. 29, 1979); Pres. Mem. of July 26, 1994, 59 Fed. Reg. 40205. The Secretary of State has waived § 2370(f) as it applies to Vietnam. Comm. Int'l Relations & H. Comm. on Foreign Relations, I-A Legislation on Foreign Relations Through 2008 § 620 n.1004 (March 2010). No similar waiver has been made under § 2370a.

In place of an argument that § 2370a has been complied with, Defendants argue that Plaintiffs lack standing to challenge noncompliance with the statute. In the alternative they argue that compliance with the statute represents a political question.

In order for a Plaintiff to establish standing, three elements must be met:

> First, the plaintiff must have suffered an injury in fact— an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted).

The Fifth Circuit has not had an opportunity to address the application of either provision at issue in this case. The D.C. Circuit, in *Talenti v. Clinton*, 102 F.3d 573 (D.C. Cir. 1996), considered a claim under § 2370a brought by an American citizen, Talenti, who claimed the Italian government had rezoned and expropriated millions of dollars' worth of his property from 1974 to 1985. *Id*. at 575. He sought to cease United States foreign aid to Italy based on the statute and the lack of a Presidential waiver. The D.C. Circuit found that Talenti lacked standing. Specifically, it found Talenti could not meet third requirement of standing – redressability – because it was speculative, if not "doubtful", that any relief granted under that statute would redress Talenti's injury. *Id*. at 577. The court recognized that § 2370a does not require the suspension of aid, but instead allows the President to waive the prohibition on aid by reporting the waiver to Congress. Accordingly, the only relief the court could accord Talenti was to order the President to report any waiver to Congress before resuming aid. *Id*. That relief could not redress Talenti's injury, because forcing the President to make the report to Congress would do little if anything to assist Talenti in getting compensation for his property. *Id*. at 578. Further, even if aid was halted, that likewise would not redress Talenti's claims – since it was merely speculative that the Italian government would respond to the denial of aid by remedying his property claims. *Id*.

The United States District Court for the District of Puerto Rico reached a similar conclusion on standing when faced with a challenge to aid to the Dominican Republican under § 2370a. *Betteroads Asphalt Corp. v. United States*, 106 F. Supp. 2d 262, 267 (D.P.R. 2000).

Further, in *Aerotrade, Inc. v. Agency for Int'l Dev., Dep't of State*, 387 F. Supp. 974 (D.D.C. 1974) the United States District Court for the District of Columbia found a plaintiff lacked standing to challenge aid to Haiti. That case dealt with 22 U.S.C. § 2370(e)(1), the provision cited by Plaintiffs in their complaint here but which has been superseded by § 2370a. Nonetheless, the court's reasoning is nearly identical, and recognized that because the President was free to waive the provision and because there was a lack of evidence that stopping aid would remedy plaintiff's injury, the plaintiff lacked standing. *Id*. at 975-76.

In short, no court has permitted the type of suit advanced here to go forward. Plaintiffs' only retort to this fact is to claim that those prior cases are distinguishable because in those cases "there were no prior Settlement Claims Act established by Congress for the specific purpose of compensating property losses of U.S. Citizens nor were they presented with such unique facts as this case." Opposition, (Rec. Doc. No. 58 at 19). The Court is not persuaded. The fact that a settlement claims process exists does not make it more likely that Plaintiffs' claims can be redressed by court action. Further, while the facts of this case are no doubt unique, that still does not change the inability of the Court to redress Plaintiffs' grievances in this forum.

The Court agrees with the case law referenced above and finds that the Plaintiffs here lack standing to pursue suit against Defendants. Plaintiffs have failed to allege how a favorable ruling would redress their injury. Like the plaintiffs in the cases recited above, it is mere speculation to assume that a court order halting aid or requiring the President to meet the reporting requirements would assist in resolution of Plaintiffs' land disputes. While the Court joins in Plaintiffs' frustration, Plaintiffs lack the necessary legal standing to challenge the alleged failure to comply with clear statutory provisions. Accordingly, dismissal is appropriate under either the motion to dismiss or summary judgment standard.

II. Constitutional Claims

Plaintiffs next claim Defendants have violated their 5th and 14th Amendment rights by discriminating against Vietnamese-Americans. Specifically, Plaintiffs argue that Defendants have mishandled the expropriation claims brought by foreign born Vietnamese-Americans, but have honored claims brought by American born citizens – thus violating the equal protection rights of foreign born citizens.

Except in limited circumstances not relevant here, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Plaintiffs' allegations in their complaint are that: From 1975 to 1995, the U.S. Government through the Department of State, and/or the Office of the U.S. Trade Representative, and/or the Federal Claims Settlement Commission had persistently pressed the Socialist Republic of Vietnam to pay compensation to naturally born U.S. citizens whose properties had been seized or nationalized by the Vietnamese government after the Vietnam War. (Rec. Doc. No. 45 at ¶ XLIX) During that same time period, Plaintiffs claim the U.S. government did not make similar demands or arrangements for naturalized Vietnamese-Americans to obtain compensation for their property. (*Id*. at ¶ LIII).

Accepting Plaintiffs' claims as true, the statute of limitations on their claims expired at the latest in 2001 – six years after the Defendants alleged discriminatory conducted concluded in 1995. Plaintiffs' counsel filed his clients' claims in 2013, well beyond obvious legal time limitations. The claims are therefore time barred, and must be dismissed.

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Cross References

ILC, **Chapter 7.D.**
TRIA and the FSIA, **Chapter 10.A.4.**
Investment dispute resolution, **Chapter 11.B.**
*Arbitration (*BG Group *and* Commisimpex*),* **Chapter 15.C.1.**

CHAPTER 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS

1. Central African Republic

As discussed in *Digest 2013* at 251, the United States suspended operations of its embassy in Bangui, Central African Republic in 2013. On September 15, 2014, the State Department announced that the United States was resuming operations at the embassy in Bangui. See John Kerry Press Statement, available at *www.state.gov/secretary/remarks/2014/09/231632.htm*. Secretary Kerry's press statement explains that the Central African Republic had made progress in its transition from violence to peace and stability, including by establishing a transitional government and cooperating with a UN peacekeeping mission. See section B.2. *infra* for discussion of U.S. relations with the transitional government. For further discussion of the UN peacekeeping efforts in the Central African Republic, see Chapter 17.

2. Syria

On March 18, 2014, the State Department suspended the operations of the Syrian Embassy in Washington and Honorary Syrian Consulates in Michigan and Texas and terminated the status of the remaining diplomatic and consular personnel. Embassy personnel who were not U.S. citizens or lawful permanent residents were required to depart by March 31, 2014, following which date the United States no longer regarded the previously-accredited embassy personnel as entitled to privileges and immunities. The United States maintained diplomatic relations with Syria.

3. Cuba

On December 17, 2014, President Obama announced that the United States would begin the process of restoring diplomatic relations with Cuba. For a discussion of the process of removing Cuba from the list of state sponsors of terrorism and lifting other sanctions, see Chapter 16. Roberta S. Jacobson, Assistant Secretary of State in the Bureau of Western Hemisphere Affairs, held a special briefing on December 18, 2014 to discuss next steps in changing U.S. policy toward Cuba. A full transcript of the briefing with Secretary Jacobson is available at *www.state.gov/r/pa/prs/ps/2014/12/235405.htm*. The briefing included the following remarks on the legal process of restoring diplomatic relations:

> That process is relatively straightforward, frankly, from a legal perspective. Countries agree, as we did yesterday, that we will begin the process of restoration of diplomatic relations. We can do that via an exchange of letters or of notes. It doesn't require a formal sort of legal treaty or agreement. But what they do require is that both countries come to the agreement on the process, right. And obviously, it requires us also terminating the 53-year agreement that we've had with the Swiss Government as our protecting power, and the same for the Cubans. So that will be done as soon as possible, whereupon we would transition to becoming an embassy, and we would change the sign on our mission. We would obviously then, instead of having all of our officers be officers under the Swiss protection, they would be officers and we would have our diplomatic list of officers declared to the Cuban Government instead of through the Swiss, et cetera.

B. STATUS ISSUES

1. Ukraine

In the face of Russian intervention in Ukraine in 2014, the United States consistently maintained its support for Ukraine's sovereignty, political independence, unity, and territorial integrity within its internationally recognized borders. For discussion of U.S. and international sanctions imposed on Russia relating to its actions in Ukraine, see Chapter 16. On March 1, 2014, after Russian President Vladimir Putin received authorization from the Russian parliament for Russian troops to act in Crimea, Secretary of State John Kerry issued the following press statement on the situation in Ukraine, available at *www.state.gov/secretary/remarks/2014/03/222720.htm*.

* * * *

The United States condemns the Russian Federation's invasion and occupation of Ukrainian territory, and its violation of Ukrainian sovereignty and territorial integrity in full contravention of Russia's obligations under the UN Charter, the Helsinki Final Act, its 1997 military basing agreement with Ukraine, and the 1994 Budapest Memorandum. This action is a threat to the peace and security of Ukraine, and the wider region.

I spoke with President Turchynov this morning to assure him he had the strong support of the United States and commend the new government for showing the utmost restraint in the face of the clear and present danger to the integrity of their state, and the assaults on their sovereignty. We also urge that the Government of Ukraine continue to make clear, as it has from throughout this crisis, its commitment to protect the rights of all Ukrainians and uphold its international obligations.

As President Obama has said, we call for Russia to withdraw its forces back to bases, refrain from interference elsewhere in Ukraine, and support international mediation to address any legitimate issues regarding the protection of minority rights or security.

From day one, we've made clear that we recognize and respect Russia's ties to Ukraine and its concerns about treatment of ethnic Russians. But these concerns can and must be addressed in a way that does not violate Ukraine's sovereignty and territorial integrity, by directly engaging the Government of Ukraine.

Unless immediate and concrete steps are taken by Russia to deescalate tensions, the effect on U.S.-Russian relations and on Russia's international standing will be profound.
I convened a call this afternoon with my counterparts from around the world, to coordinate on next steps. We were unified in our assessment and will work closely together to support Ukraine and its people at this historic hour.

In the coming days, emergency consultations will commence in the UN Security Council, the North Atlantic Council, and the Organization for Security and Cooperation in Europe in defense of the underlying principles critical to the maintenance of international peace and security. We continue to believe in the importance of an international presence from the UN or OSCE to gather facts, monitor for violations or abuses and help protect rights. As a leading member of both organizations, Russia can actively participate and make sure its interests are taken into account.

The people of Ukraine want nothing more than the right to define their own future – peacefully, politically and in stability. They must have the international community's full support at this vital moment. The United States stands with them, as we have for 22 years, in seeing their rights restored.

* * * *

On March 2, the United States joined with its Group of Seven ("G-7") partners in a statement condemning Russian intervention in Ukraine. Daily Comp. Pres. Docs., 2014 DCPD No. 00136, pp 1-2. The Joint Statement by Group of Seven Leaders on the Situation in Ukraine follows.

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* * * *

We, the leaders of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States and the President of the European Council and President of the European Commission, join together today to condemn the Russian Federation's clear violation of the sovereignty and territorial integrity of Ukraine, in contravention of Russia's obligations under the UN Charter and its 1997 basing agreement with Ukraine. We call on Russia to address any ongoing security or human rights concerns that it has with Ukraine through direct negotiations, and/or via international observation or mediation under the auspices of the UN or the Organization for Security and Cooperation in Europe. We stand ready to assist with these efforts.

We also call on all parties concerned to behave with the greatest extent of self-restraint and responsibility, and to decrease the tensions.

We note that Russia's actions in Ukraine also contravene the principles and values on which the G–7 and the G–8 operate. As such, we have decided for the time being to suspend our participation in activities associated with the preparation of the scheduled G–8 Summit in Sochi in June, until the environment comes back where the G–8 is able to have meaningful discussion.

We are united in supporting Ukraine's sovereignty and territorial integrity, and its right to choose its own future. We commit ourselves to support Ukraine in its efforts to restore unity, stability, and political and economic health to the country. To that end, we will support Ukraine's work with the International Monetary Fund to negotiate a new program and to implement needed reforms. IMF support will be critical in unlocking additional assistance from the World Bank, other international financial institutions, the EU, and bilateral sources.

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Ambassador Samantha Power, U.S. Permanent Representative to the UN, also condemned Russian intervention in Ukraine in response to Russia's purported justifications for military action at a UN Security Council meeting on Ukraine on March 3, 2014. Ambassador Power's statement is excerpted below and available at *http://usun.state.gov/briefing/statements/222799.htm*.

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It is a fact that Russian military forces have taken over Ukrainian border posts. It is a fact that Russia has taken over the ferry terminal in Kerch. It is a fact that Russian ships are moving in and around Sevastapol. It is a fact that Russian forces are blocking mobile telephone services in some areas. It is a fact that Russia has surrounded or taken over practically all Ukrainian military facilities in Crimea. It is a fact that today Russian jets entered Ukrainian airspace. It is also a fact that independent journalists continue to report that there is no evidence of violence against Russian or pro-Russian communities.

Russian military action is not a human rights protection mission. It is a violation of international law and a violation of the sovereignty and territorial integrity of the independent nation of Ukraine, and a breach of Russia's Helsinki Commitments and its UN obligations.

The central issue is whether the recent change of government in Ukraine constitutes a danger to Russia's legitimate interests of such a nature and extent that Russia is justified in

intervening militarily in Ukraine, seizing control of public facilities, and issuing military ultimatums to elements of the Ukrainian military. The answer, of course, is no. Russian military bases in Ukraine are secure. The new government in Kyiv has pledged to honor all of its existing international agreements, including those covering Russian bases. Russian mobilization is a response to an imaginary threat.

A second issue is whether the population of the Crimea or other parts of eastern Ukraine, are at risk because of the new government. There is no evidence of this. Military action cannot be justified on the basis of threats that haven't been made and aren't being carried out. There is no evidence, for example, that churches in [e]astern Ukraine are being or will be attacked; the allegation is without basis. There is no evidence that ethnic Russians are in danger. On the contrary, the new Ukrainian government has placed a priority on internal reconciliation and political inclusivity. President Turchinov—the acting President—has made clear his opposition to any restriction on the use of the Russian tongue.

* * * *

I note that Russia has implied a right to take military action in the Crimea if invited to do so by the prime minister of Crimea. As the Government of Russia well knows, this has no legal basis. The prohibition on the use of force would be rendered moot were sub-national authorities able to unilaterally invite military intervention by a neighboring state. Under the Ukrainian constitution, only the Ukrainian Rada can approve the presence of foreign troops.

If we are concerned about the rights of Russian-speaking minorities, the United States is prepared to work with Russia and this Council to protect them. We have proposed and wholeheartedly support the immediate deployment of international observers and monitors from the UN or OSCE to ensure that the people about whom Russia expresses such concern are protected from abuse and to elucidate for the world the facts on the ground. The solution to this crisis is not difficult to envision. There is a way out. And that is through direct and immediate dialogue by Russia with the Government of Ukraine, the immediate pull-back of Russia's military forces, the restoration of Ukraine's territorial integrity, and the urgent deployment of observers and human rights monitors, not through more threats and more distortions.

Tonight the OSCE will begin deploying monitors to Ukraine. These monitors can provide neutral and needed assessments of the situation on the ground. Their presence is urgently necessary in Crimea and in key cities in eastern Ukraine. The United States calls upon Russia to ensure that their access is not impeded.

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The United States categorically rejects the notion that the new Government of Ukraine is a "government of victors." It is a government of the people and it is one that intends to shepherd the country toward democratic elections on May 25th—elections that would allow Ukrainians who would prefer different leadership to have their views heard. And the United States will stand strongly and proudly with the people of Ukraine as they chart out their own destiny, their own government, their own future.

The bottom line is that, for all of the self-serving rhetoric we have heard from Russian officials in recent days, there is nothing that justifies Russian conduct. As I said in our last session, Russia's actions speak much louder than its words. What is happening today is not a

human rights protection mission and it is not a consensual intervention. What is happening today is a dangerous military intervention in Ukraine. It is an act of aggression. It must stop. This is a choice for Russia. Diplomacy can serve Russia's interests. The world is speaking out against the use of military threats and the use of force. Ukrainians must be allowed to determine their own destiny. …

* * * *

On March 5, 2014, Secretary of State John Kerry hosted a meeting in Paris with the Foreign Secretary of the United Kingdom, William Hague, and the acting Foreign Minister of Ukraine, Andriy Deshchytsia. Russia was also invited to participate in the meeting, but declined. The purpose of the meeting was to discuss the Budapest Memorandum, a memorandum signed by the Governments of the United States of America, the United Kingdom, Russia, and Ukraine in 1994.

The Group of Seven issued another joint statement on the situation in Ukraine on March 12, 2014. Daily Comp. Pres. Docs., 2014 DCPD No. 00161, p. 1 (Mar. 12, 2014). As indicated in the Joint Statement, the G-7 suspended preparations for a planned G-8 summit, to be hosted in Sochi, Russia in June, due to Russia's actions. The G-8 summit was subsequently cancelled. The March 12 G-7 Joint Statement appears below.

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We, the leaders of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, the President of the European Council and the President of the European Commission, call on the Russian Federation to cease all efforts to change the status of Crimea contrary to Ukrainian law and in violation of international law. We call on the Russian Federation to immediately halt actions supporting a referendum on the territory of Crimea regarding its status, in direct violation of the Constitution of Ukraine.

Any such referendum would have no legal effect. Given the lack of adequate preparation and the intimidating presence of Russian troops, it would also be a deeply flawed process which would have no moral force. For all these reasons, we would not recognize the outcome.

Russian annexation of Crimea would be a clear violation of the United Nations Charter; Russia's commitments under the Helsinki Final Act; its obligations to Ukraine under its 1997 Treaty of Friendship, Cooperation and Partnership; the Russia-Ukraine 1997 basing agreement; and its commitments in the Budapest Memorandum of 1994. In addition to its impact on the unity, sovereignty and territorial integrity of Ukraine, the annexation of Crimea could have grave implications for the legal order that protects the unity and sovereignty of all states. Should the Russian Federation take such a step, we will take further action, individually and collectively.

We call on the Russian Federation to de-escalate the conflict in Crimea and other parts of Ukraine immediately, withdraw its forces back to their pre-crisis numbers and garrisons, begin direct discussions with the Government of Ukraine, and avail itself of international mediation and observation offers to address any legitimate concerns it may have. We, the leaders of the G–7, urge Russia to join us in working together through diplomatic processes to resolve the current crisis and support progress for a sovereign independent, inclusive and united Ukraine. We also

remind the Russian Federation of our decision to suspend participation in any activities related to preparation of a G–8 Sochi meeting until it changes course and the environment comes back to where the G–8 is able to have a meaningful discussion.

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On March 15, 2014, Ambassador Samantha Power addressed the UN Security Council regarding the situation in Ukraine. The United States, along with all but two of the members of the Security Council, voted in favor of a resolution that would have urged countries to reject the results of a referendum on the status of Crimea. Russia voted against the resolution and China abstained. Ambassador Power's remarks on the failed resolution, available at *http://usun.state.gov/briefing/statements/223543.htm*, are excerpted below.

* * * *

Good day everybody. Today's vote is a reflection of what Russia denies and the whole world knows.

The whole world knows the government of Ukraine has acted with restraint in the face of repeated provocations. From the beginning, Ukraine's leaders have sought dialogue and a peaceful solution. Unlike the former President, who fled the country, they have sought to fulfill the spirit of the February 21 agreement.

They have reached out to minorities inside the country and scheduled nationwide elections for May that will be closely monitored by legions of international observers. Those elections will give the people of Crimea and all of Ukraine the opportunity they deserve to choose their own leaders and, by so doing, shape the policies and priorities of a new government.

The whole world knows the legitimate leadership of Ukraine did not instigate this crisis, and neither did the citizens of Ukraine. The crisis came with a label—made in Moscow. It was Moscow that ordered its armed forces to seize control of key facilities in Crimea, to bully local officials, and to threaten the country's eastern border. It was Moscow that tried to fool the world with a false narrative about extremism and the protection of human rights—about refugees fleeing, and about attacks on synagogues. The reality is that the part of Ukraine where minorities are threatened is Crimea, where Russian forces have confronted Ukrainians, and spread fear within the Tatar community—which has endured Russian purges and ethnic cleansing in the past and fears now that this bitter past will serve as prologue.

The whole world knows that the referendum scheduled for tomorrow in Crimea was hatched in the Kremlin and midwifed by the Russian military. It is inconsistent with Ukraine's constitution and international law. It is illegitimate and it will have no legal effect.

The world knows that the resolution offered today was offered in a spirit of reconciliation, in the desire for peace, in keeping with the rule of law, in recognition of the facts, and in fulfillment of the obligation of this Council to preserve stability and to promote peace among nations. Russia may have the ability to block this resolution's passage, just as it has blocked Ukrainian ships, blocked the voices of journalists objecting to Moscow's belligerence and blocked international observers. But as I said in my statement earlier, Russia cannot veto the truth.

President Obama and Secretary of State Kerry have said repeatedly that the United States will stand with the Ukrainian people as we continue to seek a principled and peaceful resolution to this crisis. That is our position—and as we saw in the Council today, we are not alone in that regard. Russia is.

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On March 15, 2014, Ambassador Power delivered the explanation of vote for the United States on the resolution on Ukraine which Russia vetoed that provided that the referendum on the status of Crimea "can have no validity, and cannot form the basis for any alteration of the status of Crimea" and called upon "all states, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status." That explanation of vote follows and is available at *http://usun.state.gov/briefing/statements/223538.htm*.

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The United States deeply appreciates the support from our colleagues around this table and from the many states who have called for a peaceful end to the crisis in Ukraine.

This is, however, a sad and remarkable moment.

This is the seventh time that the UN Security Council has convened to discuss the urgent crisis in Ukraine. The Security Council is meeting on Ukraine because it is the job of this body to stand up for peace and to defend those in danger.

We have heard a lot each time the Security Council has met about the echoes and relevance of history. We have heard, for example, about the pleas of the brave democrats of Hungary in 1956 and about the dark chill that dashed the dreams of Czechs in 1968.

We still have the time and the collective power to ensure that the past doesn't become prologue. But history has lessons for those of us who are willing to listen. Unfortunately, not everyone was willing to listen today.

Under the UN Charter, the Russian Federation has the power to veto a Security Council resolution, but it does not have the power to veto the truth. As we know, the word "truth", or "pravda" has a prominent place in the story of modern Russia. From the days of Lenin and Trotsky until the fall of the Berlin Wall, Pravda was the name of the house newspaper of the Soviet Communist regime. But throughout that period, one could search in vain to find pravda in Pravda. And today, one again searches in vain, to find truth in the Russian position on Crimea, on Ukraine, or on the proposed Security Council resolution considered and vetoed a few moments ago.

The truth is that this resolution should not have been controversial. It was grounded in principles that provide the foundation for international stability and law: Article 2 of the UN Charter; the prohibition on the use of force to acquire territory; and respect for the sovereignty, independence, unity, and territorial integrity of member states. These are principles that Russia

agrees with and defends vigorously all around the world—except, it seems, in circumstances that involve Russia.

The resolution broke no new legal or normative ground. It simply called on all parties to do what they had previously pledged, through internationally binding agreements, to do. It recalled specifically the 1975 Helsinki Final Act and the 1994 Budapest Memorandum, in which Russia and other signatories reaffirmed their commitments themselves to respect Ukraine's territorial integrity and to refrain from aggressive military action toward that country.

The resolution called on the government of Ukraine to do what it has promised it will do: to protect the rights of all Ukrainians, including those belonging to minority groups.

Finally, the resolution noted that the planned Crimean referendum, scheduled for tomorrow, has no legal validity and will have no legal effect on the status of Crimea.

From the beginning of this crisis, the Russian position has been at odds not only with the law, but also with the facts. Russia claimed that the rights of people inside Ukraine were under attack, but that claim has validity only in the parts of Ukraine where it was Russia, and Russian military forces, that were exercising undue influence. Russia denied that it was intervening militarily, but Russian troops have helped to surround and occupy public buildings, shut down airports, obstruct transit points, and prevent the entry into Ukraine of international observers and human rights monitors. Russian leadership has disclaimed any intention of trying to annex the Crimea, then reversed itself and concocted a rationale for justifying just such an illegal act.

Russia claims that its intentions are peaceful, but Russian officials have shown little interest in UN, European and American efforts at diplomacy—including Secretary of State Kerry's efforts yesterday in London. Russia has refused Ukraine's outstretched hand while, as we speak, Russian armed forces are massing across Ukraine's eastern border. Two days ago, in this very chamber, Ukraine's prime minister appealed to Russia to embrace peace. Instead, Russia has rejected a resolution that had peace at its heart and law flowing through its veins.

The United States offered this resolution in a spirit of reconciliation, in the desire for peace, in keeping with the rule of law, in recognition of the facts, and in fulfillment of the obligation of this council to promote and preserve stability among nations. At the moment of decision, only one hand rose up to oppose those principles. Russia—isolated, alone, and wrong—blocked the Resolution's passage, just as it has blocked Ukrainian ships and international observers. Russia put itself outside those international norms that we have painstakingly developed to serve as the bedrock foundation for peaceful relations between states.

The reason only one country voted "no" today, is that the world believes that international borders are more than mere suggestions. The world believes that people within those internationally recognized borders have the right to chart their own future, free from intimidation. And the world believes that the lawless pursuit of one's ambitions, serves none of us.

Russia has used its veto as an accomplice to unlawful military incursion—the very veto given nearly seventy years ago to countries who had led an epic fight against aggression. But in so doing, Russia cannot change the fact that moving forward in blatant defiance of the international rules of the road will have consequences. Nor can it change Crimea's status. Crimea is part of Ukraine today; it will be part of Ukraine tomorrow; it will be part of Ukraine next week; it will be part of Ukraine unless and until its status is changed in accordance with Ukrainian and international law.

Russia prevented adoption of a resolution today. But it cannot change the aspirations and destiny of the Ukrainian people. And it cannot deny the truth displayed today that there is overwhelming international opposition to its dangerous actions.

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As discussed in Chapter 19, Russia's actions in Ukraine constitute a failure to abide by commitments and obligations reaffirmed in the 1994 Budapest Memorandum, signed when Ukraine decided to remove all nuclear weapons from its territory. The March 25, 2014 U.S.-Ukraine Joint Statement (excerpted in Chapter 19 and available at *www.whitehouse.gov/the-press-office/2014/03/25/joint-statement-united-states-and-ukraine*) affirms the commitments by Ukraine and the United States under the Budapest Memorandum, and condemns Russia's purported annexation of Crimea.

Ambassador Power addressed the UN General Assembly at a meeting on Ukraine on March 27, 2014. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/224017.htm*.

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We meet today to express our collective judgment on the legality of the Russian Federation's military intervention in and occupation of Ukraine's Crimea region. The resolution before us is about one issue and one issue only. And that is affirming our commitment to the sovereignty, political independence, unity, and territorial integrity of Ukraine. Through it, we make clear our ongoing support for the fundamental idea that borders are not mere suggestions.

At the same time, this Resolution expresses the desire of the international community to see a peaceful outcome to the dispute between Ukraine and Russia and stresses the importance of maintaining an inclusive political dialogue that reflects every segment of Ukrainian society.

We have always said that Russia had legitimate interests in Ukraine; it has been disheartening in the extreme to see Russia carry on as if Ukrainians have no legitimate interests in Crimea, when Crimea is a part of Ukraine. Self-determination is a value that all of us here today hail. We do so while recognizing the critical, foundational importance of national and international law. Coercion cannot be the means by which a self determines. The chaos that would ensue is not a world that any of us can afford; it is a dangerous world. We echo the views expressed by all regions of the world these last weeks calling for a de-escalation of tensions and an electoral process in Ukraine that will allow the people of that country—in all of their diversity—to choose their leaders, freely, fairly, and without coercion.

Speaking at The Hague two days ago, President Obama said that "if the Ukrainian people are allowed to make their own decisions, their decision will likely be that they want to have a relationship with Europe and they want to have a relationship with Russia, and that this is not a zero sum game."

Ukraine was wise to bring its concerns before this body. It is wise to seek our backing for the preservation of its rights, which are also all of our rights—to have our territory and independence respected. Ukraine is justified in seeking our votes in reaffirming and protecting its borders. It is justified in asking us not to recognize the new status quo that the Russian

Federation has tried to create with its military. Ukraine merits our commendations for the restraint it has shown and the positive steps it has taken to prevent a further escalation of the crisis. And Ukraine deserves our full support in trying to persuade Russia to end its isolation and to move from a policy of unilateral confrontation and aggressive acts to a good faith diplomatic effort informed by facts, facilitated by dialogue, and based on law.

We urge you to vote "yes" on a resolution that enshrines the centrality of territorial integrity and that calls for a diplomatic, not a military solution, to this crisis.

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On March 27, 2014, the UN General Assembly adopted resolution 68/262, on the "Territorial integrity of Ukraine," which contains language similar to the Security Council resolution that Russia vetoed, declaring the invalidity of the March 16, 2014 referendum on the status of Crimea. Ambassador Power's statement hailing the General Assembly resolution follows and is available at *http://usun.state.gov/briefing/statements/224058.htm*.

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Today, countries from every corner of the world made clear their support for Ukraine's territorial integrity and sovereignty, their support for international law, and for the foundational norms that underpin the United Nations and international cooperation in the 21st century. The world has made clear that the international community will not accept Russia's illegal annexation of Crimea

The resolution adopted by the General Assembly is a clear call from the international community for all states to desist and refrain from actions that undermine Ukraine's national unity and territorial integrity. The resolution also stresses the importance of maintaining an inclusive political dialogue in Ukraine that reflects the diversity of its society.

I welcome the support from member states in every region who have joined together in condemning an act that blatantly undermines the UN Charter. The vote shows the strong global conviction, grounded in international law, that nations and peoples have the right to chart their own course free from external influences or fear of invasion. Many of today's votes were cast in recognition that while we may currently be discussing Ukraine, if such a blatant violation of a nation's borders is left unchecked, the consequences for other nations could be severe.

It is important to note that, in the face of international isolation, only a handful of states joined with Russia in defending its violation of Ukrainian sovereignty and territorial integrity. Many of these votes came from regimes that, like Russia, fear free expression and peaceful assembly. Today's vote shows that despite significant misinformation spread by Russia, the truth of what Russia has done in Crimea has penetrated to all the regions of the world.

The United States continues to encourage a resolution to this crisis through direct dialogue between Russia and Ukraine as supported by the international community; international monitors to ensure the rights of all Ukrainians are protected including vulnerable minorities in

occupied Crimea; a free and fair presidential election in May; and an inclusive constitutional reform process. The United States stands with the people of Ukraine and will continue to support them as they build a democratic, stable and prosperous future.

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On April 29, 2014, Ambassador Power addressed another Security Council meeting on Ukraine. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/225390.htm*.

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On April 17, Ukraine, the Russian Federation, the European Union and the United States issued the Geneva Joint Statement to deescalate the crisis that brings us together this evening. That statement outlined a series of concrete steps to end the violence, halt provocative actions, and protect the rights and security of all Ukrainian citizens. As Secretary Kerry said on April 17, "all of this, we are convinced, represents a good day's work. The day's work has produced principles, and it has produced commitments, and it has produced words on paper, and we are the first to understand and to agree that words on paper will only mean what the actions that are taken as a result of those words produce."

Secretary Kerry also commended Foreign Minister Lavrov and the Ukrainian Foreign Minister for their cooperation in achieving this hard-negotiated agreement. It was a moment of hope. Since then, the Government of Ukraine has been implementing its commitments in good faith. Regrettably, the same cannot be said of the Russian Federation.

As we meet, observers from the OSCE Special Monitoring Mission are reporting that most of Ukraine—including eastern Ukraine—is peaceful. The exceptions are in such areas as Donetsk, Luhansk, and Slovyansk where pro-Russian separatists continue to occupy buildings and attack local officials. There, we have seen a sharp deterioration in law and order. Just today, pro-Russian separatists—armed with baseball bats—stormed the government buildings in Luhansk, seizing control of the center of municipal activity in one of the largest cities in eastern Ukraine. This kind of thuggery mimics the seizures of police stations, city halls, and other government buildings in cities and towns in Donetsk Oblast and surrounding areas.

In addition to occupying government buildings, over the past two weeks: Gunmen kidnapped a senior police officer in Luhansk. In Donetsk, pro-Russian thugs armed with baseball bats attacked peaceful participants at a pro-unity rally, seriously injuring at least 15. Also in Donetsk, pro-Russian groups continue to hold 17 buildings, including the regional television broadcasting center. In the city of Slovyansk, the mayor was kidnapped, as were several journalists. The separatists in that area now hold an estimated 40 hostages. Nearby, three bodies were recently pulled from a river; each showing unmistakable signs of physical abuse; one has been identified as a local politician, another as a 19 year-old pro-unity student activist. Yesterday, gunmen reportedly chased members of the Slovyansk Roma community from their homes.

Make no mistake, these are not peaceful protests. This is not an eastern Ukrainian spring. It is a well-orchestrated campaign—with external support—to destabilize the Ukrainian state.

Finally, as all the world knows, pro-Russian separatists in Donetsk have kidnapped and continue to hold seven international inspectors, openly declared as members of a Vienna Document mission, along with their Ukrainian escorts. My government joins with responsible governments everywhere in condemning this unlawful act and in being outraged by the shameful exhibition before the media of these international public servants. The Vienna Document, agreed upon by all 57 participating States of the OSCE, has been a lasting source of cooperation and military transparency. We call, with others, for the immediate and unconditional release of the inspectors and their Ukrainian escorts and the immediate end to their mistreatment while in captivity. We also call upon Russia, as a signatory to the Vienna Document, to help secure their release, and to confirm publicly—even if belatedly—for the record that the abducted monitors were part of a legitimate mission on behalf of the international community.

My colleagues, since April 17, the government of Ukraine has acted in good faith and with admirable restraint to fulfill its commitments. The Kyiv City Hall and its surrounding area are now clear of all Maidan barricades and protestors. Over the Easter holiday, Ukraine voluntarily suspended its counterterrorism initiative, choosing to de-escalate despite its fundamental right to provide security on its own territory and for its own people. Unlike the separatists, Ukraine has cooperated fully with the OSCE Special Monitoring Mission and allowed its observers to operate in regions about which Moscow had voiced concerns regarding the treatment of ethnic Russians.

In addition, Prime Minister Yatsenyuk has publicly committed his government to undertake far-reaching constitutional reforms that will strengthen the power of the regions. He has appealed personally to Russian-speaking Ukrainians, pledging to support special status for the Russian language and to protect those who use it. He announced legislation to grant amnesty to those who surrender arms.

All this should be cause for optimism and hope. Tragically, what we have seen from Russia since April 17 is exactly what we saw from Russia prior to April 17. More attempts to stir up trouble. More efforts to undermine the government of Ukraine. And statement after statement that are at odds with the facts. What we have not seen is a single positive step by Russia to fulfill its Geneva commitments. Instead, Russian officials have refused to publicly call on the separatists to give up their weapons and relinquish their illegal control of Ukrainian government buildings. In fact, Russia continues to fund, to coordinate, and to fuel the heavily-armed separatist movement. In addition, just outside of Ukraine's border, Russia has continued to engage in threatening troop movements that are designed not to calm tensions, but to embolden the separatists and to intimidate the government.

In closing, I emphasize that the United States remains committed to supporting the principles of the UN Charter and will continue to uphold the territorial integrity and sovereignty of Ukraine. We continue to seek stability within a peaceful, democratic, inclusive, and united Ukraine, especially in advance of the upcoming important elections. We remain committed to a diplomatic process. But Russia seems committed to destabilization and fantastical justifications for her actions. The truth about what is happening in Ukraine should guide our discussion – because truth is the only foundation on which an equitable and lasting solution to this crisis can be based.

* * * *

On May 10, The State Department issued a press statement on the illegal referenda in eastern Ukraine. The press statement, available at *www.state.gov/r/pa/prs/ps/2014/05/225945.htm*, is excerpted below.

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* * * *

As the United States has said, the referenda being planned for May 11 in portions of eastern Ukraine by armed separatist groups are illegal under Ukrainian law and are an attempt to create further division and disorder. If these referenda go forward, they will violate international law and the territorial integrity of Ukraine. The United States will not recognize the results of these illegal referenda.

In addition, we are disappointed that the Russian government has not used its influence to forestall these referenda since President Putin's suggestion on May 7 that they be postponed, when he also claimed that Russian forces were pulling back from the Ukrainian border.

Unfortunately, we still see no Russian military movement away from the border, and today Kremlin-backed social media and news stations encouraged residents of eastern Ukraine to vote tomorrow, one even offering instructions for polling stations in Moscow. Russian state media also continue to strongly back the referenda with no mention of Putin's call for postponement.

The focus of the international community must now be on supporting the Ukrainian government's consistent efforts to hold a presidential election on May 25. International observers note that preparations for these elections are proceeding apace and in accordance with international standards, which will allow all Ukrainian people a voice in the future of their country. According to recent independent polls, a substantial majority of Ukrainians intend to vote on May 25. Any efforts to disrupt this democratic process will be seen clearly for what they are, attempts to deny the rights of Ukraine's citizens to express their political will freely.

As President Obama and Chancellor Merkel stated on May 2, the Russian leadership must know that if it continues to destabilize eastern Ukraine and disrupt this month's presidential election, we will move quickly to impose greater costs on Russia.

The Russian government can still choose to implement its Geneva commitments, as well as follow through on President Putin's statement of May 7. We call on them to do so.

* * * *

After the referenda in eastern Ukraine, Russian troop deployments increased along Ukraine's border and Russian support for pro-Russian separatists in eastern Ukraine continued. Despite a ceasefire agreement in September, attacks on Ukrainian forces in eastern Ukraine persisted. On September 25, 2014, the G-7 foreign ministers issued a further Joint Statement on Ukraine urging respect for the ceasefire agreement. The State Department media note publishing the joint statement is available at *www.state.gov/r/pa/prs/ps/2014/09/232123.htm*. The September 25, 2014 G-7 Joint Statement follows.

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We, the Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and the High Representative of the European Union, express our continued grave concern on the situation in eastern Ukraine.

We welcome the Minsk agreements of 5 and 19 September as an important step towards a sustainable, mutually agreed cease-fire, a secure Russian-Ukrainian border and the return of peace and stability to eastern Ukraine with the establishment of a "special status" zone, which is to be empowered with a strong local self-government under Ukrainian law. We condemn the ongoing violations of the ceasefire agreement.

The ceasefire agreement offers an important opportunity to find a durable political solution to the conflict, in full respect of Ukraine's sovereignty and territorial integrity. Russia must immediately meet its own commitments of the Minsk agreement, including by withdrawing all of its forces, weapons and equipment from Ukraine; securing and respecting the international border between the two countries with OSCE monitoring; and ensuring that all hostages are released. Russia must also ensure that all commitments of the Minsk agreement be met and the political process within Ukraine continues. We commend the efforts Ukraine has made to implement its responsibilities under the Minsk agreement, such as passing legislation on amnesty and a "special status" for parts of eastern Ukraine.

We commend the OSCE´s key role through the Special Monitoring Mission (SMM) and within the Trilateral Contact Group in helping de-escalate the crisis. The OSCE has been assigned a crucial role as the monitoring mechanism in the implementation of the Minsk agreement, which we fully support. We call on all OSCE states to help provide the organization all support necessary to fulfill these responsibilities, and to support an expansion of the SMM. We urge the Governments of Russia and Ukraine to fully facilitate and support this expansion.

We reiterate our condemnation of Russia's illegal attempted annexation of Crimea.

We reiterate our condemnation of the downing of the Malaysia Airlines aircraft on 17 July 2014 with the loss of 298 innocent lives and welcome the internationally respected recent publication of the preliminary report on the tragedy. We call for immediate, safe and unrestricted access to the crash site to enable independent experts to swiftly conclude their investigations, also in order to hold accountable those responsible for the event.

On the threshold of the coming winter, Ukraine faces difficult economic and social challenges, partially caused by the conflict forced upon the country. We commit ourselves to help Ukraine to recover from this massive economic setback and to rebuild its economy. To this end we will closely work together and coordinate with other donors and international financial institutions. We welcome the upcoming donors' and investors' conferences organized by Ukraine with the support of the European Union. We encourage the Ukrainian leadership to continue with necessary political, economic and rule of law-related reforms. We trust that the early parliamentary elections will be free, fair and fully in line with international standards.

We stand united in the expectation that this crisis will be solved with respect for international law, and Ukraine's sovereignty, territorial integrity and independence. In the course of the past weeks, we have put in place additional coordinated sanctions affecting Russia. Sanctions are not an end in themselves; they can only be rolled back when Russia meets its commitments related to the cease fire and the Minsk agreements and respects Ukraine's

sovereignty. In case of adverse action, however, we remain ready to further intensify the costs on Russia for non-compliance.

We welcome the ratification of the Association Agreement and Deep and Comprehensive Free Trade Area (DCFTA) by the European Parliament and the Verkhovna Rada on 16 September. In accordance with the agreement reached at the trilateral meeting between the EU, Ukraine and Russia on 12 September on the implementation of the DCFTA, the EU intends to postpone the provisional application of the trade-related provisions until 31 December 2015, while maintaining the EU's autonomous trade measures to the benefit of Ukraine, as agreed upon at the trilateral meeting between the EU, Ukraine and Russia on 12 September. This will help stabilize the Ukrainian economy in this difficult time. We welcome that the trilateral talks between Ukraine, Russia and the EU will continue. It is equally important to continue the discussions between Russia, Ukraine and the EU on resolving outstanding energy issues

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2. Central African Republic

On January 21, 2014, the United States welcomed the selection of Catherine Samba-Panza as Transitional President in the Central African Republic ("C.A.R."). Secretary Kerry's press statement is available at *www.state.gov/secretary/remarks/2014/01/220501.htm* and includes the following:

> As C.A.R.'s first woman head of state since the country's independence, and with her special background in human rights work and mediation, she has a unique opportunity to advance the political transition process, bring all the parties together to end the violence, and move her country toward elections not later than February 2015.
>
> We also commend the Transitional National Council for conducting the selection process for the new C.A.R. Transitional President in a deliberate, open, and transparent manner that ensured the airing of a full range of views from C.A.R.'s civil society.
>
> The United States has been deeply engaged in the work to help pull C.A.R. back from the brink, including the pivotal visits of Ambassador Power and Assistant Secretary Thomas-Greenfield less than a month ago. The United States, along with regional leaders of the Economic Community of Central African States (ECCAS), the African Union, and other members of the international community, hopes to support President Samba-Panza and call on the people of C.A.R. to work constructively with her, participate in the political process, and avoid any resurgence in violence.

3. European Integration

a. Albania

On June 27, 2014, the State Department issued a press statement, available at *www.state.gov/r/pa/prs/ps/2014/06/228545.htm*, congratulating Albania on the decision by the European Council to grant European Union candidate country status to Albania. The press statement includes the following:

> We salute the dedicated, hard work present and previous governments have invested to reach this important milestone. Albania's political parties, whether in government or in opposition, will need to continue to work together to advance their country on the path to European Union membership.
>
> The United States and Albania are close friends and enduring allies. We remain committed to offering our full support as the Albanian people pursue their chosen path towards a prosperous European future.

b. Georgia, Moldova, and Ukraine

The State Department issued another press statement on June 27, 2014, congratulating Georgia, Moldova, and Ukraine on the signing of association agreements and establishing free trade areas with the European Union. The press statement, available at *www.state.gov/secretary/remarks/2014/06/228518.htm*, includes the following:

> The agreements signed today mark a major step toward integrating these Eastern Partnership countries more closely with the European Union and realizing a Europe whole, free, and at peace.
>
> It is not just that these agreements link the EU's eastern neighbors into its single market and unlock new opportunities for trade and assistance. Today, Moldova, Georgia, and Ukraine have signaled their readiness to undertake important economic and legal reforms that will make them stronger, more vibrant democracies.
>
> We continue to support the territorial integrity of Georgia, Moldova, and Ukraine. The decision on the best path to security, prosperity, and a better future for their citizens is one that can and should be made by these sovereign nations, and by them alone. We applaud the hard work and determination that has brought them to this point, and we will continue to stand with them as they work to implement key reforms and build more prosperous, stable, and democratic societies.

The State Department issued another press statement on September 16, 2014, available at *www.state.gov/r/pa/prs/ps/2014/09/231699.htm*, to congratulate Ukraine after the Ukrainian and European parliaments simultaneously ratified Ukraine's Association Agreement with the European Union.

4. Georgia

On December 18, 2014, the United States Department of State hosted the annual meeting of the U.S.-Georgia Strategic Partnership Commission's Working Group on People-to-People and Cultural Exchanges. The State Department media note released in conjunction with the meeting reiterates U.S. support for Georgia's sovereignty and territorial integrity. The media note, available at *www.state.gov/r/pa/prs/ps/2014/12/235418.htm*, includes the following:

> The United States … reaffirmed that it will not recognize the legitimacy of any so-called "treaty" between Georgia's Abkhazia region and the Russian Federation. Furthermore, the United States expressed concern about the ongoing "borderization" activities along the Administrative Boundary Lines of Georgia's occupied territories, which are inconsistent with Russia's international commitments. In this context, the Working Group renewed its full support for the Geneva International Discussions as a key tool to achieve concrete progress on security and humanitarian issues in the occupied territories. The Working Group emphasized the importance of engagement with the inhabitants of the occupied regions of Abkhazia and South Ossetia through civil integration and other reconciliation initiatives, and encouraged the continuation of such efforts. The Working Group also discussed the importance of promoting tolerance and inclusiveness for religious and ethnic minorities, and the United States expressed support for ongoing and future programs advancing these important goals. The Government of Georgia welcomed U.S. efforts to further bolster people-to-people engagement on the ground.

5. Bosnia and Herzegovina

On November 11, 2014, the United States participated in a Security Council session on Bosnia and Herzegovina. Remarks by Ambassador David Pressman, Alternate Representative to the United Nations for Special Political Affairs, at the Security Council session are available at *http://usun.state.gov/briefing/statements/233950.htm* and excerpted below. Ambassador Pressman expressed ongoing U.S. support for the mandate of the High Representative under the General Framework for Peace as well as Resolution 2183 adopted by the Security Council on November 11, 2014.

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* * * *

This Chapter VII mandate renewal reaffirms the Council's willingness to support the people of Bosnia and Herzegovina in their efforts to sustain a safe and secure environment with the assistance of the EUFOR mission and NATO Headquarters Sarajevo, and to implement the

civilian aspects of the General Framework Agreement for Peace with the help of the Office of the High Representative.

Bosnia and Herzegovina has expressed, without reservation, its strong support for this mandate renewal and for all of the language therein. The United States joins Bosnia and Herzegovina and the members of this Council and the EU Foreign Affairs Council in our continued support for the EUFOR mandate. And we are disappointed that one delegation did not join consensus in responding to Bosnia and Herzegovina's own request for continued Security Council support.

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…[T]he United States commends Bosnia and Herzegovina on holding general elections this October. The elections were orderly and conducted in a competitive environment, although we also cannot ignore that there were several irregularities, as noted by the OSCE observation mission.

As finalized results are expected today, it is our hope that governments will form as quickly as possible and that the elected representatives of the people will look for ways to move the country forward positively and to compromise, where needed.

Further, we call on the political parties and institutions to meet their obligations to implement the ruling of the BiH Constitutional Court on the electoral system for Mostar.

Madame President, we support Bosnia and Herzegovina's long-expressed goal of Euro-Atlantic integration and continue to believe that the integration process is the surest and most expeditious path to the country's long-term stability and prosperity. We note Bosnia and Herzegovina recently reiterated this goal during the recent General Debate, in which Serb Member of the Presidency of Bosnia and Herzegovina Radmanovic stated unequivocally that his country's ultimate goal was, "full, legal integration into the European Union."

Euro-Atlantic integration will not happen without continued efforts by a variety of stakeholders. We welcome the reform initiative proposed by the British and German Foreign Ministers last week to get the country back on track for EU membership, and we will work with our European partners to support the adoption and implementation of this reform agenda. We also will work with Bosnia and Herzegovina's newly elected leaders to press for the resolution of the listing of defense properties in order to activate its NATO Membership Action Plan. We hope the new government seriously engages on the reform agenda to build a more effective, democratic and prosperous state, and to progress towards the country's goals of EU and NATO integration.

As the High Representative noted in his report, authorities have again failed to make any concrete progress on the outstanding 5+2 objectives and the conditions for the closure of the Office of the High Representative. We also share his concern over the Republika Srpska's lack of compliance with its obligation to provide the High Representative with timely access to officials, institutions and documents, and we urge the relevant authorities to comply.

The United States strongly supports the territorial integrity and sovereignty of Bosnia and Herzegovina as guaranteed by the Dayton Peace Accords. We note that some political leaders persist in their attempts to use divisive rhetoric to distract the public from economic and political stagnation.

The recent elections proved that an increasing majority of citizens are tired of these distractions and seek true leadership from their officials. We condemn divisive rhetoric, and during the coalition formation period, we urge parties to seek partners that are prepared to work toward a future for all of Bosnia and Herzegovina.

Finally, I want to again reiterate the support of the United States for the renewal of the EUFOR mandate under the Chapter VII of the UN Charter. The United States commends the work of NATO Headquarters Sarajevo and EUFOR mission in Bosnia and Herzegovina and we believe EUFOR and NATO Headquarters Sarajevo—successors to SFOR—are essential in sustaining a safe and secure environment in Bosnia and Herzegovina, providing vital capacity-building to the government, and offering reassurance across ethnic lines that the international community is committed to the country's stability.

We remain hopeful for the future of Bosnia and Herzegovina and we will continue to work with the international community and with the country's institutions to encourage progress in each of these areas and to improve the lives of its citizens.

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C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION

On April 21, 2014, the Supreme Court granted certiorari for a second time in *Zivotofsky v. Secretary of State*, No. 13-628. The Supreme Court had previously remanded the case to the court of appeals in 2012 for a determination of the constitutionality of a law (Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350) requiring the Department of State to record "Israel" as the place of birth for a U.S. citizen born in Jerusalem upon request of that citizen. The court of appeals had found the question nonjusticiable when it first considered the appeal. On remand, the court of appeals struck down the provision as unconstitutional on the merits, reasoning that it infringes on the exclusive authority of the executive branch to determine which states, governments, and territorial boundaries the United States recognizes. The United States filed its brief in the Supreme Court in support of affirming the court of appeals on September 22, 2014. The Supreme Court heard oral argument in the case on November 3, 2014. For prior developments in the case, see *Digest 2006* at 530-47, *Digest 2007* at 437-43, *Digest 2008* at 447-54, *Digest 2009* at 303-10, *Digest 2011* at 278-82, *Digest 2012* at 283-86, and *Digest 2013* at 259-69. Excerpts follow from the brief of the United States filed in the U.S. Supreme Court in 2014 (with footnotes omitted).[**]

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[**] Editor's note: On June 8, 2015 the Supreme Court decided the case, holding that the President has exclusive recognition power and that the law infringes on that power.

I. THE CONSTITUTION GRANTS THE PRESIDENT EXCLUSIVE POWER TO RECOGNIZE FOREIGN STATES AND THEIR TERRITORIAL BOUNDARIES

A. The Constitution Assigns Exclusively To The Executive The Authority To Recognize Foreign States And Governments, Including Their Territorial Boundaries

The decision to recognize a foreign state or its government is an official conclusion by the United States that the entity in question meets the requirements of a state or government, and should be treated as such in this Nation's foreign relations. Recognizing a government entails recognizing the existence of the state ruled by that government, which in turn entails determining the territorial boundaries (*i.e.*, the extent of the state's sovereignty) that will be recognized. Because the establishment of diplomatic relations and negotiation of treaties with states are predicated on recognition of the state and government in question, recognition decisions establish the foundation for the conduct of the Nation's foreign affairs.

The text and structure of the Constitution's foreign-affairs provisions establish that the President has sole recognition authority. By contrast, the Constitution's text prescribes no role for the Congress in recognition decisions, and that body lacks the institutional capability to make the timely, informed and nuanced judgments required to exercise the recognition power in a manner that advances the Nation's foreign-relations interests. And because the Constitution provides no mechanism by which the Legislative and Executive Branches could share the recognition power, exclusive commitment of the recognition power to the Executive is necessary to ensure that the Nation speaks with one voice in foreign affairs.

1. Article II of the Constitution assigns the recognition power to the President

a. The Reception Clause confers recognition power on the President

The primary source of the President's recognition power is Article II's grant of authority to the President alone to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. That authority necessarily includes the power to decide which ambassadors the President will receive, and therefore the power to decide whether to establish diplomatic relations with a foreign entity. Because establishing diplomatic relations with a foreign entity entails determining that the entity should be treated as a state, the recognition power is vested solely in the President. See 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1560, at 415-416 (1833) (*Story*).

* * * *

b. The President's other foreign-affairs powers reinforce his recognition power

The President's recognition power is further grounded in the Constitution's assignment of the bulk of foreign-affairs powers to the President. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1, Cl. 1. "[T]he historical gloss on the 'executive Power' * * * has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)).

* * * *

The Constitution thus establishes the Executive as "the sole organ of the federal government in the field of international relations," with exclusive authority to conduct diplomatic relations. *United States v. Curtiss-Wright Exp. Corp*., 299 U.S. 304, 319-320 (1936). Recognition—the decision whether to treat an entity as a state or government in the Nation's foreign relations—falls within the core of the President's sole authority over "[t]he transaction of business with foreign nations." 16 *Jefferson Papers* 379.

…Particularly relevant to recognition, the Constitution assigns to the President the power to nominate ambassadors, U.S. Const. Art. II, § 2, Cl. 2, and to "make Treaties," *ibid*.

The Constitution gives the President alone the power to nominate an ambassador. U.S. Const. Art. II, § 2, Cl. 2. The nomination decision encompasses the antecedent questions whether to recognize the foreign state and government, and whether to establish diplomatic relations. In nominating the ambassador, the President implements his recognition decision. While the Senate must consent to appointment of the President's nominee, that determination concerns whether or not the President's nominee is suitable for confirmation, and does not extend to the recognition decision already made by the President. See 16 *Jefferson Papers* 378, 379-380 (Senate's confirmation power does not include the power to "judge* * * the necessity which calls for a mission to any particular place"). Even if the Senate withholds consent to a nominee, moreover, the President may effectuate a recognition decision by engaging in diplomatic relations through officials who do not require confirmation. And the President retains the authority not to appoint an ambassador even after the Senate has given its advice and consent. Nor does the Constitution contemplate any participation by Congress in the Presidential decision to initiate diplomatic relations; Article II's requirement that Congress establish offices by law (§ 2, Cl. 2) does not apply to ambassadors and other public ministers. And no other constitutional power would authorize Congress to establish diplomatic relations with a foreign entity.

Similarly, the President has the power to "make Treaties" with the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. The President has the sole responsibility for negotiating treaties before presenting them to the Senate. See *Curtiss-Wright*, 299 U.S. at 319 ("Into the field of [treaty] negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."). Once the President has completed negotiations, the Senate has the constitutional prerogative to decide whether to consent to ratification. The President, however, retains the ultimate authority to decide whether to ratify and conclude a treaty after the Senate provides its consent. See Restatement (Third) of Foreign Relations Law § 303 cmt. d, at 160 (1987) (Restatement). The President thus has exclusive power to ensure that the United States negotiates and concludes treaties in a manner that fully accords with his recognition policy.

c. The Founding generation understood the Executive's recognition power to include the exclusive authority to decide whether recognition is appropriate

i. Consistent with the contemporaneous understanding and practice at the time of the Founding, the Washington Administration understood the decision whether to recognize a foreign state or government to require an assessment of whether recognition was appropriate under the circumstances. But cf. Pet. Br. 28. Hamilton thus explained that the Reception Clause "includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not." *Pacificus No. 1*, at 12.

* * * *

ii. President Washington's Cabinet also understood the Executive's authority to make recognition decisions to be exclusive of Congress. In 1793, Washington and the Cabinet unanimously decided that the President could receive the French ambassador, thereby recognizing the new government of France, without first consulting Congress. Letter from Washington to the Cabinet (Apr. 18, 1793), in 25 Jefferson Papers 568-569. …

* * * *

2. Structural and functional considerations confirm that the President's recognition power is exclusive

a. While the Constitution expressly confers recognition authority on the President through the power to receive ambassadors and other foreign-relations powers, the Constitution contains no provision for Congress to make, or even participate in, recognition decisions. See Story § 1560, at 417 ("The constitution has expressly invested the executive with power to receive ambassadors, and other ministers. It has not expressly invested congress with the power, either to repudiate, or acknowledge them."). Nor do any of Congress's enumerated powers encompass the recognition power.

The Constitution commits the recognition power to the Executive alone for the same reason it vests most foreign-affairs powers in the Executive. Congress proved institutionally incapable of conducting foreign relations under the Articles of Confederation, and the Framers understood that the Executive's "unity[,]* * * [d]ecision, activity, secrecy, and dispatch" would enable it to react to international events with the necessary alacrity and clarity of purpose. The Federalist No. 70, at 472 (Hamilton); see Story § 1561, at 418 (Branches' relative institutional capabilities "[p]robably" explain Constitution's conferral of recognition power on the Executive without Senate participation); House Members Amicus Br. 17 (functional considerations justify exclusive Executive recognition power).

b. The decision whether to recognize a foreign state or government requires careful judgments about whether the state or government exists and controls particular territory, as well as judgments about whether recognition (or withholding recognition) will serve the United States' foreign-relations interests. The Executive is far better positioned than the Congress to gather and assess the information needed to make those judgments in a timely and decisive manner, as the President "has his confidential sources of information," and "his agents in the form of diplomatic, consular and other officials." *Curtiss-Wright*, 299 U.S. at 320. With its "vast share of responsibility" for conducting foreign relations, only the Executive has the comprehensive understanding of the United States' contemporaneous foreign-relations objectives that is necessary to decide whether—and when—recognition will advance the United States' interest. *Garamendi*, 539 U.S. at 414 (citation omitted).

In addition, the timing of recognition decisions is often critical to steering international events in a direction that advances the Nation's interests. For instance, President Truman recognized Israel minutes after it proclaimed independence, acting quickly to ensure that Israel would have immediate foreign support and that U.S. recognition would precede Soviet recognition. Michael J. Cohen, *Truman and Israel* 211, 215, 219 (1990). Indeed, the Executive makes numerous and often nuanced decisions related to recognition, including territorial determinations, in response to evolving events and claims of sovereignty—and each decision

entails a careful assessment of the national-security and foreign-relations implications of the decision. … Congress, which can take legally effective action only by passing a law, through bicameral action and presentment to the President, see *INS v. Chadha*, 462 U.S. 919, 955-958 (1983), would be unable to exercise the recognition power with the necessary flexibility and dispatch.

Finally, secrecy can be crucial in determining whether to recognize a state or government, as such decisions often are made against the backdrop of conflict or annexation. Public disclosure of deliberations about recognition could exacerbate international tensions and create confusion regarding the United States' position. While the Executive is well-positioned to keep its deliberations secret, Congress is not. See *Curtiss-Wright*, 299 U.S. at 322.

c. Because recognition is a determination that the United States will treat an entity as a state or government in its foreign relations, it is crucial that the Nation speak with one voice. Cf. *Curtiss-Wright*, 299 U.S. at 319-320. That unity would be impossible, however, if the recognition power were shared between Congress and the Executive, as petitioner contends.

When the Executive and Congress share power over a single foreign-affairs decision—*i.e.*, whether to commit the United States to a treaty—the Constitution expressly delineates the Branches' respective roles. See *Curtiss-Wright*, 299 U.S. at 319 (treaty power preserves Executive's role as sole organ of foreign relations). But the Constitution contains no such apportionment of responsibility for recognition decisions. Treating the recognition power as shared could therefore set the two Branches at cross-purposes, undermining the Nation's ability to make and implement recognition decisions with the necessary speed and clarity.

Under petitioner's position, which in fact appears to be one of congressional supremacy, Congress would have the authority to reverse any Executive recognition decision—whether it reflected (as here) more than six decades of consistent policy, or a recent judgment in response to a rapidly evolving situation—by passing a law. The prospect of friction between the Branches during Congress's deliberations would create international uncertainty about the United States' position. If Congress passed such a bill, the President might veto it, and the Nation's recognition policy would then hinge on whether Congress overrides the veto. In the event of an override, the President would be bound to follow the recognition policy prescribed by Congress. That recognition decision, embodied in a statute, could not be easily altered or reversed, even if subsequent events rendered the decision detrimental to United States' foreign-relations interests. And any repeal—assuming Congress acted at all—might take weeks or months.

Under such a regime, the United States' apparent recognition position could flip back and forth, preventing the Nation from responding to international events with clarity and decisiveness, and leaving foreign sovereigns to guess at where the United States stands…

Even congressional action short of outright reversal of the President's recognition decisions could undermine the Nation's ability to convey and implement a coherent recognition policy. Here, for instance, petitioner contends (Br. 64-65) that Section 214(d) does not require the Executive to reverse the Nation's position on Jerusalem's status. But Section 214(d) would indisputably put the Executive in the position of attempting to maintain the Nation's longstanding position of not recognizing any claim of sovereignty over Jerusalem, while at the same time implementing a policy that requires it to present diplomatic documents on behalf of the United States that contradict that position. The result would be not merely to prevent the Nation from speaking with one voice, but to prevent the *Executive itself* from doing so in its conduct of foreign relations.

B. Historical Practice Confirms That The Executive Branch Has Sole Authority Regarding Recognition

More than two hundred years of historical practice confirms what the Constitution's text and structure make clear: The recognition power belongs exclusively to the Executive. …

From the Washington Administration to the present, Presidents have asserted the sole authority to recognize a foreign state, its government, and the territorial scope of its sovereignty—and have unilaterally made hundreds of recognition decisions. Petitioner is unable to identify a single instance in our history in which Congress has asserted primacy in matters of recognition—either by rejecting a President's recognition decision or by making a decision the President was unwilling to make unilaterally. On a few occasions in the nineteenth century, Members of Congress sought to have Congress effect recognition on its own. But those efforts invariably foundered after the Executive and other Members of Congress insisted that the President had sole recognition authority. In addition, in a handful of instances on which petitioner relies (Br. 57), the President for political reasons chose to seek congressional support before effecting recognition—but in each case, the President determined recognition policy, and Congress acted consistently with his views.

1. The Executive has consistently asserted sole authority over recognition, including recognition of territorial boundaries

a. In 1793, without consulting Congress, President Washington recognized the new government of France by officially receiving Genet. … Since then, the Executive has routinely made hundreds of unilateral recognition decisions. See, e.g., 1 John Bassett Moore, *A Digest of International Law* §§ 27-58, at 72-163 (1906) (*Moore*) (eighteenth- and nineteenth-century decisions); 1 Green Haywood Hackworth, Digest of International Law §§ 35-51, at 195-318 (1940) (twentieth-century decisions); 2 Marjorie M. Whiteman, *Digest of International Law* §§ 6-64, at 133-467 (1963) (twentieth-century decisions). …

The Executive's exercise of unilateral authority continues today. For instance, in March 2014, the White House released a joint statement with Ukraine, stating that the United States "will not recognize Russia's illegal attempt to annex Crimea." Joint Statement by the United States and Ukraine, *http://www.whitehouse.gov/the-press-office/2014/03/25/joint-statement-united-states-and-ukraine*. Other examples include the 2013 recognition of the Government of Somalia and the 2011 recognition of the state of South Sudan. U.S. Dep't of State, Hillary Rodham Clinton, Sec'y of State, *Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting* (Jan. 17, 2013), *http://www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm*; Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, *2011 Digest* § 9, at 271, 274.

b. The President's exclusive recognition power has always been understood to include the authority to determine the territorial boundaries of a foreign state. Such judgments are integral to recognition, as one of the criteria of statehood under customary international law is that a state must have "defined territory" (which may be disputed or unsettled in part). Restatement § 201 & cmt. b, at 72-73. Recognition of a state therefore requires the United States to determine its position on the claimed territorial extent of the state's sovereignty (including when the United States' position is that the claim is disputed). See *id*. §§ 202, 203 n.2, at 77, 84; Pet. App. 56a.

The Executive makes decisions about what international boundaries to recognize through an interagency process that is led by the State Department and includes the Department of Defense. Such determinations often have national-security implications. For instance, the Executive must determine the extent to which it recognizes a state's territorial claims to preserve the freedom of movement of the U.S. Armed Forces through air and sea. See U.S. Navy Judge Advocate General's Corps, *Maritime Claims Reference Manua*l (2013), *http://www.jag.navy.mil/organization/code_10_mcrm.htm*; Under Sec'y of Def. for Policy, Dep't of Def., *Freedom of Navigation Reports*, *http://policy.defense.gov/OUSDPOffices/FON.aspx* (last visited Sept. 18, 2014). Territorial recognition decisions also may have substantial consequences for U.S. relations with the states involved. The President's refusal to recognize Russia's annexation of Crimea is the most recent example of such a determination.

* * * *

2. Congress has acquiesced in the President's sole recognition power

Members of Congress have occasionally proposed bills that would have asserted a congressional role in recognizing foreign states or governments. But the Executive Branch—and some Members of Congress—opposed those efforts, and they ultimately came to nothing.

* * * *

3. Petitioner's attempt to demonstrate that Congress has exercised recognition power is unavailing

Petitioner cites (Br. 37-41, 45-52) four instances in which, he contends, Congress exercised the recognition power. Contrary to petitioner's arguments, on each occasion Congress's actions were consistent with recognition determinations made by the President.

a. In the early nineteenth century, Congress passed trade statutes that were consistent with the Executive's already-stated position on sovereignty over Haiti. In 1800, Congress passed a statute suspending "commercial intercourse between the United States and France, and the dependencies thereof," and providing that the "island of Hispaniola shall for purposes of this act be considered as a dependency of the French Republic." Act of Feb. 27, 1800, ch. 10, §§ 1, 7, 2 Stat. 7, 10. That statement tracked President Adams' 1799 proclamation declaring that "St. Domingo"—a name for the whole island that the Executive used interchangeably with "Hispaniola"—should be treated as a French dominion for purposes of an earlier non-intercourse law. A Proclamation (June 26, 1799), in 1 *Messages and Papers* 288-289 (1896). In the Executive's view, France had by treaty gained sovereignty over "the whole of the Island of St. Domingo." Letter from Monroe to Madison (June 3 [ca. July 23], 1795), in 16 *Madison Papers* 38 (1898).

Similarly, an 1806 statute prohibiting trade between the United States and "any part of the island of St. Domingo, not in possession, and under the acknowledged government of France," was consistent with the Executive's position that France retained sovereignty even though Haiti had declared independence and driven the French from portions of the island. Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351; see Letter from Madison to Livingston (Jan. 31, 1804), in 6 *Madison Papers* 410-411 (2002).

b. Congress also acted consistently with the President's stated views in connection with President Jackson's 1837 recognition of Texas's independence from Mexico. Contra Pet. Br. 45-49. In 1836, Jackson informed Congress that on "the ground of expediency," he believed Congress should decide when recognition would be appropriate, and that his own view was that recognition should be "suspended" pending a threatened invasion by Mexico. Message (Dec. 21, 1836), in 3 *Messages and Papers* 265-271. He reserved the question of the Executive's exclusive authority. *Ibid*. After the invasion failed, Cong. Globe, 24th Cong., 2d Sess. 33 (1837), Congress appropriated funds for a minister "whenever the President * * * shall deem it expedient." Act of Mar. 3, 1837, ch. 33, 5 Stat. 170. Jackson then appointed a minister. Message (Mar. 3, 1837), in 3 *Messages and Papers* 281-282. Congress thus implemented the recognition policy the President established.

c. In 1862, Congress facilitated President Lincoln's decision to recognize Haiti and Liberia. Contra Pet. Br. 50-52. In light of the political sensitivity of recognizing Haiti and Liberia during the Civil War, Lincoln decided that it would be prudent to enlist congressional support for his recognition decision. Rayford W. Logan, *The Diplomatic Relations of the United States With Haiti* 1776-1891, at 299 (1941). Lincoln informed Congress that he believed the countries should be recognized but was unwilling to inaugurate a "novel policy" in that respect without congressional agreement, and he requested an appropriation for ministers to the "new States." First Annual Message (Dec. 3, 1861), in 6 *Messages and Papers* 47 (1897). After debates in which the bill's sponsor observed that congressional action was unnecessary to permit the President to recognize the republics, Cong. Globe, 37th Cong., 2d Sess. 1773 (1862) (Sen. Sumner), Congress authorized the appointment of diplomatic representatives to Liberia and Haiti. Act of June 5, 1862, ch. 96, 12 Stat. 421.

d. Finally, the Executive did not, as petitioner asserts (Br. 49-50), acknowledge congressional recognition authority in considering whether to recognize Hungary in 1849. During the Hungarian independence movement, the President gave a diplomatic agent the power to recognize Hungary's independence by negotiating a treaty with the new government. Power to Mr. Mann to Negotiate with Hungary (June 18, 1849), in 38 *British and Foreign State Papers 1849-1850*, at 264 (1862). In that context, the Secretary of State's statement that the President would also "recommend" recognition "to Congress," *id*. at 263-264, is best read to suggest that the President would seek congressional support for the recognition decision he had already made. After the revolution failed, the President informed Congress that he would have recognized Hungary had he deemed it warranted "according to the usages and settled principles of this Government." S. Doc. No. 279, 61st Cong., 2d Sess. 2 (1910).

C. This Court And Individual Justices Have Repeatedly Stated That The Constitution Assigns Recognition Authority To The President Alone

1. This Court and individual Justices have many times stated that the Executive has sole authority to make recognition decisions. In 1817, Chief Justice Marshall, sitting as Circuit Justice, held that "as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." *United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (No. 15,429). In 1838, Justice Story concluded that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments."8 Williams, 29 F. Cas. at 1404. Later decisions have reaffirmed the point. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *Baker*, 369 U.S. at 212; *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955); *United States v. Pink*, 315 U.S. 203, 229 (1942); *Guaranty Trust Co. v. United States*, 304 U.S.

126, 137-138 (1938); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

Although these decisions held that the President had "sole" authority to recognize a foreign government, *Belmont*, 301 U.S. at 330, and that such action is "conclusive" on the courts, *Guaranty Trust*, 304 U.S. at 138, they did not specifically address a congressional attempt to constrain the President's recognition power. In light of Congress's historical acquiescence in the Executive's exclusive exercise of that power, however, it is unsurprising that the Court had no occasion to address a dispute between the Branches. At the same time, it is significant that the Court never suggested a role for Congress in recognizing foreign states or governments.

2. Petitioner contends (Br. 59-60) that "*[d]icta* in opinions of this Court" assign the recognition power jointly to the President and to Congress. But the decisions on which petitioner relies did not involve the power to recognize foreign states or governments. Those decisions dealt with the status of territories controlled or acquired by the United States, a matter over which Congress has authority under the Territories Clause of the Constitution. See U.S. Const. Art. IV, § 3, Cl. 2; *Henkin* 72; *Jones v. United States*, 137 U.S. 202, 212, 216-217 (1890) ("legislative and executive departments" determined whether islands were "in the possession of the United States"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 378, 380-381 (1948); *Boumediene v. Bush*, 553 U.S. 723, 753 (2008) (U.S. sovereignty at Guantanamo Bay).

Finally, petitioner also relies (Br. 30-31) on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), but that decision is inapposite. There, Chief Justice Marshall—who had concluded in Hutchings that recognition decisions were made by the Executive, 26 F. Cas. at 442—stated that in applying the piracy statute to actions that would be acts of war (rather than crimes) if committed by agents of a government fighting for independence, the courts "must view such newly constituted government as it is viewed by the legislative and executive departments of the government." 16 U.S. (3 Wheat.) at 643. Because criminal offenses must be defined by statute, *id*. at 634-635, the Court's point was that distinguishing between acts of piracy and acts of war would involve analyzing Congress's intent in enacting the piracy statute, as well as the United States' recognition position. *Palmer* therefore does not suggest that the Court believed Congress shared in the recognition power.

II. SECTION 214(d) UNCONSTITUTIONALLY INTERFERES WITH THE PRESIDENT'S EXCLUSIVE RECOGNITION POWER

Section 214(d) requires the Executive, upon request by individual citizens, to treat Jerusalem as within Israeli sovereignty in issuing U.S. passports, which are official documents addressed to foreign sovereigns. Because passports are diplomatic communications, the Executive has long used its inherent constitutional authority over the content of passports to ensure that their birthplace designations conform to the President's recognition decisions. By reversing that practice with respect to Jerusalem, Section 214(d) infringes the core of the President's exclusive recognition power. Since Israel's founding, every President has adhered to the position that the status of Jerusalem should not be unilaterally determined by any party. Section 214(d) would require the Executive simultaneously to express precisely the opposite position in a subset of the Executive's official communications with foreign sovereigns, and to do so at the behest of individual citizens seeking to express their personal views on what the Nation's position should be.

Congress's attempt to force the Executive into that Janus-like posture is an unconstitutional impingement on the Executive's recognition power and its conduct of foreign affairs based on that power. The effective exercise of the recognition power—the prerogative to determine and communicate the position of the United States on matters of recognition—turns

on the Executive's ability to be the single authoritative voice of the United States' position. A decision by this Court requiring the Executive to implement Section 214(d) would force the Executive to take inconsistent positions in conducting foreign relations on behalf of the United States, thereby undermining the President's credibility and his conduct of sensitive diplomatic efforts.

A. The Executive Has Constitutional Authority To Determine The Content Of Passports As It Relates to Recognition

1. The Executive possesses constitutional authority over passports as instruments of diplomacy

a. A passport, this Court has explained, is an instrument of diplomacy, see *Haig v. Agee*, 453 U.S. 280, 292-293 (1981), through which the President, on behalf of the United States, "in effect request[s] foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers," *United States v. Laub*, 385 U.S. 475, 481 (1967); J.A. 22 (reproducing petitioner's passport). Thus, although a passport functions on one level as a "travel control document" that provides "proof of identity and proof of allegiance to the United States," it is also an official communication "by which the Government vouches for the bearer and for his conduct." *Agee*, 453 U.S. at 293; see also *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835).

Because a passport is a document through which the President communicates with foreign sovereigns, the authority to issue passports historically has been understood to flow directly from his inherent constitutional power regarding "the national security and foreign policy of the United States." *Agee*, 453 U.S. at 293. From the time of the Founding, the Executive Branch has issued passports, even though no statute addressed its authority to do so until 1856. See, *e.g.*, U.S. Dep't of State, *The American Passport* 8-21 (1898); *Urtetiqui*, 34 U.S. (9 Pet.) at 699. The Executive also determined the content of those passports insofar as that content relates to the conduct of diplomacy, see *The American Passport* 77-86, an authority that flowed naturally from passports' character as instruments of official communication to other nations.

Congress historically has "endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." *Agee*, 453 U.S. at 294. When Congress enacted the first Passport Act in 1856, it did so to "confirm[] an authority already possessed and exercised by the Secretary of State" and to establish that the Secretary's authority was exclusive of state and local governments. *Id*. at 294-295 & n.27 (citation omitted). Accordingly, the 1856 statute, using "broad and permissive language," *id*. at 294, provided that "the Secretary of State shall be authorized to grant and issue passports * * * under such rules as the President shall designate." Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 60; see Rev. Stat. § 4075 (1875) (replacing "shall be authorized" with "may").

* * * *

2. Any passport legislation must be in furtherance of Congress's enumerated powers, and may not interfere with the Executive's recognition determinations

a. Although Article I of the Constitution does not expressly confer any "passport power" on Congress, that body has the authority to regulate passports in furtherance of its enumerated powers, including its powers over immigration and foreign commerce. But because a passport is

a diplomatic document, and the Executive Branch has long exercised constitutional authority to determine the content of passports insofar as it pertains to the conduct of diplomacy, separation-of-powers principles prohibit Congress from exercising its authority over the content of passports in a manner that interferes with the President's exclusive authority.

That conclusion is reinforced by Congress's historic acknowledgment of the Executive's broad authority over the content and use of passports. … The current Passports Act continues that tradition, as it provides that the Secretary of State "may grant and issue passports * * * under such rules as the President shall designate and prescribe." 22 U.S.C. 211a; see 22 C.F.R. 51.1-51.74; 7 FAM 1300 (2014).

b. The relatively few statutes that Congress has passed governing passports demonstrate the extent to which Congress has left the content of passports, and their use as instruments of diplomacy, to the Executive. Those statutes also demonstrate how radically Section 214(d) departs from the traditional realm of passport legislation.

For example, Congress has exercised its powers over foreign commerce and border control to enact statutes requiring passports for certain travel or limiting particular persons' travel, as well as prohibitions on application fraud and passport tampering. See, *e.g.*, 8 U.S.C. 1185(b); 22 U.S.C. 212a, 2714; 42 U.S.C. 652(k); 8 U.S.C. 1365b, 1504, 1732; 18 U.S.C. 1542-1544. Congress has also regulated the issuance of passports to aliens abroad and the use of passports as proof of citizenship, in aid of its control over immigration and naturalization. 22 U.S.C. 212, 2705, 2721. None of those statutes purports to regulate passports' content, much less the Executive's authority to determine that content as it relates to the United States' foreign-relations interests.

Congress has also enacted passport legislation that assists the Executive in implementing its authority over passports. See U.S. Const. Art. I, § 8, Cl. 14. For instance, Congress has prohibited passport issuance by anyone but the Secretary of State, 22 U.S.C. 211a, and it has also regulated fees, 22 U.S.C. 214, 214a; 10 U.S.C. 2602, and time limits, 22 U.S.C. 217a.

In vivid contrast to those statutes, Section 214(d) purports to regulate passport content by requiring the Executive, upon request, to designate "Israel" as the birthplace of U.S. citizens born in Jerusalem. In enacting Section 214(d), Congress did not suggest, as the Senate now does in its amicus brief (at 2), that the provision was necessary and proper to further Congress's powers over foreign commerce and naturalization. Rather, Section 214(d) is part of a section entitled "United States policy with respect to Jerusalem as the capital of Israel," a title that petitioner concedes "sounds more in foreign policy than in passport regulation." Pet. Br. 19. Even accepting the contention (Senate Amicus Br. 25) that, despite its title, Section 214(d) seeks only to facilitate "self-identification" of U.S. citizens…, it is difficult to discern even an attenuated connection between that purpose and naturalization (*i.e.*, setting the conditions on which individuals may become citizens) or foreign commerce (*i.e.*, controlling travel or entry). Section 214(d) bears so little resemblance to the passport regulations Congress has traditionally enacted that it can fairly be characterized as "passport legislation" (Pet. Br. 19) only in the sense that it uses passports as a vehicle to achieve a recognition-related objective.

B. Section 214(d) Unconstitutionally Forces The Executive To Communicate To Foreign Sovereigns That The United States Views Israel As Exercising Sovereignty Over Jerusalem

By requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns, Section 214(d) unconstitutionally encroaches

on the President's core recognition authority. See, *e.g.*, *Chadha*, 462 U.S. at 946-948; *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871).

1. The place-of-birth designation on passports and reports of birth abroad implements the Executive's recognition policy

In order to implement its recognition policy regarding Jerusalem, the Executive Branch takes care to ensure that its communications with foreign sovereigns and other public statements express a consistent message: The United States does not recognize any sovereignty, including Israeli sovereignty, over Jerusalem. The State Department's policy of listing "Jerusalem," not "Israel," as the birthplace in passports and reports of birth abroad for U.S. citizens born in Jerusalem is one expression of the United States' recognition policy. J.A. 49-50. It is also an exercise of the President's constitutional authority to determine the content of passports insofar as that content pertains to his conduct of diplomacy.

a. To be sure, the primary function of the place-of-birth entry on a passport is to assist in identifying the passport holder and to distinguish the individual from other persons having similar names. J.A. 70, 78. But the decision as to how to describe the place of birth—*i.e.*, to list a particular country name, or to designate a particular city or region as being within a country—necessarily operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area. By its nature, a passport is not a document that expresses the views of its bearer on matters of recognition. It is a document that expresses the official position of the United States.

Accordingly, the State Department has long maintained rules that align place-of-birth designations with U.S. recognition policies. See generally J.A. 109-149 (7 FAM 1383). Such designations have been included in U.S. passports since the early twentieth century. J.A. 202. When individuals have protested the country listed on their passports—particularly when boundaries shifted after World War II—the Department has uniformly explained that its policy is to ensure that the birthplace designation is consistent with the present "sovereignty recognized by our Government." J.A. 204, 207-209 (citation omitted). That policy continues in force today: While the Department generally lists the "country of the applicant's birth" in passports, the Department will refrain from designating a country whose sovereignty over the relevant territory the United States does not recognize. J.A. 111. The State Department accordingly maintains detailed rules governing place-of-birth designations. J.A. 109-149. The designation of "Jerusalem" in passports and consular reports of birth abroad is a specific—and particularly sensitive—application of the Executive's foreign-policy and recognition decisions.

b. Petitioner's arguments (Br. 21-22, 25-26) that the State Department's place-of-birth rules do not implement recognition policy are unavailing.

Petitioner first argues (Br. 25) that the FAM permits the listing of localities that are not sovereignties. That is beside the point. The Department's policy does not require a recognized sovereign to be listed; rather, it simply prohibits listing as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. J.A. 111. Thus, a "city or area" may be listed in cases of disputed territory. *Ibid*.

Finally, contrary to petitioner's arguments (Br. 21- 22), the State Department's policy regarding the designation of Taiwan as a birthplace is fully consistent with the Executive's general position on birthplace designations. In 1994, Congress provided for the Department to

permit U.S. citizens born on Taiwan to request that "Taiwan" be recorded as their birthplace rather than "China." See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 395, as amended by Act of Oct. 25, 1994, Pub. L. No. 103-415, § 1(r), 108 Stat. 4302. The United States recognizes the People's Republic of China as the sole legal government of China, but it merely acknowledges the Chinese position that there is only one China and that Taiwan is part of China. J.A. 154. Because the United States does not take a position on the latter issue, the Department concluded that listing either "Taiwan" or "China" would convey a message consistent with the President's recognition policy—either option involves a geographic description, not an assertion that Taiwan is or is not part of sovereign China. Here, by contrast, the State Department has concluded that designating "Israel" as the place of birth would directly conflict with the United States' refusal to recognize Israeli sovereignty over Jerusalem. The Department's decisions concerning Jerusalem and Taiwan demonstrate the fact-specific foreign-policy judgments that the Department must make in ensuring that passports are consistent with the President's recognition policy. See, *e.g.*, *Regan v. Wald*, 468 U.S. 222, 242-243 (1984).

2. Section 214(d) unconstitutionally interferes with the Executive's core recognition power

a. Section 214(d) requires the Executive to alter its official passport policy with respect to Jerusalem. Its enforcement would result in the Executive's issuing passports acknowledging Israel's sovereignty over Jerusalem. That message would arise not simply from the individual passports themselves, but from the context of the Executive's passport policy and Section 214. Foreign sovereigns (and other foreign and domestic audiences) understand that the United States does not identify a state as a birthplace on passports unless doing so is consistent with U.S. recognition policy. See J.A. 88, 228-229. Foreign sovereigns would also be aware that the Executive is designating "Israel" pursuant to a statute whose explicit purpose is to express "United States policy with respect to Jerusalem as the capital of Israel." § 214, 116 Stat. 1365 (capitalization altered). Section 214's other subsections reinforce the point, as they require the President to take other steps—relocating the U.S. embassy and memorializing Jerusalem's asserted status in official documents—that would connote recognition of Jerusalem as Israel's capital. § 214(a), (b), (c), 116 Stat. 1365-1366. And the legislative history reiterates that Section 214 "contains four provisions related to the recognition of Jerusalem as Israel's capital." See H.R. Conf. Rep. No. 671, 107th Cong., 2d Sess. 123 (2002).

For those reasons, the Executive has determined that complying with Section 214(d) would communicate that the United States has "prejudg[ed]" Jerusalem's status and reversed its decades-long policy of not taking any official action that could be perceived as constituting recognition of Israeli sovereignty over Jerusalem. J.A. 55-56. That conclusion is a foreign relations judgment entitled to substantial deference. See, *e.g.*, *Regan*, 468 U.S. at 242-243; *Curtiss-Wright*, 299 U.S. at 319. It is also indisputable, as the reaction that ensued when Section 214 was enacted demonstrates. See J.A. 57-58 (Palestinian officials condemned Section 214 as "undervaluing" Palestinian and Arab "rights in Jerusalem") (citation omitted); J.A. 230-234.

By forcing the Executive to communicate in official government documents that Israel has sovereignty over Jerusalem, Section 214(d) infringes the President's core recognition power. The President's exclusive authority to decide the United States' recognition policy would be greatly undermined if Congress, disagreeing with that policy, could force the Executive Branch to make official statements in foreign relations that are inconsistent with the Executive's determinations. Other sovereigns would be unable to rely on the President's assurances, which

would prevent the Executive from using its recognition position to advance U.S. foreign-relations interests. There are few contexts in which the President's role as the "sole organ" of the Nation in foreign affairs is more crucial. *Curtiss-Wright*, 299 U.S. at 319-320.

These consequences would be particularly severe in the extraordinarily sensitive context of this case. The United States' position on Jerusalem has always been a crucial principle undergirding U.S. foreign policy in the region, and since 1948 each President has taken care to articulate that position clearly and precisely. … Section 214 has already damaged the President's ability to convey his position on Jerusalem, as many in the Arab world discounted President Bush's assurances, in his signing statement, that U.S. policy had not changed. J.A. 231-234. Doubt that the United States remains committed to negotiations on Jerusalem's status would only deepen if this Court were to require the Executive to implement Section 214(d) and begin asserting in official documents that Jerusalem is under Israeli sovereignty. Because U.S. policy toward Jerusalem is inextricably linked to this Nation's broader foreign policy in the region, confusion about the President's recognition position could undermine the United States' credibility with the parties to the peace process. Compliance with Section 214(d) also "could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." J.A. 59.

Because Section 214(d) interferes with the President's core recognition power, it is unconstitutional. Amici House Members argue, however, that Section 214(d) should be held invalid only if it "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and there is no "overriding need" to promote objectives within Congress's authority. House Members Amicus Br. 21-22 (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)). But "where the Constitution by explicit text commits the power at issue to the exclusive control of the President," the Court has "refused to tolerate any intrusion by the Legislative Branch." *Public Citizen v. DOJ*, 491 U.S. 440, 485, 486-487 (1989) (Kennedy, J., concurring in the judgment); see also *Chadha*, 462 U.S. at 945; *Morrison v. Olson*, 487 U.S. 654, 711-712 (1988) (Scalia, J., dissenting). In any event, Section 214(d) does prevent the Executive from accomplishing its constitutionally assigned function of establishing recognition policy concerning Jerusalem. And petitioner and his amici have not identified anything close to an "overriding need" to permit private citizens, who have no individual rights in the conduct of the Nation's foreign relations, see *Kennett*, 55 U.S. (14 How.) at 49-50, to use the birthplace designation on their passports to express their personal views, at the expense of the Nation's established policy. Indeed, because Section 214(d) gives private citizens an option, it would not even establish a uniform rule in its sphere of operation.

b. Petitioner's and amici's remaining arguments that Section 214(d) does not interfere with the President's recognition power lack merit.

Petitioner, joined by the Senate and House Members as amici, argues that Section 214(d) merely permits individuals to "identify themselves as born in 'Israel.'" Pet. Br. 16; House Members Amicus Br. 25; Senate Amicus Br. 21. Section 214's text and operation refute that argument. The statute's express purpose is to establish "United States policy with respect to Jerusalem as the capital of Israel." … And Section 214(d)'s one-sided operation—it does not permit Palestinian-Americans born in Jerusalem after 1948 to self-identify as being born in "Palestine"—is inconsistent with fostering "self-identification." In any event, even if Section

214(d) had a "self-identification" component, it is one that requires public endorsement by the Executive—in official documents.

Petitioner also contends (Br. 19) that constitutional avoidance principles support disregarding Section 214's title and its other subsections. Those principles are inapposite here. There is no dispute that Section 214(d) would require the Executive, upon request, to designate "Israel" in the passports and reports of birth abroad of U.S. citizens born in Jerusalem. The question in this case is whether that mandate impermissibly interferes with the President's exclusive recognition power. Cf. *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012). The answer to that question would be "yes" even if Section 214 had a more innocuous title. The title exacerbates Section 214(d)'s unconstitutional effect by confirming to the world that Congress intended to require the Executive to take steps in furtherance of recognizing Jerusalem as the capital of Israel.

Petitioner next contends (Br. 63) that implementation of Section 214(d) would have "negligible" foreign policy consequences. The President's recognition power, however, does not depend on a showing that a particular recognition determination is necessary to avoid adverse foreign-relations consequences. In any event, the Executive has determined, exercising its expertise as the Branch responsible for diplomacy, that deviating from longstanding passport practice would have severe adverse foreign-relations consequences. J.A. 53. That judgment is entitled to substantial deference. See *Regan*, 468 U.S. at 242-243.

Relatedly, petitioner argues (Br. 17) that any harm to the United States' foreign-relations interests would be the result of "misperception" by the Arab world, which could be mitigated by American reassurances. But anger and confusion among foreign entities would be the direct result of Section 214(d)'s requirement that the Executive contradict its recognition position—not mere "misperceptions." Simply reaffirming the President's recognition policy—while being compelled to implement Section 214(d)—is no remedy. Section 214(d)'s mandate makes the Executive's reaffirmance of its longstanding Jerusalem policy less credible and therefore less likely to be effective. J.A. 232-234.

That is precisely why it is unconstitutional.

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Cross References

U.S. objections to Palestinian Authority efforts to accede to treaties, **Chapter 4.A.1.**
Purported treaty between Abkhazia region and Russia, **Chapter 4.A.2.**
Definition of "foreign state" in FSIA, **Chapter 10.A.1.**
Response to downing of Malaysia Airlines flight in Ukraine, **Chapter 11.A.3.**
Russia/Ukraine sanctions, **Chapter 16.A.5.**
Middle East peace process, **Chapter 17.A.**
Russia and Ukraine, **Chapter 19.B.10.c.**

CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs claims of immunity in civil actions against foreign states in U.S. courts. The FSIA's various statutory exceptions to a foreign state's immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, and 1607, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2014 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Definition of "foreign state" in the FSIA

As discussed in *Digest 2011* at 284-87, the United States filed a brief in the U.S. Court of Appeals for the Second Circuit in 2011 asserting that the European Community[*] ("EC"), while not a foreign state (because the President has not recognized it as such), qualifies as an "agency or instrumentality of a foreign state" as defined in the FSIA, and accordingly, there was a basis for federal diversity jurisdiction over the EC's state law claims against RJR Nabisco. On April 23, 2014, the Second Circuit decided the case, agreeing that the district court had jurisdiction under the federal diversity jurisdiction statute. *EC v. RJR Nabisco, Inc.*, 764 F.3d. 129 (2d Cir. 2014). The Court of Appeals did not address the question of whether the EC could be considered a foreign state, but did

[*] Editor's Note: The European Union has since succeeded the European Community. However, for purposes of establishing diversity jurisdiction, federal courts consider the identity of the parties at the time the complaint in the case was filed.

conclude that it satisfied the definition of "agency or instrumentality of a foreign state" in the FSIA. Excerpts from the opinion of the Court of Appeals follow (with footnotes omitted).

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* * * *

Section 1332(a)(4) grants the federal courts jurisdiction over suits where the amount in controversy exceeds $75,000 and the suit is between "a foreign state ... as plaintiff and citizens of a State." 28 U.S.C. § 1332(a)(4). A "foreign state" is defined for purposes of § 1332(a)(4) by § 1603, which is part of the Foreign Sovereign Immunities Act ("FSIA"). This latter section provides:

> (a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof
>
> ...
>
> and
>
> (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

Id. § 1603.

The European Community is therefore a "foreign state" for purposes of § 1332(a)(4) if it is an "agency or instrumentality of a foreign state." Whether it is an agency or instrumentality of a foreign state, in turn, depends on whether it conforms to the definition in subsection (b). There is no doubt that the European Community satisfies the first and third elements of the definition of "agency or instrumentality" provided in § 1603(b). It is clear also that the European Community is not a political subdivision of a foreign state. The question is whether the European Community is "an organ of a foreign state." *Id.*

For the reasons discussed below, we conclude that the European Community is an organ of a foreign state, and thus an agency or instrumentality of a foreign state. As a result, the continued participation of the European Community in this suit does not destroy complete diversity.

A. Definitions

The FSIA does not include a definition of the term "organ." A number of dictionaries we have consulted include definitions of "organ" that are altogether compatible with the European Community in its relationship to the states that formed it. ...RJR in rebuttal points to definitions that characterize an organ as subordinate to a larger entity, arguing that this is not the case with the European Community's relationship to its member nations. But the fact that the word is sometimes used to refer to a smaller part of a larger whole does not mean that the word can serve only in that fashion. The European Community was formed by its member nations to serve on their collective behalf as a body exercising governmental functions over their collective territories. We see no reason why it is not properly described as an organ of each nation.

In *Filler v. Hanvit Bank,* 378 F.3d 213, 217 (2d Cir.2004), this court set forth five factors to guide a court in determining whether a party is an "organ" under the FSIA. The factors are:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 846–47 (5th Cir.2000)) (alteration in original). We have stated that these factors invite a balancing process, and that an entity can be an organ even if not all of the factors are satisfied. *See In re Terrorist Attacks on Sept. 11, 2001,* 538 F.3d 71, 85 (2d Cir.2008), *abrogated on other grounds by Samantar v. Yousuf,* 560 U.S. 305, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010). The European Community satisfies four of these factors and, very likely, also the fifth: it was created by the European nations for national purposes; it is supervised by the foreign countries; it has public employees whose salaries are paid, at least indirectly, by the member nations, which continue to bear collectively the expenses of operation; it holds exclusive rights in the foreign countries; and the foreign countries treat it as a government entity under their laws. We discuss each of these factors briefly below.

1. National Purpose

It seems beyond doubt that the member states that founded the European Community did so for a "national purpose." *Filler,* 378 F.3d at 217. Their purpose was to establish governmental control on a collective basis over various national functions previously performed by each of the member states on an individual basis, such as by establishing a common market and a monetary union, and by coordinating economic activities throughout the community. EC Treaty, arts. 1–4. The management of a common currency and the maintenance of economic stability are quintessential national purposes.

2. Supervision

We have said that a foreign state actively supervises an organ when it appoints the organ's key officials and regulates some of the activities the organ can undertake. *See, e.g., Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.,* 476 F.3d 140, 143 (2d Cir.2007). Member states exercise supervisory responsibility over the European Community by appointing representatives to serve on the Council of Ministers, which is the European Community's "primary policy-making and legislative body." *See* Stephen Breyer, *Changing Relationships Among European Constitutional Courts,* 21 Cardozo L.Rev. 1045, 1046 (2000). Each member of the Council is the appointed representative of one member state (although the individual representative will change depending on the subject matter to be discussed by the Council). *Id.* Additionally, each member state selects commissioners to serve on the European Commission, which administers the Community's various departments. *Id.* at 1046–47.

It is true that these entities are just two of the five basic institutions of the European Community. However, this factor does not require the foreign state to micro-manage every aspect of the organ's activities. The Council of Ministers is the European Community's primary policy-making and legislative body. Therefore, the member states' supervision of this entity enables the member states to supervise the most significant policy decisions made by the European Community.

3. Public Employees

The third factor asks "whether the foreign state requires the hiring of public employees and pays their salaries." *Filler,* 378 F.3d at 217. The EC Treaty, enacted by the member states, requires the creation of particular positions, which are to be filled by public officials. *See European Cmty. II,* 814 F.Supp.2d at 205. Service as a European Community official satisfies the European Court of Justice's definition of "public service" because such officials exercise "powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities." *Id.* (quoting Case 149/79, *Comm'n of the European Cmtys. v. Kingdom of Belgium,* 1980 E.C.R. 3881, ¶ 10). The member states indirectly pay the salaries of the public employees. In 2000, for example, they contributed 78.4% of the European Community's budget, 5.5% of which goes to administrative expenses, which include salaries and pensions. *See* European Commission, EU Budget 2008 Financial Report, 82, 88 (2009).

RJR argues that the European Community does not satisfy this factor because its employees are not public employees *of the member states. See, e.g., Patrickson v. Dole Food Co.,* 251 F.3d 795, 808 (9th Cir.2001), *aff'd by* 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). This fact seems to us of small importance at best. Given that the European Community exercises governmental functions delegated to it by the member states, and does so through public employees whose pay is financed largely by the member states, it seems to make little or no difference for the question whether the European Community serves as an organ of its member states that its employees are not employees directly of the member states. Nevertheless, as noted above, our precedent makes clear that the five *Filler* factors are merely issues to be considered in the decision, and there is no requirement that all five be satisfied to support the conclusion that an entity is an organ of a foreign state. We would reach the same conclusion even if precedent compelled us to decide that the European Community fails to satisfy this factor. *See Peninsula Asset Mgmt.,* 476 F.3d at 143 (concluding the entity was an "organ" despite the fact that it failed to satisfy the public employee factor).

4. Exclusive Rights

Fourth, we consider "whether the entity holds exclusive rights to some right in the foreign country." *Filler,* 378 F.3d at 217 (alteration omitted). This factor has been given a broad meaning. *See, e.g., Terrorist Attacks,* 538 F.3d at 86 (an entity satisfied this factor when it held "the 'sole authority' to collect and distribute charity to Bosnia"); *Peninsula Asset Mgmt.,* 476 F.3d at 143 (entity "has the exclusive right to receive monthly business reports from the solvent financial institutions it oversees"). The European Community holds the exclusive right to exercise a number of significant governmental powers, which include the right to "authori[z]e the issue of banknotes within the Community" and "to conclude the Multilateral Agreements on Trade in Goods." *European Cmty.,* 814 F.Supp.2d at 206–07.

5. Foreign State Law

Finally, the fifth factor asks "how the entity is treated under foreign state law." *Filler,* 378 F.3d at 217. In *Peninsula Asset Management,* this factor was satisfied when the "Korean government informed the State Department and the district court that it treats [the entity] as a government entity." *Peninsula Asset Mgmt.,* 476 F.3d at 143. Neither party cites to European law that clearly addresses this question. The member states that are parties to this suit have identified the European Community as an organ. Plaintiffs informed the district court in their briefing that they consider the European Community to be a governmental entity, and the United States Department of State has advised that it accepts this representation. *See* Brief for the United States as Amicus Curiae at 29. Therefore, in a manner similar to the one employed in *Peninsula Asset*

Management, the European Community appears to satisfy this factor. Furthermore, the fact that the member states have ceded portions of their governmental authority to the European Community to be exercised by it in their stead and on their collective behalf seems to confirm its status as an organ and agency of the member states.

RJR argues that none of the member states has treated the European Community as its "organ," rather than as a supranational body of the member states. This argument, however, depends on the proposition that a governmental entity created by a collectivity of governments to exercise certain powers in their stead and on their behalf cannot be at once a supranational entity and an organ or agency of the actors that created it. It appears to us that both descriptions are accurate, and the fact that the European Community functions as a supranational governmental entity does not negate its also being an organ and agency of its member states, which continue to exist as sovereign nations, notwithstanding having delegated some of their governmental powers to the supranational agency they created.

B. Multi–National Entities

RJR argues that the text and legislative history of the FSIA, along with the common law at the time of the FSIA's enactment, demonstrate that an "organ" of a foreign state cannot include an international organization created by multiple states. We disagree.

* * * *

2. Exceptions to Immunity from Jurisdiction: Commercial Activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

In December 2014, the United States government filed a brief in response to the Supreme Court's request for its views on a petition for certiorari filed by Austria's state-owned railway in a case involving the interpretation of section 1605(a)(2). *OBB Personenverkehr AG v. Carol P. Sachs*, No. 13-1067. Respondent in the Supreme Court (plaintiff in the district court), Sachs, had sued the railway in federal court in California after sustaining injuries while boarding an OBB train in Austria. She had purchased her Eurail pass in the United States via a travel agency ("RPE"). The district court in California dismissed the case for lack of jurisdiction under the FSIA's commercial activity exception and a panel of the Court of Appeals for the Ninth Circuit affirmed. However, the Ninth Circuit granted rehearing en banc and reversed. Petitioner challenged the Court of Appeals' conclusions that (1) common-law agency principles may be used to attribute an entity's actions to a foreign state for purposes of the FSIA's commercial activity exception; and (2) Respondent's claims are "based upon" commercial activity – *i.e.*, the sale of the Eurail pass in the United States.

The U.S. brief explains that the Court of Appeals' had correctly held that the commercial activity exception encompasses situations in which a foreign state carries on commerce through the acts of an independent agent in the United States, and that this ruling does not conflict with any decisions of the Supreme Court or other courts of appeals. With respect to the second question, the U.S. brief asserts the position that the Court used an overly permissive formulation of the "based upon" standard, but that further review was not warranted because the lack of clarity about the precise nature of Respondent's claims would make it difficult for the Court to provide guidance on the content of the "based upon" requirement by applying it to the claims in the case. In addition, the U.S. brief notes that the district court on remand may dismiss the case on other grounds, and that cases presenting similar claims are unlikely to recur with any frequency, in light of the prevalence of forum-selection clauses in form ticket contracts for travel.

Excerpts follow (with footnotes and citations to the record omitted) from the U.S. brief recommending the Supreme Court deny the petition for certiorari.[**]

* * * *

I. THE COURT OF APPEALS' HOLDING THAT A FOREIGN STATE MAY CARRY ON COMMERCIAL ACTIVITY IN THE UNITED STATES THROUGH THE ACTS OF AN AGENT ACTING ON ITS BEHALF DOES NOT WARRANT REVIEW

The court of appeals correctly held that a foreign state may be found to have "carried on" commercial activities in the United States when it has employed an entity to act as its agent in conducting those activities. That holding does not conflict with any decision of this Court or another court of appeals.

A. 1. The FSIA's commercial activity exception provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(e) (defining the latter phrase as commercial activity "carried on by such state and having substantial contact with the United States"). The FSIA does not further explain what it means for commercial activity to be "carried on" by a foreign state. Applying traditional agency law principles to give content to that phrase best furthers Congress's intent in enacting the exception.

The commercial activity exception is designed to ensure that when a foreign state acts as an "every day participant[]" in the marketplace—in other words, when the state engages in commercial ventures of the sort that private parties undertake—plaintiffs may seek judicial resolution of any resulting "ordinary legal disputes." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976) (House Report); id. at 17 (examples of disputes that would fall within the exception include "business torts occurring in the United States").

[**] Editor's Note: On January 23, 2015, the petition for certiorari was granted. On April 24, 2015, the United States filed an amicus brief in support of reversal of the Ninth Circuit's decision.

Private parties often engage in commercial activities with the assistance of agents whose conduct they direct and control. As a result, common-law agency principles are routinely applied in private commercial disputes: for purposes of both jurisdiction and liability, agency principles may provide a basis for attributing the conduct of one party to a principal who directed the activity at issue. See Restatement (Third) of Agency § 1.01 cmt. c (2006); *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (acts of agent may be imputed to principal for purposes of exercising specific jurisdiction).

Congress therefore would have expected traditional agency-law principles to play a similar role in determining when a foreign state has undertaken commercial activities that subject it to suit. Foreign states, like private actors, may often engage in commercial activities by employing entities under their direction and control to enter into and execute transactions. See *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983). When a foreign state uses agents to accomplish its commercial ends, the state is acting as an "every day participant[]" in the marketplace. House Report 7. And by virtue of the state's direction and control over the agent, the state is effectively taking actions in the United States commercial market itself. Applying agency-law principles to determine when a foreign state has "carried on" commercial activity therefore furthers Congress's purpose of ensuring that foreign states may be subject to suit when they act in a commercial manner. See *Maritime Int'l*, 693 F.2d at 1105; see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 372-373 (1993) (Kennedy, J., concurring in part and dissenting in part) (actions of private entity acting as agent of Kingdom of Saudi Arabia could be attributed to Kingdom); U.S. Amicus Br. at 14 n.8, *Nelson*, supra (No. 91-522).

Exercising jurisdiction over a foreign state that has "carried on" commercial activity through an agent is also consistent with international practice. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, a draft convention describing well-accepted state practice in this respect, provides that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is *in fact acting on the instructions of, or under the direction or control of, that State* in carrying out the conduct." G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83, at 3 (Jan. 28, 2002) (emphasis added). The United States expressed support for an earlier, materially similar draft article. State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998).

* * * *

II. THE COURT OF APPEALS' HOLDING THAT RESPONDENT'S CLAIMS ARE "BASED UPON" PETITIONER'S COMMERCIAL ACTIVITY IN THE UNITED STATES DOES NOT WARRANT REVIEW

Petitioner also challenges the court of appeals' conclusion that respondent's claims are "based upon" petitioner's commercial activity in the United States. Although the court applied an overly permissive formulation of the "based upon" requirement, this case would not be a suitable vehicle to provide guidance on the correct application of that requirement.

A. 1. In order to establish jurisdiction over a foreign state under the relevant clause of Section 1605(a)(2), a plaintiff must show that "the action is based upon" the state's commercial activity in the United States. In *Nelson*, this Court held that the phrase "based upon" connotes "conduct that forms the 'basis,' or 'foundation,' for a claim." 507 U.S. at 357. The Court

explained that the phrase "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case," and it cited with approval a decision describing the inquiry as focusing on "the gravamen of the complaint." *Ibid*. (quoting *Callejo v. Bancomer*, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985)). The Court also cautioned that it "d[id] not mean to suggest that the first clause of [Section] 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state." *Id*. at 358 n.4. The Court concluded that Nelson's claims challenging his torture and imprisonment during his employment in Saudi Arabia were not based upon his recruitment and hiring in the United States. Those commercial activities, the Court stated, "preceded the[] commission" of the intentional torts Nelson alleged. *Id*. at 358.

2. In this case, the court of appeals stated that a claim is "based upon" commercial activity under *Nelson* if "an element of [the plaintiff's] claim consists in conduct that occurred in commercial activity carried on in the United States," or if such activity is an "essential fact" to proving an element of the claim. That understanding of the "based upon" requirement is problematic. As this Court indicated in *Nelson*, the commercial activity must be the "gravamen"—the essence or gist—of the plaintiff's claim, not simply a link in the chain of events that led to an overseas injury. 507 U.S. at 357; accord U.S. Amicus Br. at 10, *Nelson*, *supra* (No. 91-522). Congress's inclusion of the "based upon" language provides a significant limitation on the jurisdiction of courts in cases brought under Section 1605(a)(2) by requiring an appropriate connection between the claims at issue and the foreign state's commercial activities in the United States. There may be situations in which the commercial activity establishes a single element of, or fact necessary to, a claim, and that element is so central to the claim that the commercial activity may be said to be the gravamen of the claim. But a court might apply the single-element formulation in a manner that permits the "based upon" requirement to be satisfied simply because the commercial activity is relevant to an element or factual predicate of the plaintiff's claim that has little to do with the core wrong the plaintiff has allegedly suffered. That could lead the court to assert jurisdiction in a case that does not have a substantial connection to the foreign state's commercial activity in the United States.

The court of appeals' application of the single-element standard in this case also appears to have been unduly permissive. The court focused on whether the ticket sale in the United States established a fact necessary to an element of each of respondent's claims. The court concluded that respondent's claims were "based upon" the sale of the Eurail pass because, under California law, that sale was necessary to (1) establish a heightened duty of care for petitioner as a common carrier for purposes of respondent's negligence claim, and (2) to establish the existence of a transaction between seller and consumer for purposes of respondent's strict-liability and breach-of-implied-warranty claims. *Id*. at 34-40. It is doubtful that the sale of a rail pass in the United States should be considered the gravamen of respondent's claims, as those claims focus on the events in Austria that caused respondent's injury there.

* * * *

B. As petitioner observes, the Second Circuit has used a different formulation than the Ninth Circuit to describe the "based upon" requirement. The Second Circuit has emphasized that a claim "based upon" commercial activity requires a "significant nexus" between the activity and the gravamen of the complaint that exceeds but-for causation. *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 155 (2007) (emphasis omitted) (holding that plaintiff's claim was not based upon

shipments in United States because they were not the core of the alleged conspiracy); see *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp*., 204 F.3d 384, 390 (2d Cir. 2000), cert. denied, 532 U.S. 904 (2001). Other courts, however, have used a single-element formulation similar to that employed by the Ninth Circuit. See *Kirkham v. Société Air France*, 429 F.3d 288, 292-293 (D.C. Cir. 2005) (under single-element formulation, claims for injuries suffered in French airport were "based upon" ticket sale in United States); *BP Chems. Ltd. v. Jiangsu Sopo Corp*., 285 F.3d 677, 682 (8th Cir.) ("only one element of a plaintiff's claim must concern commercial activity"), cert. denied, 537 U.S. 942 (2002).

The extent to which those different formulations reflect substantive disagreements as to the content of the "based upon" requirement is unclear, however, because each case concerns distinct claims and varying degrees of connection between the commercial activity and one or more elements of the plaintiff's claims. …

* * * *

3. Service of Process and Attempt to Compel Foreign Sovereign to Intervene

The United States filed an *amicus* brief in a state appellate court in New York on August 21, 2014 in a case arising out of the long-running efforts of a class of victims of human rights violations by the regime of former President Ferdinand Marcos of the Philippines to collect a judgment against the Marcos estate. *Swezey v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.,* No. 155600/13 (N.Y. App. Div. 1st Dep't.). The class has been seeking to satisfy their judgment against the Marcos estate by levying on certain assets that have also been the subject of forfeiture proceedings in the Philippines courts. In 2008, the U.S. Supreme Court determined that an interpleader action brought in federal court seeking to resolve competing claims to the assets had to be dismissed because the Republic of the Philippines was immune and the action could not proceed in its absence. *Republic of the Philippines v. Pimentel* , 553 U.S. 851 (2008). See *Digest 2008* at 475-81.

Following the Supreme Court's decision, the class initiated a state court action in New York seeking turnover of the funds. In June 2012, the New York Court of Appeals required that action to be dismissed, ruling that the fact that the Philippine government could not be joined without its consent required dismissal. In June 2013, the class filed another state court turnover proceeding. Initially, the trial courts in New York stayed the action to allow proceedings relating to the assets in the courts of the Philippines to conclude. However, in 2014, the state trial court lifted the stay. Excerpts below (with footnotes omitted) from the 2014 U.S. *amicus* brief address the trial court's order directing service of process and seeking to compel the Republic to intervene in the litigation. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*. After the U.S. filed its brief, the appellate court reversed the trial court's order and reimposed the stay.

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The trial court's order should be vacated, and this case should be remanded with instructions to dismiss the petition. As a threshold matter, the method of service ordered by the trial court was inadequate to obtain personal jurisdiction over the Republic, and is inconsistent with both the FSIA and the United States' international obligations. To the extent the trial court intended to compel the Republic to appear, furthermore, it was without the power to do so.

Nor was the trial court correct to order that the action could proceed in the Republic's absence. As the U.S. Supreme Court, this Court, and the New York Court of Appeals have all recognized, the Republic's invocation of sovereign immunity to decline to be joined is entitled to substantial weight, and dismissal is the only remedy that will protect the interests at stake. *Pimentel*, 553 U.S. at 873; *Swezey II*, 19 N.Y.3d at 555; *Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 87 A.D.3d 119, 123 (N.Y. App. Div. 1st Dep't 2011) (Swezey I). The factual developments since those prior decisions do not materially affect the equitable balancing, or undermine the conclusion that dismissal is warranted.

A. Service on the Republic Was Improper, and the Trial Court Erred to the Extent It Sought to Compel the Republic's Appearance.

1. As noted, the trial court directed petitioner's counsel to serve its order on the Republic at the Republic's Embassy and one of its consulates in the United States. This method of service was improper for two reasons: it fails to comport with the FSIA and is inconsistent with the United States' international treaty obligations.

First, Section 1608(a) of the FSIA governs service on a foreign state in state and federal courts in the United States, and it sets out four exclusive procedures for effecting service on a foreign state. See 28 U.S.C. § 1608(a). None of the available methods of service includes service by mailing papers to a consulate or embassy, and none of the procedures set forth in Section 1608(a) appears to have been followed in this case. Plaintiffs' counsel indicated at the hearing that the Republic already had notice of these proceedings, pointing to the fact that the Republic's urgent motion for entry of judgment filed with the Philippine Supreme Court referenced the New York action. … However, numerous courts have recognized that, when serving a foreign state, actual notice is insufficient; instead, strict compliance with Section 1608(a) is required. See *Magness*, 247 F.3d at 615-616; *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir.1983); *Gray*, 443 F. Supp. at 820-821.

Although Section 1608's provisions refer to service of documents that initiate litigation or enter default judgment against a foreign state, 28 U.S.C. § 1608(a), (e), Section 1608 provides a model for what constitutes adequate service on a foreign state. The same procedures should apply by analogy where a plaintiff requests a court order seizing assets over which the foreign state claims ownership, and where the state has not previously been a party to the action. The order at issue here is analogous to service of an initial summons and complaint, because it is an effort to assert jurisdiction over the state or to adjudicate the state's rights in its absence, before the state has received any formal notice of the suit. It is critical that a foreign state have proper notice of such an action where, by definition, the foreign state may have rights at stake in the dispute and/or could be inequitably affected by a judgment. See CPLR 1001(a) (defining necessary parties as persons "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action").

Second, the particular service method ordered here by the trial court and attempted by petitioners—delivery on the Philippine Embassy and a consulate—is inconsistent with international treaty obligations of the United States. This defect in service provides an independent basis for vacating the order, and also illustrates why Section 1608 should be read broadly to respect Congress's attempt to standardize the methods by which sovereigns are alerted to pending litigation.

Under Article 22 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (entered into force with respect to the United States Dec. 13, 1972), the premises of a diplomatic mission are inviolable, and a court order requiring service of legal documents upon an embassy is contrary to this inviolability. See *Autotech Techs. LP v. Integral Research & Dev. Corp*., 499 F.3d 737, 748-49 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law. The Vienna Convention on Diplomatic Relations * * * prohibits service on a diplomatic officer." (citing *Tachiona v. United States*, 386 F.3d 205, 222 (2d Cir. 2004))). Section 1608(a) was enacted specifically to "preclude" private litigants from serving a foreign state by "mailing [] a copy of the summons and complaint to [its] diplomatic mission," in order to "avoid questions of inconsistency" with the Convention's definition of the physical inviolability" of foreign missions. H.R. Rep. No. 94-1487, at 26.

Similarly, under Article 31 of the Vienna Convention on Consular Relations, consular premises are inviolable. *Vienna Convention on Consular Relations*, art. 31, Apr. 24, 1963, 21 U.S.T. 77 (entered into force with respect to the United States Dec. 13, 1972). Service on consular premises is a violation of consular inviolability, and is prohibited under the Convention. See *Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012); Restatement (Third) of Foreign Relations Law § 466, note 2 (1987); State Dep't Mem. & Letter, Digest of U.S. Practice in International Law 204-206 (1976).

Efforts to serve a foreign state at its embassy or consulate can cause significant friction in our foreign relations. In analogous circumstances, the United States routinely objects to attempts by private parties or foreign courts to serve U.S. diplomatic missions or consulates overseas with any type of order directing the United States to respond or appear in litigation, insisting that service occur through diplomatic channels absent an applicable international agreement providing otherwise. The service ordered by the trial court here was unlawful, and accordingly was not effective and failed to give the court personal jurisdiction over the Republic.

2. The trial court's order provided the Republic of the Philippines with 60 days from the filing of proof of service to intervene in this action and to respond to the turnover petition. Although the court's intent is not entirely clear, it is possible that the court believed it could compel the Republic to appear in the action and that it was empowered to adjudicate the Republic's rights, particularly given its recent comments that "[t]he Philippine government has not cooperated with us. It has not moved here. It has not appeared." [Doc. No. 83] (Tr. of Mot. Proc., May 8, 2014, at 6). The court lacked authority to take such action.

As the New York Court of Appeals made clear, "principles of sovereign immunity require the Republic's consent before a New York court may exercise jurisdiction over it." *Swezey II*, 19 N.Y.3d at 552. As noted earlier, the FSIA sets out the exclusive means by which a U.S. court can obtain jurisdiction over a foreign state in a civil case, and provides that foreign states are immune from jurisdiction except in the narrow circumstances set forth in the statute. The Philippines has not waived its immunity for purposes of this action, nor have the petitioners (or the trial court) sought to establish that an exception to immunity under the FSIA applies here.

Given the absence of an applicable exception in this case, it is settled that the Republic cannot be compelled to participate nor be bound by any order issued in its absence. *Id*. at 553-554; accord *Pimentel*, 553 U.S. at 865, 870 (recognizing that any order of the trial court could not bind the Republic).

To the extent the trial court here purported to disregard this precedent and exercise authority to require the Republic to appear, or to legally bind the Republic, the court erred.

B. This Action Should Have Been Dismissed in the Absence of the Republic.

The trial court also erred in refusing to dismiss this action and in ordering the action to proceed to adjudicate plaintiffs' claim to the account, even in the Republic's absence. …. The U.S. Supreme Court, this Court, and the New York Court of Appeals have all held in virtually identical circumstances that the inability to join the Republic as a necessary party requires dismissal. No material change has occurred since those rulings that would tip the equitable balancing, or alter the conclusion that dismissal is necessary in light of the Republic's invocation of sovereign immunity. Indeed, to the extent subsequent factual developments have any relevance, they provide additional support for dismissal.

* * * *

4. Execution of Judgments against Foreign States and Other Post-Judgment Actions[***]

a. Attempted execution on diplomatic bank accounts

On October 22, 2014, the United States filed a statement of interest in U.S. district court in Florida to oppose an effort by a plaintiff to satisfy a default judgment against Venezuela by garnishing all of Venezuela's diplomatic, consular, and UN and OAS mission bank accounts. *Devengoechea v. Venezuela*, No. 12-23743 (S.D. Fla.). The U.S. statement of interest is excerpted below (with footnotes omitted) and available at *www.state.gov/s/l/c8183.htm*. The district court magistrate judge's report and recommendation, agreeing with the U.S. statement of interest and recommending that the writs of garnishment be dissolved, which was later adopted by the district court judge, is also available at *www.state.gov/s/l/c8183.htm*.

[***] Editor's note: In a significant U.S. court decision in 2014 in a case in which the United States did not participate, *Jerez v. Republic of Cuba*, 775 F.3d 419 (D.C. Cir. 2014), the Court of Appeals for the D.C. Circuit held that a default judgment obtained in state court against the Cuban government could not be enforced because the state court lacked a basis for jurisdiction under the FSIA to enter the default judgment. The state court had failed to consider whether jurisdiction existed under the FSIA, finding jurisdiction under the Alien Tort Claims Act. In subsequent federal enforcement proceedings seeking to attach property of alleged agencies and instrumentalities of Cuba, the U.S. District Court for the District of Columbia decided to vacate a writ of attachment, finding no jurisdiction for the underlying judgment under the FSIA. On appeal, Jerez identified the non-commercial tort exception, 28 U.S.C. § 1605(a)(5), and the terrorism exception, at the relevant time, 28 U.S.C. § 1605(a)(7) (2006), as bases for jurisdiction. Considering jurisdiction *de novo*, the D.C. Circuit affirmed, reasoning that the non-commercial tort exception did not apply because the torture Jerez was subjected to took place in Cuba, not the United States. And the court found the terrorism exception inapplicable because his claims did not satisfy the statutory requirement that the state in question was designated a state sponsor of terrorism at the time the alleged act of terrorism occurred or was designated later because of the act of terrorism at issue.

* * * *

A. UNDER INTERNATIONAL AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY, THE BANK ACCOUNTS OF VENEZUELA'S EMBASSY, CONSULATES, U.N. MISSION, AND OAS MISSION ARE IMMUNE FROM ATTACHMENT OR EXECUTION

Applicable treaties, which are binding on federal courts to the same extent as domestic statutes, establish the immunity of the bank accounts of Venezuela's Embassy, consulates, U.N. Mission, and OAS Mission. Although the FSIA serves as the exclusive basis for jurisdiction over foreign states in federal and state courts and also governs the execution of judgment obtained against foreign states, it is well-established that the FSIA does not displace the immunities provided by these treaties. See generally *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Cook v. United States*, 288 U.S. 102, 120 (1933). When it enacted the FSIA, Congress recognized that the United States had existing international legal obligations with respect to theprotection of diplomatic and consular property. Congress therefore provided that the FSIA provisions addressing the immunity from attachment and execution of a foreign state's property were "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. § 1609; see also H.R. Rep. No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610 (noting that the FSIA is "not intended to affect either diplomatic or consular immunity"); *767 Third Avenue Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 298 (2d Cir. 1993) ("Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act.").

At the time the FSIA was enacted, the United States had already entered into several international agreements establishing its obligations to protect the property of diplomatic and consular missions from interference. The Vienna Convention on Diplomatic Relations ("VCDR") and the Vienna Convention on Consular Relations ("VCCR")—to which Venezuela is also a party—obligate the United States to ensure that diplomatic and consular missions are accorded the facilities they require for the performance of their diplomatic and consular functions. Article 25 of the VCDR provides that "the receiving state shall accord full facilities for the performance and functions of the mission." VCDR, art. 25, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Article 28 of the VCCR similarly provides that "the receiving state shall accord full facilities for the performance of the functions of the consular post." VCCR, art. 28, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820.

With respect to missions to the United Nations ("U.N."), the U.N. Charter provides that "representatives of the Members of the United Nations . . . shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." U.N. Charter, art. 105, para. 2, June 26, 1945, 59 Stat. 1031, T.S. No. 993. In addition, the United States has agreed that representatives to the U.N. "shall . . . be entitled . . . to the same privileges and immunities . . . as [the United States] accords to diplomatic envoys accredited to it." Agreement Between the U.N. and the United States Regarding the Headquarters of the U.N., art. V, § 15, June 26, 1947, T.I.A.S. 1676; see also Convention on the Privileges and Immunities of the U.N., art. IV, § 11(g), Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. 7502 (entered into force with respect to the United States Apr. 29, 1970) (stating that representatives of U.N. members shall enjoy "such . . . privileges, immunities and facilities . . . as diplomatic envoys

enjoy"). Similarly, with respect to missions to the Organization of American States (OAS), the bilateral agreement between the United States and the OAS on privileges and immunities provides that certain diplomatic-level mission members enjoy "the same privileges and immunities in the United States . . . as the United States accords to diplomatic envoys who are accredited to it." Agreement Between the United States and the OAS, art. 1, Mar. 20, 1975, 26 U.S.T. 1026; see also 22 U.S.C. 288g. These agreements ensure that diplomats accredited to the U.N. and OAS, and the permanent missions through which they operate, receive the same protections as diplomats and missions accredited to the United States, including the protections accorded to diplomatic property by the VCDR. See *767 Third Avenue Assocs.*, 988 F.2d at 298 (applying VCDR to define protection afforded to U.N. permanent mission); *Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172 (RRM)(MDG), 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) (explaining that the VCDR "applies with equal force to missions accredited to the United Nations and the United States, with respect to immunity against execution and levy of mission assets").

Courts have drawn on these international agreements to recognize that bank accounts of diplomatic and consular missions that are used for mission purposes are immune from attachment or execution, because a mission's access to its bank funds in the receiving state is critical to the functioning of a mission. …

In each of the cases … that address the "full facilities" provision, the foreign state submitted a declaration stating that the bank accounts at issue were used for the functioning of the mission. Here too, Venezuela has filed with the Court three signed declarations from high-ranking officials with knowledge of the accounts, attesting that the funds in all of the accounts are used by Venezuela for purposes of its missions and consulates. …. Courts have concluded that such declarations are dispositive in establishing that bank accounts are "official bank accounts used or intended to be used for purposes of the diplomatic mission," and have not ordered discovery to examine the mission's budget and records. *Liberian E. Timber Corp.*, 659 F. Supp. at 608; …Accordingly, the Court should accord the bank accounts of Venezuela's Embassy, consulates, U.N. Mission, and OAS Mission immunity from attachment and execution in furtherance of the United States' international obligations, and vacate the garnishment of such accounts.

Efforts to attach or execute on foreign mission or consular property also implicate important foreign policy interests of the United States. The attachment of or execution on a mission's or consulate's bank accounts may adversely affect the United States' relationships with foreign states. Furthermore, such actions raise reciprocal concerns for the treatment of U.S. missions abroad; the United States vigorously opposes efforts by private parties to attach its diplomatic accounts abroad, including by seeking to enlist the assistance of the government of the receiving state in such cases. See Boos v. Barry, 485 U.S. 312, 323 (1988) (respecting diplomatic immunity "ensures that similar protections will be accorded those that we send abroad to represent the United States"). For these reasons as well, the Court should ensure that the bank accounts of Venezuela's Embassy, consulates, and missions to the U.N. and OAS are accorded the full protections to which they are entitled under international law.

B. A FOREIGN SOVEREIGN'S PROPERTY MAY BE ATTACHED ONLY IN ACCORDANCE WITH THE FSIA

Even if one or more of the bank accounts at issue here were not immune from attachment under the international agreements discussed above, the Court still must ensure compliance with the FSIA's provisions governing the attachment of or execution on a foreign state's property. See, *e.g.*, *Liberian E. Timber Corp.*, 659 F. Supp. at 608-10. Under § 1609, a foreign state's property in the United States is immune from attachment, including garnishment, unless a specific statutory exception to immunity applies. See 28 U.S.C. § 1609; H.R. Rep. 94-1487, at 28 (noting that the "term 'attachment in aid of execution' in the FSIA is intended to include attachments, garnishments, and supplemental proceedings under applicable Federal or State law to obtain satisfaction of a judgment"). Furthermore, § 1610(c) of the FSIA prohibits attachment of or execution on a foreign state's property unless the court has issued an order determining such attachment or execution to be appropriate under the statute after a reasonable period of time following entry of the judgment (including service of a default judgment under 1608(e), where required). See 28 U.S.C. § 1610(c); H.R. Rep. 94-1487, at 30 …. A court must find an exception to immunity to permit attachment even if the foreign government does not appear; and the judgment creditor bears the burden of identifying the particular property to be executed against and proving that it falls within a statutory exception to immunity from execution. See, e.g., *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 293-94, 297 (2d Cir. 2011); *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 796, 799, 801 (7th Cir. 2011) (explaining that courts are required "to determine—sua sponte if necessary—whether an exception to immunity applies," a determination that must be made "regardless of whether the foreign state appears"); *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) ("[C]ourts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution sua sponte."); *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004).

The writ of garnishment at issue here (ECF No. 31) was signed by the clerk of court on plaintiff's motion; it was not issued pursuant to a court order determining that Bank of America held property subject to attachment under the FSIA. Because the procedural requirements of the FSIA were not satisfied, the writ of garnishment should be vacated. …

* * * *

b. Restrictions on the Attachment of Property under the FSIA and TRIA

(1) Rubin v. Iran

Plaintiffs in *Rubin v. Iran* hold a judgment against Iran arising out of Iran's role in a 1997 terrorist attack and sought to attach various artifacts in the possession of Chicago museums, including the Chogha Mish collection, which is the subject of a dispute between Iran and the United States before the Iran-U.S. Claims Tribunal. The United States filed a statement of interest in the case in the district court on February 19, 2014, which is available at *www.state.gov/s/l/c8183.htm*. The district court granted motions for summary judgment by Iran and the Chicago museums, holding that the artifacts

were immune from attachment under the FSIA, and that the artifacts were not blocked assets under the Terrorism Risk Insurance Act of 2002 ("TRIA"), P.L. No. 107-297, 116 Stat. 2322 (28 U.S.C. § 1610 note). Plaintiffs appealed to the U.S. Court of Appeals for the Seventh Circuit. The United States filed a brief as *amicus curiae* on November 3, 2014 in support of affirming the decision of the district court. Previous proceedings in this case are discussed in *Digest 2012* at 307-09 (discussing the U.S. brief in the Supreme Court on petition for certiorari); *Digest 2011* at 318-21 (excerpting the previous decision of the Court of Appeals for the Seventh Circuit; *Rubin v. Islamic Republic of Iran,* 637 F.3d. 783 (7th Cir. 2011)); *Digest 2009* at 352-53, 361-62 (excerpting the previous brief of the United States in the Seventh Circuit). Excerpts follow from the 2014 *amicus* brief of the United States (with footnotes omitted). The full text of the U.S. brief filed in the Seventh Circuit in 2014 is available at *www.state.gov/s/l/c8183.htm*.

* * * *

I. 28 U.S.C. § 1610(a) Provides An Immunity Exception Only For Properties That The Foreign State Itself Used In Commercial Activity

In 28 U.S.C. § 1610(a), the FSIA permits attachment of "[t]he property in the United States of a foreign state, . . . used for a commercial activity in the United States," in certain circumstances. The text of Section 1610(a) does not explicitly state whether the "use[]" of the property for a commercial activity must be by the foreign state, or if it can be by a third party. But as the district court correctly recognized, when Section 1610(a)'s text is read in conjunction with the rest of the FSIA, and in light of the FSIA's purpose and history, it becomes clear that only the commercial activity of the foreign state itself suffices.

In 28 U.S.C. § 1602, Congress codified its "[f]indings and declaration of purpose" upon enacting the FSIA. That statutory section reflects that, in enacting the statute, Congress sought to conform to its understanding of immunity in international law, under which "states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." *Id.* (emphases added). Congress's repeated statutory references to "their" indicate that Congress intended that foreign sovereigns would be taking the actions that would abrogate immunity.

This understanding is consistent with the "restrictive theory" of sovereign immunity, which the FSIA has generally been understood to codify. See *Republic of Austria v. Altmann*, 541 U.S. 677, 690-91 (2004). Under that theory, a sovereign enjoys immunity for its sovereign or public acts, but not with regard to private acts like commercial activity. The theory is partially based on the idea that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04 (1976) (plurality opinion) …. When it is a third party that has engaged in the commercial acts, and the foreign government has not had such dealings, that logic ceases to hold. As a result Section 1610(a) should be read as reaching only property that is used by the foreign state itself for commercial activity; third-party acts are irrelevant. …

Plaintiffs' interpretation would also lead to anomalous results contrary to the statutory scheme. As the Fifth Circuit has recognized, if the question were merely whether any entity had ever used the property in commercial activity, virtually all property of a foreign state would qualify since most property (whatever its current use by the foreign state) is purchased from private parties who "used" that property in a commercial transaction when they sold it to the foreign state in the first place. See *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002). Accord *Aurelius Capital Partners LP v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009) (recognizing that the commercial activities of companies that managed a foreign state's assets were irrelevant under the FSIA). It is highly unlikely that Congress intended such a result.

Limiting Section 1610(a) to property used for a commercial activity by the foreign state itself is also consistent with the relationship between the FSIA's execution provisions and its jurisdictional provisions. The latter immunity exceptions allow suit where, inter alia, the action is "based upon a commercial activity carried on . . . by the foreign state," or certain acts "in connection with a commercial activity of a foreign state." 28 U.S.C. 1605(a)(2). With that in mind, it is important that Congress, starting from a baseline barrier of absolute executional immunity, envisioned at the time of the FSIA's enactment that it was "partially lowering" that barrier so that the attachment immunity set out in Section 1610(a) would "conform more closely" to the jurisdictional immunity provisions in Section 1605(a). See H.R. Rep. No. 94-1487, at 27 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6626. Yet because judicial seizure of a foreign state's property was considered a drastic affront to a foreign state's sovereignty at the time the FSIA was enacted, the exceptions to executional immunity are narrower than, and independent from, the exceptions to jurisdictional immunity. See *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014); *Rubin*, 637 F.3d at 796; *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984). Plaintiffs' argument would reverse that well-established rule—it would mean that commercial activity by a third party, which would not support subject matter jurisdiction for purposes of suing a foreign state under § 1605(a)(2), would nevertheless strip the immunity of foreign state property under § 1610(a).

* * * *

II. Section 1610(g) Only Reaches Foreign State Property Used In Commercial Activity

As an alternative argument, plaintiffs contend that they can pursue their attachment under Section 1610(g), even if Iran's property was not used for commercial activity in the United States. Rubin Br. 48-54. The district court correctly rejected plaintiffs' argument.

Under the FSIA's baseline rule, "the property in the United States of a foreign state [is] immune from attachment . . . except as provided" elsewhere in the FSIA. 28 U.S.C. § 1609. Section 1610 goes on to permit attachment in various circumstances, including the one set out in 28 U.S.C. § 1610(a)(7) that plaintiffs have invoked as individuals who hold a terrorism-related judgment and who are pursuing foreign state property. But when dealing with foreign state property, Section 1610 only authorizes attachment when the foreign state's property is used for a "commercial activity in the United States." *Id.* § 1610(a); *see also id.* § 1610(b) (imposing a "commercial activity" requirement with regard to agency or instrumentality property); *NML Capital*, 134 S.Ct. at 2256.

That "commercial activity" restriction is important, because the plain text of Section 1610(g) indicates that specified property is "subject to attachment . . . *as provided in this section*." 28 U.S.C. § 1610(g)(1) (emphasis added). The referenced "section" is Section 1610, and thus Section 1610(g) incorporates by reference the other requirements for attaching foreign state property provided under Section 1610.

Plaintiffs make no attempt to address the crucial "as provided in this section" language. And the cases they cite, some of which entirely ignore the relationship between Section 1610(g) and other subsections, or address the issue only in dicta, make this similar error. *See, e.g.*, *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010) (dicta, and no discussion of "commercial activity"); *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 25-26 (D.D.C. 2011) (no discussion whether Section 1610(g) abrogates "commercial activity" requirements). Indeed, in the Southern District of California case plaintiffs cite, *Ministry of Defense v. Cubic Defense Systems*, 984 F. Supp. 2d 1070 (2013), which is currently on appeal to the Ninth Circuit, the United States has filed an *amicus* brief explaining that the district court misinterpreted Section 1610(g) because it ignored the "as provided in this section" language. Br. For the United States As Amicus Curiae, *Ministry of Defense v. Frym*, No. 13-57182 (9th Cir.) (filed July 3, 2014), at 27-32.

Plaintiffs' reading also would render portions of Section 1610 superfluous, contrary to the "cardinal principle of statutory construction" that a statute should be construed to avoid superfluity. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). Both Sections 1610(a)(7) and (b)(3), which concern terrorism-related judgments entered under 28 U.S.C. § 1605A, require some relation to commercial activity on the part of the foreign state's property, or by the foreign state agency or instrumentality, as a condition of attachment of property in aid of execution. But if Section 1610(g), which also relates to a judgment under Section 1605A, had no such requirement, plaintiffs' view would render the restrictions in Section 1610(a)(7) and (b)(3) superfluous. That cannot be correct.

Despite all of the above, plaintiffs see significance in the fact that Section 1610(g) allows attachment "regardless of" five listed factors. 28 U.S.C. § 1610(g)(1)(A)-(E); *see also* Rubin Br. 51-53. But as this Court has already recognized, *see Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014), that aspect of the statute merely demonstrates that Section 1610(g) was written to override the multi-factor test created in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), for determining when a creditor can look to the assets of a separate juridical entity (like a state-owned bank engaged in commercial activity) to satisfy a claim against a foreign sovereign. *See id.* at 628-34. Indeed, the five factors listed in the statute paraphrase almost perfectly the so-called *Bancec* factors that courts had sometimes applied to determine if such assets are attachable. *See Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Accordingly, those five factors merely clarify that Iran's judgment creditors can reach properties owned by Iran's agencies and instrumentalities, even if those properties are not directly owned by Iran itself.

* * * *

(2) Ministry of Defense v. Frym et al. (*"Cubic")*

On July 3, 2014, the United States filed a brief as *amicus*, in the U.S. Court of Appeals for the Ninth Circuit, in support of affirming a U.S. district court's decision allowing plaintiffs who had obtained a judgment against Iran to attach another district court's confirmation of arbitral award against Cubic Defense Systems Inc. ("Cubic") that had been obtained by the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("Ministry of Defense"). *Ministry of Defense v. Frym at al.*, No. 13-57182 (9th Cir.). For a discussion of prior proceedings and U.S. briefs in this case (in particular, the U.S. Supreme Court's decision in *Ministry of Defense v. Elahi*), see *Digest 2009* at 341-48. The United States makes three arguments in its brief, which is excerpted below (with most footnotes omitted): (1) the attachment does not violate the Algiers Accords; (2) the confirmed arbitral award is a "blocked" asset; (3) section 1610(g) of the FSIA does not allow assets to be attached unless they are used in commercial activity. The U.S. *amicus* brief is available in full at *www.state.gov/s/l/c8183.htm*.

* * * *

I. Allowing Attachment Would Be Consistent With The Algiers Accords

Repeating an argument that Iran has made in a pending dispute before the Claims Tribunal, the Ministry contends that the Algiers Accords prohibit the Claimants' attachment. The Ministry is wrong.

1. When the United States entered into the 1981 Algiers Accords to resolve the hostage crisis, it undertook to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." 20 I.L.M. at 224. The agreement also stated that the United States would "arrange . . . for the transfer to Iran of all Iranian properties which are located in the United States," subject to certain exceptions. *Id.* at 227. The longstanding position of the United States is that this simply required the United States to return, as directed by Iran, specified Iranian properties that were in existence and subject to U.S. jurisdiction as of January 19, 1981 (the date of the Accords). The United States had no transfer obligation with respect to property that Iran acquired after the date of the Accords.

This interpretation of the Accords, offered by the United States Government, is entitled to "great weight." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 & n. 10 (1982); *see also* Restatement (Third) of Foreign Relations Law of the United States § 326(2). It also draws support from the Accords' plain text. The Accords oblige the United States to return specified properties that "*are located* in the United States and abroad," 20 I.L.M. at 226-27 (emphasis added); the use of the present tense shows that the assets to be transferred had to have been in existence at the time of the agreement.

That reading also accords with common sense. It is unreasonable to think that the United States had pledged to guarantee to restore Iran to its 1979 financial position indefinitely into the future, regardless of any post-1981 actions that Iran might make, and regardless of any efforts

that Iran itself might undertake to bring future assets into the United States. The United States pledged only to "restore" Iran's financial position, 20 I.L.M. at 224, not to freeze it for all time.

This interpretation also finds support in Executive Order No. 12281, which the Claims Tribunal has understood to be "part of the 'practice' of [the Algiers Accords] for purposes of its interpretation." *Iran v. United States*, 28 Iran-U.S. Cl. Trib. Rep. 112, 129 (1992). That executive order directed U.S. holders of Iranian properties to transfer the properties as directed by Iran "after the effective date of this Order," which was January 19, 1981. 46 Fed. Reg. at 7923. By tying the transfer obligation to the order's "effective date," the order made clear that the United States did not undertake in the Algiers Accords any obligation with regard to properties in the future. And to the extent the Executive Order itself might be ambiguous on that score, any ambiguity was cleared up by OFAC's implementing regulations, which expressly applied the transfer directive only to "properties held on January 18, 1981." 31 C.F.R. § 535.215(a).

2. In light of the above, the Claimants' attachment plainly would not place the United States in violation of the Accords, since the Claimants are attaching property that did not exist in 1981. As the Supreme Court has already held, the specific asset that the Claimants are trying to attach is not the training system itself (which was sent to Canada in 1982). Rather, they are trying to attach the "judgment enforcing [the] arbitration award based upon Cubic's failure to account to Iran for Iran's share of the proceeds of that system's sale." *Elahi*, 556 U.S. at 375-76. Iran's interest in that judgment did not arise until 1998, and its interest "in the property that underlies" that judgment did not even arise until 1982. *Id.* at 376-77. Because the judgment did not exist or come within U.S. jurisdiction until after 1981, attaching that judgment would not run afoul of the Algiers Accords.

* * * *

3. Even if the Ministry were correct that the relevant asset was the underlying training system, attachment would still not place the United States in violation of the Accords. As noted above, the Accords simply direct the United States to "restore" Iran to its November 1979 financial position. An attachment here would not violate that requirement, as it would merely be used to satisfy an outstanding judgment against Iran for events that postdate the Accords. Iran would still benefit from the full value of its judgment, since its outstanding liability to the Claimants would be reduced by that amount.

Without addressing this point specifically, the Ministry seems to assume that the Accords let Iran shield assets from creditors indefinitely, even for debts that postdate the Accords. But such an interpretation would mean that instead of "restoring" Iran's financial position, the Accords had improved that position by giving Iran a special immunity from future creditors. That is contrary to how the Iran-U.S. Claims Tribunal has understood the agreement. …It is also contrary to the longstanding construction of the Algiers Accords held by the United States Government.

II. The Judgment Is A "Blocked Asset" Under TRIA

The district court correctly concluded that the judgment is a "blocked asset" under two different IEEPA-based sanctions regimes, either of which would support attachment under TRIA.

A. The Judgment Is Blocked Under The 2012 Executive Order

Subject to certain exceptions, Executive Order 13539 blocks (among other things) "[a]ll property and interests in property of the Government of Iran . . . that are in the United States." 77 Fed. Reg. at 6659; *see also* 31 C.F.R. § 560.211(a). This Court has already found that the Ministry is "an inherent part of the state of Iran," *Ministry of Defense*, 495 F.3d at 1036, *rev'd on other grounds by Ministry of Defense v. Elahi*, 556 U.S. 366 (2009), meaning that the Ministry's judgment would be covered by this blocking order.

The Ministry nonetheless claims that the blocking order does not apply because it exempts the "property and interests in property of the Government of Iran" that had been blocked in 1979 and then made subject to the 1981 transfer directive. Ministry Br. 30-40; *see also* 77 Fed. Reg. at 6660; 31 C.F.R. § 560.210(f). But as the district court properly recognized, that argument is squarely foreclosed by the Supreme Court's decision in *Elahi*, which held that Iran's "interest in the Cubic Judgment" arose after January 1981. *Elahi*, 556 U.S. at 376. Accordingly, the Ministry's extended discussions of the 1977 contract with Cubic, and principles of Iranian contract law, are entirely irrelevant. *See* Ministry Br. 32-36.

Also irrelevant is the Ministry's assertion that 31 C.F.R. § 535.540(f) governed the proceeds of Cubic's sale to Canada. *See* Ministry Br. 36-40. As explained above, the Supreme Court held that the relevant asset here is *not* the proceeds of the sale, but the judgment confirming the arbitral award. *Elahi*, 556 U.S. at 376. In any event, Section 535.540(f) only requires sale proceeds to be transferred to Iran when the sale of otherwise blocked property is made pursuant to a specific type of OFAC license. The Supreme Court concluded in *Elahi* that the training system was *not* blocked after January 1981, *see Elahi*, 556 U.S. at 377, which meant that this regulation would have been irrelevant. …

B. The Judgment Is Blocked Under A Separate Sanctions Regime Governing Proliferators Of Weapons Of Mass Destruction

Apart from the fact that the judgment is blocked under the 2012 Executive Order, it is also blocked under an IEEPA sanctions regime targeting proliferators of weapons of mass destruction. That sanctions regime implements Executive Order 13382, *see* 70 Fed. Reg. at 38567; 31 C.F.R. § 544.201, and among other things it blocks the property of an Iranian entity known variously as the "Ministry of Defense and Armed Forces Logistics" and the "Ministry of Defense and Support for Armed Forces Logistics," as well as by the acronyms "MODSAF" and "MODAFL." 72 Fed. Reg. at 71992.

The district court—deferring to the expressed views of the United States—concluded that the Ministry was the exact entity targeted by this designation. MER 39. Since the Ministry had an interest in the judgment, the judgment became a blocked asset under this sanctions regime. *Id.*

On appeal, the Ministry no longer disputes that it is the targeted entity. Instead, it contends that this entire sanctions regime has been *sub silentio* modified by President Obama's subsequent 2012 executive order. Ministry Br. 40-44. If the Court addresses this argument—notwithstanding the Ministry's apparent waiver by failing to raise it in district court—the Court should reject it. The argument reflects a fundamental misunderstanding of IEEPA sanctions regimes.

Under IEEPA, the President can respond to a specific foreign threat by declaring a "national emergency with respect to such threat," and then taking various actions in response, including blocking transactions in property with a sufficient connection to a foreign sanctions target. 50 U.S.C. §§ 1701(a), 1702(a). The Weapons of Mass Destruction Proliferators Sanctions, which implement a 2005 executive order, are part of the government's response to a previously-recognized "national emergency . . . regarding the proliferators of weapons of mass destruction and the means of delivering them." 70 Fed. Reg. at 38567.

By contrast, the 2012 executive order is part of a separate sanctions regime, implemented in response to a separate emergency specifically related to Iranian policies. *See* 77 Fed. Reg. at 6659; 60 Fed. Reg. at 14615. Nothing about the 2012 order purports to modify the Weapons of Mass Destruction Proliferators Sanctions. Thus even if the Ministry is correct that the judgment is not blocked under the 2012 executive order, that fact has no bearing on whether the judgment is separately blocked under the Weapons of Mass Destruction Proliferators Sanctions (or under any other sanctions regime). *Accord* 31 C.F.R. § 560.101 (explaining that the regulations implementing the 2012 executive order are "separate from, and independent of" the OFAC regulations implementing other sanctions regimes); *id.* § 544.101 (same, as to the Weapons of Mass Destructions Proliferators Sanctions).

* * * *

(3) Villoldo

In *Villoldo*, plaintiffs sought to execute on a $2.8 billion judgment against Cuba for alleged acts of torture by the Cuban government. The federal district court ordered attachment of certain securities and accounts held by Computershares Ltd. before the United States became involved in the case based on plaintiffs' argument that certain Cuban laws had transferred ownership of these assets to the government of Cuba. *Villoldo et al. v. Castro Ruz et al. v. Computershare Ltd.*, No. 4:13-mc-94014-TSH (D. D. Mass).

On June 30, 2014, the United States filed a statement of interest which argues that the securities and accounts registered to individuals with Cuban addresses are not subject to attachment under TRIA and the FSIA because they have not been shown to be assets owned by the Cuban government. Excerpts follow from the U.S. brief (with footnotes omitted), which is available in full at *www.state.gov/s/l/c8183.htm*. The section of the brief articulating the applicability of the act of state doctrine is excerpted in Chapter 5.

The United States filed a similar brief on October 15, 2014 in a case brought by the same plaintiffs seeking to attach assets held by the Comptroller of New York in his capacity as custodian of unclaimed funds under New York's Abandoned Property Law. *Villoldo v. Castro Ruz v. DiNapoli*, Case No. 1:14-mc-25-LEK-CFH (N.D.N.Y.). That brief is also available at *www.state.gov/s/l/c8183.htm*.

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II. The Court Should Undertake a Full Analysis of Whether the Computershare Accounts Are Assets "of" Cuba

A. Consistent with important U.S. policy interests, TRIA and FSIA only permit the attachment of assets that are actually owned by the terrorist party

As this Court appears to have recognized in its Turnover Order, under TRIA and FSIA, in order for an asset to be subject to attachment and execution to satisfy a judgment in connection with a claim for which the foreign state was not immune under section 1605A, the asset must actually be owned by the judgment debtor terrorist party (or an agency or instrumentality thereof). … TRIA states that a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets of that terrorist party (including the blocked asserts of any agency or instrumentality *of* that terrorist party)." TRIA § 201(a) (emphasis added). Similarly, FSIA allows certain terrorism victims to attach certain "property *of* a foreign state" subject to a judgment under Section 1605A, and certain "property *of* an agency or instrumentality of such a state." 28 U.S.C. §§ 1610(a)(7), 1610(b)(3), 1610(g)(1) (emphases added).

Supreme Court decisions indicate that, when used in the context of similarly worded statutes, "the use of the word 'of' denotes ownership." *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Roche Molecular Sys.*, 131 S. Ct. 2188, 2196 (2011) (quoting *inter alia Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); see also *Calderon-Cardona*, 867 F. Supp. 2d at 399-400. The statutory language used in FSIA and TRIA is also notably narrower than the language used in the blocking regulations themselves, which apply to property in which the foreign state at issue has an "interest of any nature whatsoever," see, *e.g.*, 31 C.F.R. § 515.201 (CACR); *id*. § 538.307 (Sudan sanctions); *id*. § 560.323 (Iran sanctions), and in the specific context of Cuba, also extend to property in which Cuban nationals have such an interest, see 31 C.F.R. § 515.201(a). If Congress had intended for all assets subject to OFAC blocking regulations to be within the scope of TRIA or FSIA, it would most likely have adopted this broader language from the blocking regulations. See *Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 439-40 (D.D.C. 2005). This narrower reading of the statutory language is also consistent with FSIA's legislative history—the Conference Committee Report explained that section 1610(g)(1) authorizes the attachment of "any property in which the foreign state has a beneficial *ownership*." H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Report) (emphasis added); see also *id*. (explaining that the provision "is written to subject any property interest in which the foreign state enjoys beneficial *ownership* to attachment and execution" (emphasis added)).

Furthermore, there is no indication that Congress intended to expand TRIA and FSIA beyond well-established common law execution principles, according to which "'a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor.'" *Heiser*, 735 F.3d at 938 (quoting 50 C.J.S. Judgments § 787 (2013)). Thus, TRIA's and FSIA's attachment provisions are best understood as applying only to those blocked assets actually owned by the terrorist party, not all blocked assets in which the terrorist party has any interest of any nature.

Not only is this interpretation of TRIA and FSIA consistent with the plain language of those statutes, their legislative history, and traditional common law principles, but it is also supported by important U.S. policy interests. First, the United States has a strong interest in preserving the President's ability to use blocked assets as a tool of foreign policy. Allowing some plaintiffs to attach blocked assets that are not owned by the sanctions target (in this case, Cuba)

would selectively drain the pool of blocked assets, thereby reducing the leverage that these assets provide. See *Heiser*, 885 F. Supp. 2d at 441 ("Plaintiffs' sweeping interpretation would effectively—through future attachments and executions—eliminate the President's ability to use blocked assets as bargaining chips in solving foreign policy disputes."); *id*. at 435; *Rubin*, 709 F.3d at 57 ("The fact that blocked assets play an important role in the conduct of United States foreign policy may provide a further reason for deference to the views of the executive branch in this case.").

Second, an interpretation of TRIA and FSIA that permits attachment of blocked assets that the terrorist party does not own would effectively subsidize terrorist states by allowing plaintiffs to satisfy a judgment from assets owned by innocent third parties. …. In fact, not only would paying judgments from assets that are not owned by the terrorist party fail to impose a similar cost on the terrorist party, it would even assist terrorist parties by allowing them to reduce the outstanding judgments against them at the expense of innocent private parties. This concern is particularly acute here, where as a result of the Court's determination that Cuban laws nationalized the assets of account holders without any compensation, one set of victims of the Cuban regime's excesses would be paying Cuba's debt for Cuba's wrongs against other victims. That a substantial portion ($1 billion) of the plaintiffs' underlying judgment consists of punitive damages—intended to punish the wrongdoer rather than compensate the victim—further exacerbates this policy concern.

In sum, if the Computershare accounts are not owned by Cuba then they are not available to satisfy plaintiffs' judgment under FSIA or TRIA, and the Court's Turnover Order allowing for the transfer of these assets would be incompatible with the policy interests described above. Furthermore, absent a TRIA exception, the Court's order would amount to a transfer of blocked assets without an OFAC license, and thus would be null and void. See 31 C.F.R. § 515.203(e).

B. Before applying Cuban law, the Court should have conducted a choice-of-law analysis

Because TRIA and FSIA only allow the attachment of assets "of" the terrorist party, the Computershare accounts are not subject to attachment and execution unless they are owned by Cuba. Plaintiffs bear the burden of making this showing. See *Rubin*, 709 F.3d at 51. In its Turnover Order, the Court accepted plaintiffs' arguments and concluded that "by virtue of Cuban Law Nos. 567 and 568, the Blocked Assets held at Computershare are property of the Republic of Cuba and subject to attachment and execution." Turnover Order ¶ 6. But the Court's decision does not reflect that it engaged in any choice-of-law analysis to determine what law actually governs the question of ownership.

Because Congress has not provided a rule for determining ownership under TRIA or FSIA, federal courts generally apply state property law, and if necessary, state choice-of-law rules to determine whether assets located in the United States are subject to execution. See, *e.g.*, *Karaha Bodas Co. v. Pertamina*, 313 F.3d 70 (2d Cir. 2002) (applying state choice-of-law rules to determine ownership of property for purposes of attachment under FSIA); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (noting that FSIA, to which TRIA is appended, "operates as a 'pass-through' to state law principles" to "ensure that foreign states are liable in the same manner and to the same extent as a private individual under like circumstances"); *Calderon-Cardona*, 867 F. Supp. 2d at 400 (S.D.N.Y. 2011) (applying state law to determine ownership). Alternatively, at least one court "fashion[ed]" a federal common law rule of decision, applying certain provisions of the Uniform Commercial Code (UCC) to determine that contested fund transfers did not constitute property "of" Iran within the meaning of TRIA or FSIA. See *Heiser*, 735 F.3d at 940 (noting that the UCC "is often used as the basis

of federal common law rules").

Here, there is a clearly applicable choice-of-law provision under Massachusetts law. The section of the Massachusetts UCC governing securities (Section 8-110) provides that the applicable law for determining acquisition of a security entitlement from, and the duties of, a securities intermediary such as Computershare is the law of the "securities intermediary's jurisdiction"; this jurisdiction is determined either by reference to the relevant account agreement, or if not determined therein, by the location of the office serving the account or the intermediary's chief executive office. Mass. Gen. Laws ch. 106 § 8-110 (providing a test for determining the relevant jurisdiction, as well as four fallback rules). Alternatively, if the Court were to follow *Heiser* and engage in a federal common law choice-of-law analysis, UCC § 8-110 appears to be materially indistinguishable from the corresponding Massachusetts provision, and thus presumably would lead to the same result.

Whichever body of law is applied, the determination of ownership should be consistent with the weight of authority that favors a strict construction of attachment statutes in order to avoid punishing innocent parties—a consideration which is particularly acute with respect to blocked assets. See *Heiser*, 735 F.3d at 939. In other words, TRIA and FSIA should not be interpreted as recognizing an attachable property interest that would not otherwise be recognized in cases involving execution against unregulated assets.

The United States takes no position on whether federal courts should look to state choice-of-law rules or federal common law principles in order to apply TRIA's and FSIA's ownership requirement. But here, there is no indication reflected in the Turnover Order that the Court applied any choice-of-law rules before deciding that a foreign state's law, whatever its content, is the relevant law for determining ownership of accounts maintained by a securities intermediary in Massachusetts.

C. The Court should consider whether the principles embodied in the "penal law rule" preclude enforcement of the Cuban laws

Even assuming that a proper choice-of-law analysis would lead the Court to look to Cuban law to determine ownership of the assets, the court should consider whether application of the principles underlying the "penal law rule" should prevent it from applying Cuban Laws 567 and 568. Under that rule, courts in the United States have generally declined to give effect to foreign penal laws and foreign penal judgments in civil proceedings. …Plaintiffs themselves have described the Cuban laws at issue here as imposing a "penalty for violating a criminal law," see Pls.' Reply at 7, and the plain text of Law 568 also indicates that it is penal in nature, see State Department Official Translations of Cuban Law Nos. 567 & 568 (attached as Exhibit B). Thus, Law 568 is the type of law to which the penal law rule applies (and, as explained below, Law 567 appears to be irrelevant).

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(4) Calderon-Cardona

As discussed in *Digest 2012* at 302-05, the United States filed an *amicus* brief in *Calderon-Cardona* in the U.S. Court of Appeals for the Second Circuit in 2012, arguing that the district court properly denied plaintiffs' efforts to attach electronic fund transfers ("EFTs") in order to collect on a judgment against North Korea based on its support for terrorists whose attack in 1972 victimized plaintiffs' family members. On October 23, 2014, the Second Circuit issued its decision, affirming the district court's determination with respect to TRIA and FSIA § 1610(f)(1), but remanding to the district court for further consideration of whether the assets at issue were owned by North Korea and therefore attachable under FSIA § 1610(g). The Second Circuit opinion is excerpted below.

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1. TRIA § 201

Pursuant to TRIA, assets are attachable when "a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism." TRIA § 201(a). Here, the statutory text of TRIA unambiguously requires that there (1) be a judgment, (2) against a terrorist party, and (3) the claim underlying the judgment be based on an act of terrorism. See *United States v. Santos*, 541 F.3d 63, 67 (2d Cir. 2008) ("When a court determines that the language of a statute is unambiguous, its inquiry is complete."). While plaintiffs have a judgment against North Korea that is based on an act of terrorism, that judgment was not entered against a terrorist party. As the district court correctly observed, a foreign state is a "terrorist party" for purposes of TRIA § 201(d) when it is "'designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 . . . or Section 620A of the Foreign Assistance Act of 1961.'" *Calderon-Cardona*, 867 F. Supp. at 394 (quoting TRIA § 201(d)). North Korea was no longer designated a state sponsor of terrorism as of October 11, 2008. The underlying judgment was entered against North Korea on August 5, 2010, nearly two years later. At the time the judgment below was entered, therefore, because North Korea was not a state sponsor of terrorism, it was not a "terrorist party" within the meaning of TRIA. The underlying judgment, consequently, was not a judgment against a terrorist party at the time it issued.

Petitioners' contention that a state's previous, but now lifted, designation as a state sponsor of terrorism satisfies TRIA § 201(a)'s requirement that the judgment be entered against a "terrorist party" is unpersuasive. Although interpreting "a judgment against a terrorist party on a claim based on an act of terrorism" to include only judgments entered against a party that was a designated state sponsor of terrorism when the judgment was entered appears the more natural reading, petitioners' interpretation of the language as applying where the party against whom judgment was entered was a state sponsor of terrorism when the terrorist act was committed or when the action was commenced has at least some plausibility. The statutory context, however, makes clear that Congress intended the former meaning. In other parts of FSIA, when Congress has intended that a former state sponsor of terrorism be denied sovereign immunity for wrongs done during the time it was so designated, Congress has done so expressly. For example, in

creating the private right of action against foreign states under FSIA § 1605A(c) Congress expressly included states that were formerly designated as state sponsors of terrorism. FSIA § 1605A(c) ("A foreign state that is or was a state sponsor of terrorism . . . shall be liable."). It would be discordant to hold that Congress believed it needed to provide expressly that a former state sponsor of terrorism could be held liable in one part of FSIA, but that it only needed to do so impliedly in a later-enacted statute it codified as a note to FSIA. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret [a] statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." (internal citation and quotation marks omitted)). Accordingly, because their judgment was not issued against a terrorist party, petitioners may not attach the EFTs at issue pursuant to TRIA § 201(a).

2. FSIA § 1610(g)

Section 1610(g) is not limited in the same way as TRIA § 201(a). Under § 1610(g), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment. 28 U.S.C. § 1610(g)(1). Because, as noted, a "judgment . . . under § 1605A" expressly includes judgments against foreign nations formerly, but not currently, designated as state sponsors of terrorism, the fact that North Korea no longer has that designation does not bar attachment of North Korea's property, or that of its agents and instrumentalities, under § 1610(g).

Whether attachment of the EFTs under § 1610(g) is possible turns… on whether the blocked EFTs at issue are "property of" North Korea or "the property of an agency or instrumentality of" North Korea. …

"[W]hether or not midstream EFTs may be attached or seized depends upon the nature and wording of the statute pursuant to which attachment and seizure is sought." *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 116 (2d Cir. 2010). Congress has not defined the type of property interests that may be subject to attachment under FSIA § 1610(g). In particular, FSIA § 1610(g) is silent as to what interest in property the foreign state, or agency or instrumentality thereof, must have in order for that property to be subject to execution. Because of the absence of any definition of the property rights identified in the statutory text, we hold that FSIA § 1610(g) does not preempt state law applicable to the execution of judgments in this case. Moreover, given this gap in the contours of the legislation, we cannot infer that Congress intended merely to leave a void. We therefore apply the general rule in this Circuit that when Congress has not created any new property rights, but "merely attaches consequences, federally defined, to rights created under state law," we must look to state law to define the "rights the [judgment debtor] has in the property the [creditor] seeks to reach." *Asia Pulp*, 609 F.3d at 117 (first alteration in original) (internal quotation marks omitted). In short, Congress provided that "property" of a foreign state is subject to execution, and absent any indication that Congress intended a special definition of the term, "property" interests are ordinarily those created and defined by state law.

In this Circuit, two cases in particular interpret New York law delineating the property interests held by parties to an EFT that is intercepted midstream. In *Asia Pulp* and *Jaldhi*, we dealt with the interpretation of Article 4 of the New York Uniform Commercial Code ("NY UCC"), which governs EFTs held in New York banks. See N.Y. U.C.C. Law Ch. 38, Art. 4-A;

Asia Pulp, 609 F.3d at 118 (Article 4-A was "enacted to provide a comprehensive body of law that defines the rights and obligations that arise from wire transfers" (internal quotation marks omitted)). Looking to both the text of NY UCC § 4-A-503 and the official commentaries to that statute, we determined in *Jaldhi* that under New York law "EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *Jaldhi*, 585 F.3d at 71. In *Asia Pulp* we explained that this was so because "wire transfers, which include EFTs, are a unique type of transaction to which ordinary rules do not necessarily apply." *Asia Pulp*, 609 F.3d at 118. Because EFTs function as a chained series of debits and credits between the originator, the originator's bank, any intermediary banks, the beneficiary's bank, and the beneficiary, "the only party with a claim against an intermediary bank is the sender to that bank, which is typically the originator's bank." *Id*. at 119–20 (quoting Permanent Editorial Board for the Uniform Commercial Code Commentary No. 16 §§ 4A-502(d) and 4A-503, at 3 (2009)). Put another way, under the NY UCC's statutory scheme, the only entity with a property interest in an EFT while it is midstream is the entity immediately preceding the bank "holding" the EFT in the transaction chain. In the context of a blocked transaction, this means that the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests. We therefore hold that an EFT blocked midstream is "property of a foreign state" or "the property of an agency or instrumentality of such a state," subject to attachment under 28 U.S.C. § 1610(g), only where either the state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block.

Because the district court's opinion issued prior to discovery relating to the details of the entities involved in the transaction chains of the EFTs at issue in this case, the record contains little to no evidence of whether the entities that transmitted the EFTs to the respondent banks were agencies or instrumentalities of North Korea. Without knowing the nature of those entities, we cannot determine whether the EFTs are properly attachable. Remand is therefore required for the parties to conduct discovery aimed at resolving the factual issues surrounding whether the entities that transmitted the EFTs to the respondent banks were agencies or instrumentalities of North Korea. Accord *Palestine Monetary Auth. v. Strachman*, 873 N.Y.S.2d 281 (App. Div. 1st Dep't 2009) (remanding for additional discovery where it was not known whether the bank that transmitted the EFT to the bank that was holding the EFT was controlled by a foreign government against which judgment was sought).

* * * *

(5) Hausler

On October 27, 2014, the U.S. Court of Appeals for the Second Circuit issued its decision on appeal in *Hausler*. See *Digest 2012* at 299-302 for background on the case. As in *Calderon-Cardona*, this case involves efforts to attach blocked electronic fund transfers ("EFTs"), though in this case, the plaintiffs sought to enforce a judgment against Cuba rather than North Korea. Consistent with its holding in *Calderon-Cardona*, the Second Circuit looked to state law to determine the ownership of the property at issue under FSIA § 1610(g). It held that the EFTs could not be attached because, under the law of

New York, where the banks holding the EFTs were located, Cuba did not have a property interest in the EFTs. Excerpts follow from the opinion of the Court of Appeals.

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"[W]hether or not midstream EFTs may be attached or seized depends upon the nature and wording of the statute pursuant to which attachment and seizure is sought." *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 116 (2d Cir. 2010). As with FSIA § 1610(g), Congress did not define the "type of property interests that may be subject to attachment under" TRIA § 201(a). *Calderon-Cardona*, slip op. at 12 (interpreting FSIA § 1610(g)). While the Cuban Assets Control Regulations, for purposes of those regulations, include a non-exhaustive list of types of property that may be attached, 31 C.F.R. § 515.311(a), EFTs involving a Cuban bank are not among the types of property identified. When Congress leaves a gap in a statute that "has not created any new property rights, but 'merely attaches consequences, federally defined, to rights created under state law,' we must look to state law to define the 'rights the judgment debtor has in the property the [creditor] seeks to reach.'" *Calderon-Cardona*, slip op. at 12–13 (quoting *Asia Pulp*, 609 F.3d at 117). Here, the banks at which the EFTs are blocked are in New York, so we look to New York property law to fill the gap.

We recently explained in *Calderon-Cardona* "that under New York law 'EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank.'" *Id*. at 13 (quoting *Jaldhi*, 585 F.3d at 71). As such, "the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests." *Id*. at 14. Thus, in order for an EFT to be a "blocked asset of" Cuba under TRIA § 201(a), either Cuba "itself or an agency or instrumentality thereof (such as a state-owned financial institution) [must have] transmitted the EFT directly to the bank where the EFT is held pursuant to the block." *Id*.

Unlike in *Calderon-Cardona*, where a remand was necessary to determine whether the EFTs at issue were attachable, it is undisputed that no Cuban entity transmitted any of the blocked EFTs in this case directly to the blocking bank. As a result, neither Cuba nor its agents or instrumentalities have any property interest in the EFTs that are blocked at the garnishee banks. Because no terrorist party or agency or instrumentality thereof has a property interest in the EFTs, they are not attachable under TRIA § 201.

* * * *

c. Discovery to aid in execution under the FSIA

(1) Discovery regarding sovereign assets outside the United States

As discussed in *Digest 2013* at 279-82, the United States filed a brief as *amicus curiae* in support of the petition for writ of certiorari filed in *Argentina v. NML Capital, Ltd.*, No. 12-842. For further background on the case, see *Digest 2012* at 315-19. After the

Supreme Court granted certiorari on January 10, 2014, the United States filed a further brief in support of petitioner, Argentina, urging reversal of the court of appeals. Excerpts follow from the March 2014 *amicus* brief of the United States.

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The FSIA sets forth two separate and independent rules of immunity: immunity of a foreign state from suit, and immunity of the property of a foreign state from attachment, arrest, or execution. Each of those immunities has exceptions, but those exceptions are also independent of each other—and the exceptions with respect to immunity from execution are considerably narrower than the exceptions that permit a U.S. court to exercise jurisdiction over a foreign state. A foreign state's property therefore may remain immune from execution under the FSIA even though the foreign state is subject to a judgment entered by a U.S. court. That carefully constructed framework preserves comity—since judicial seizure of a foreign state's property may be regarded as a serious affront to the state's sovereignty and affect our foreign relations with it—and addresses concerns about reciprocity for the United States when sued abroad.

Consistent with these immunity provisions, a district court's authority to order discovery into the property of a foreign state is necessarily limited, and extends only to assets as to which there is a reasonable basis to believe that an exception to execution immunity under the FSIA applies. Broad, general discovery into presumptively immune foreign-state property would impose the very costs and burdens that the immunity is intended to shield against in the first place. Discovery therefore must be restricted to the facts necessary to verify that assets fall within the scope of such an exception—exactly the kind of tailoring that courts undertake in various other immunity contexts, including qualified immunity cases. A court has jurisdiction over a foreign state in the first place only because a FSIA exception applies, and the FSIA and its exceptions therefore define the scope of the inquiry in which that court can engage.

Permitting more sweeping examination of a foreign state's assets by U.S. courts, thereby opening a substantial gap in what this Court has recognized to be a comprehensive scheme, would undermine the FSIA's purposes and have a number of adverse consequences. It would invade substantially a foreign state's sovereignty in an especially sensitive area and would be inconsistent with the comity principles the FSIA embodies. It would risk reciprocal adverse treatment of the United States in foreign courts. And it would more generally threaten harm to the United States' foreign relations on a variety of fronts. If Congress had wanted to authorize courts to issue discovery orders that could disrupt foreign policy in this way—a radical change to the prior legal regime, in which discovery of foreign-state property was not even contemplated because such property was absolutely immune from execution—Congress would have said so expressly. But it gave no indication of any such intent.

The district court in this case, styling itself a "clearinghouse" for virtually all information about Argentina's assets (Pet. App. 31), compelled discovery of several categories of foreign-state property that a U.S. court could not possibly execute against pursuant to the FSIA. The court improperly compelled discovery directed at assets located in other countries, even though the FSIA does not permit execution by a U.S. court except with respect to limited categories of foreign-state property located in the United States. The court also improperly compelled discovery of categories of property that are expressly immune from execution not only in the

United States but also elsewhere: central bank and military property, diplomatic property, and property belonging to individuals (including a sitting head of state) and entities other than the judgment debtor.

In allowing that discovery to proceed, the court of appeals believed that jurisdiction over Argentina authorized the discovery and that Argentina's sovereign immunity was not "affected" (Pet. App. 3). That approach disregards the separate immunity for foreign-state property that applies under the FSIA even when jurisdiction over a foreign state is proper. It takes no heed of the fact that a primary purpose of execution immunity is to protect against the burdens of litigation, including the burdens that Argentina has shouldered in this case. And, critically, it disregards the significant comity, reciprocity, and other foreign-relations concerns raised by wide-ranging discovery that treats a foreign state as if it were a mere private litigant—concerns that are not lessened when the discovery is directed at a bank or other third party. Accordingly, the judgment of the court of appeals should be reversed.

* * * *

The Supreme Court heard argument on April 21, 2014 and issued its decision on June 16, 2014, affirming the court of appeals. Excerpts follow from the Supreme Court's opinion (with some footnotes omitted). *Republic of Argentina v. NML Capital Ltd.*, 134 S.Ct. 2819 (2014).

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The rules governing discovery in post-judgment execution proceedings are quite permissive. Federal Rule of Civil Procedure 69(a)(2) states that, "[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in the rules or by the procedure of the state where the court is located." See 12 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure §3014, p. 160 (2d ed. 1997) (hereinafter Wright & Miller) (court "may use the discovery devices provided in [the federal rules] or may obtain discovery in the manner provided by the practice of the state in which the district court is held"). The general rule in the federal system is that, subject to the district court's discretion, "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Fed. Rule Civ. Proc. 26(b)(1). And New York law entitles judgment creditors to discover "all matter relevant to the satisfaction of [a] judgment," N. Y. Civ. Prac. Law Ann. §5223 (West 1997), permitting "investigation [of] any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts," D. Siegel, New York Practice §509, p. 891 (5th ed. 2011).

The meaning of those rules was much discussed at oral argument. What if the assets targeted by the discovery request are beyond the jurisdictional reach of the court to which the request is made? May the court nonetheless permit discovery so long as the judgment creditor shows that the assets are recoverable under the laws of the jurisdictions in which they reside, whether that be Florida or France? We need not take up those issues today, since Argentina has not put them in contention. In the Court of Appeals, Argentina's only asserted ground for objection to the subpoenas was the Foreign Sovereign Immunities Act. See 695 F. 3d, at 208 ("Argentina argues . . . that the normally broad scope of discovery in aid of execution is limited

in this case by principles of sovereign immunity"). And Argentina's petition for writ of certiorari asked us to decide only whether that Act "imposes [a] limit on a United States court's authority to order blanket post-judgment execution discovery on the assets of a foreign state used for any activity anywhere in the world." Pet. for Cert. 14. Plainly, then, this is not a case about the breadth of Rule 69(a)(2).[2] We thus assume without deciding that, as the Government conceded at argument, Tr. of Oral Arg. 24, and as the Second Circuit concluded below, "in a run-of-the-mill execution proceeding . . . the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States." 695 F. 3d, at 208. The single, narrow question before us is whether the Foreign Sovereign Immunities Act specifies a different rule when the judgment debtor is a foreign state.

B

To understand the effect of the Act, one must know something about the regime it replaced. Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B. V. v.Central Bank of Nigeria*, 461 U. S. 480, 486 (1983). Accordingly, this Court's practice has been to "defe[r] to the decisions of the political branches" about whether and when to exercise judicial power over foreign states. *Ibid*. For the better part of the last two centuries, the political branch making the determination was the Executive, which typically requested immunity in all suits against friendly foreign states. *Id*., at 486–487. But then, in 1952, the State Department embraced (in the so-called Tate Letter) the "restrictive" theory of sovereign immunity, which holds that immunity shields only a foreign sovereign's public, noncommercial acts. *Id*., at 487, and n. 9. The Tate Letter "thr[ew] immunity determinations into some disarray," since "political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Republic of Austria v. Altmann*, 541 U. S. 677, 690 (2004) (internal quotation marks omitted). Further muddling matters, when in particular cases the State Department did not suggest immunity, courts made immunity determinations "generally by reference to prior State Department decisions." *Verlinden*, 461 U. S., at 487. Hence it was that "sovereign immunity decisions were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Id*. at 488.

Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Ibid*. The key word there—which goes a long way toward deciding this case—is comprehensive. We have used that term often and advisedly to describe the Act's sweep: "Congress established [in the FSIA] a comprehensive framework for resolving any claim of sovereign immunity." *Altman*, 541 U. S., at 699. The Act "comprehensively regulat[es] the

[2] On one of the final pages of its reply brief, Argentina makes for the first time the assertion (which it does not develop, and for which it cites no authority) that the scope of Rule 69 discovery in aid of execution is limited to assets upon which a United States court can execute. Reply Brief 19. We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief.

amenability of foreign nations to suit in the United States." *Verlinden*, supra, at 493. This means that "[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar v. Yousuf*, 560 U. S. 305, 313 (2010). As the Act itself instructs, "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles set forth in this [Act]." 28 U. S. C. §1602 (emphasis added). Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.

The text of the Act confers on foreign states two kinds of immunity. First and most significant, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607." §1604. That provision is of no help to Argentina here: A foreign state may waive jurisdictional immunity, §1605(a)(1), and in this case Argentina did so, see 695 F. 3d, at 203. Consequently, the Act makes Argentina "liable in the same manner and to the same extent as a private individual under like circumstances." §1606.

The Act's second immunity-conferring provision states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." §1609. The exceptions to this immunity defense (we will call it "execution immunity") are narrower. "The property in the United States of a foreign state" is subject to attachment, arrest, or execution if (1) it is "used for a commercial activity in the United States," §1610(a), and (2) some other enumerated exception to immunity applies, such as the one allowing for waiver, see §1610(a)(1)–(7). The Act goes on to confer a more robust execution immunity on designated international-organization property, §1611(a), property of a foreign central bank, §1611(b)(1), and "property of a foreign state . . . [that] is, or is intended to be, used in connection with a military activity" and is either "of a military character" or "under the control of a military authority or defense agency," §1611(b)(2).

That is the last of the Act's immunity-granting sections. There is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets. Argentina concedes that no part of the Act "expressly address[es] [postjudgment] discovery." Brief for Petitioner 22. Quite right. The Act speaks of discovery only once, in a subsection requiring courts to stay discovery requests directed to the United States that would interfere with criminal or national-security matters, §1605(g)(1). And that section explicitly suspends certain Federal Rules of Civil Procedure when such a stay is entered, see §1605(g)(4). Elsewhere, it is clear when the Act's provisions specifically applicable to suits against sovereigns displace their general federal-rule counterparts. See, *e.g.*, §1608(d). Far from containing the "plain statement" necessary to preclude application of federal discovery rules, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539 (1987), the Act says not a word on the subject.[9]

Argentina would have us draw meaning from this silence. Its argument has several parts. First, it asserts that, before and after the Tate Letter, the State Department and American courts routinely accorded absolute execution immunity to foreign-state property. If a thing belonged to

[9] Argentina and the United States suggest that, under the terms of Rule 69 itself, the Act trumps the federal rules, since Rule 69(a)(1) states that "a federal statute governs to the extent it applies." But, since the Act does not contain implicit discovery-immunity protections, it does not "apply" (in the relevant sense) at all.

a foreign sovereign, then, no matter where it was found, it was immune from execution. And absolute immunity from execution necessarily entailed immunity from discovery in aid of execution. Second, by codifying execution immunity with only a small set of exceptions, Congress merely "partially lowered the previously unconditional barrier to post-judgment relief." Brief for Petitioner 29. Because the Act gives "no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority," *ibid*., Argentina contends, discovery of assets that do not fall within an exception to execution immunity (plainly true of a foreign state's extraterritorial assets) is forbidden.

The argument founders at each step. To begin with, Argentina cites no case holding that, before the Act, a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts. No surprise there. Our courts generally lack authority in the first place to execute against property in other countries, so how could the question ever have arisen? See Wright & Miller §3013, at 156 ("[A] writ of execution . . . can be served anywhere within the state in which the district court is held"). More importantly, even if Argentina were right about the scope of the common-law execution-immunity rule, then it would be obvious that the terms of §1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property "in the United States." So even if Argentina were correct that §1609 execution immunity implies coextensive discovery-in-aid-of-execution immunity, the latter would not shield from discovery a foreign sovereign's extraterritorial assets.

But what of foreign-state property that would enjoy execution immunity under the Act, such as Argentina's diplomatic or military property? Argentina maintains that, if a judgment creditor could not ultimately execute a judgment against certain property, then it has no business pursuing discovery of information pertaining to that property. But the reason for these subpoenas is that NML does not yet know what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law. If, bizarrely, NML's subpoenas had sought only "information that could not lead to executable assets in the United States or abroad," then Argentina likely would be correct to say that the subpoenas were unenforceable—not because information about non-executable assets enjoys a penumbral "discovery immunity" under the Act, but because information that could not possibly lead to executable assets is simply not "relevant" to execution in the first place, Fed. Rule Civ. Proc. 26(b)(1); N. Y. Civ. Prac. Law Ann. §5223. But of course that is not what the subpoenas seek. They ask for information about Argentina's worldwide assets generally, so that NML can identify where Argentina may be holding property that is subject to execution. To be sure, that request is bound to turn up information about property that Argentina regards as immune. But NML may think the same property not immune. In which case, Argentina's self-serving legal assertion will not automatically prevail; the District Court will have to settle the matter.

Today's decision leaves open what Argentina thinks is a gap in the statute. Could the 1976 Congress really have meant not to protect foreign states from post-judgment discovery "clearinghouses"? The riddle is not ours to solve (if it can be solved at all). It is of course possible that, had Congress anticipated the rather unusual circumstances of this case (foreign sovereign waives immunity; foreign sovereign owes money under valid judgments; foreign sovereign does not pay and apparently has no executable assets in the United States), it would have added to the Act a sentence conferring categorical discovery-in-aid-of-execution immunity on a foreign state's extraterritorial assets. Or, just as possible, it would have done no such thing. Either way, "[t]he question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U. S. 607, 618 (1992).

Nonetheless, Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause "a substantial invasion of [foreign states'] sovereignty," Brief for United States as Amicus Curiae 18, and will "[u]ndermin[e] international comity," *id*., at 19. Worse, such orders might provoke "reciprocal adverse treatment of the United States in foreign courts," *id*., at 20, and will "threaten harm to the United States' foreign relations more generally," *id*., at 21. These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago.[6]

* * * *

(2) Scope of post-judgment discovery and propriety of monetary contempt sanctions for failure to comply with such discovery

On September 9, 2014, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit in support of Iraq's appeal in *SerVaas Inc. v. Republic of Iraq*, Nos. 14-438, 14-569 (2d. Cir.) . SerVaas sought discovery to aid in enforcing against the Republic and its Ministry of Industry a 1991 French judgment entered against the Ministry in a contract case. The district court issued an order compelling Iraq to comply with broad discovery requests relating to the property of Iraq and its agencies and instrumentalities and then imposed sanctions of $2,000 per day when Iraq failed to abide by the order. The brief addresses the proper scope of discovery into foreign state property following the Supreme Court's decision in *NML Capital* (discussed *supra*), as well as the question of whether it is appropriate for courts to impose monetary contempt sanctions on foreign sovereigns. Excerpts follow from the U.S. brief (with most footnotes omitted). The brief is also available in full at *www.state.gov/s/l/c8183.htm*.

* * * *

[6] Although this appeal concerns only the meaning of the Act, we have no reason to doubt that, as NML concedes, "other sources of law" ordinarily will bear on the propriety of discovery requests of this nature and scope, such as "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state." Brief for Respondent 24–25 (quoting *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 543–544, and n. 28 (1987)).

POINT I

The District Court Should Not Have Compelled Iraq to Respond to Overbroad Discovery that Disregarded the Separate Juridical Status of Iraq's Agencies and Instrumentalities

In *NML Capital*, the Supreme Court recently addressed the "single, narrow question" of whether the FSIA "specifies a different rule" for post-judgment discovery where the judgment debtor is a foreign state. 134 S. Ct. at 2255. The Court concluded that it does not, reasoning that no provision of the FSIA explicitly "forbid[s] or limit[s] discovery in aid of execution," and refusing to imply a limitation from the general rule under the FSIA that a foreign state's property is immune from attachment or execution unless a specific statutory exception applies. *Id*. at 2256.

The Supreme Court made clear, however, that its ruling "concern[ed] only the meaning of the [statute]," and posited that "other sources of law ordinarily will bear on the propriety of discovery requests of this nature and scope, such as settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state." *Id*. at 2258 n.6 (internal quotation marks omitted). The Court also left open the question whether "the scope of Rule 69 discovery in aid of execution is limited to assets upon which a United States court can execute." *Id*. at 2255 n.2.

In this case, the district court erred in compelling Iraq to provide discovery responses with respect to any property in which Iraq's "agencies or instrumentalities (including State-owned entities and other commercial entities beneficially owned by the Republic)" have any right or interest. (A146, 153.) The United States does not take a position on which of the 226 entities Iraq claims are covered by the Asset Discovery Order are separate agencies and instrumentalities under the FSIA, as opposed to political subdivisions that are part of the state itself. However, demanding that a foreign state produce any documents it might have in its possession relating to assets and transactions of numerous separate agencies and instrumentalities, without any allegations or threshold showing that such entities would be responsible for paying the plaintiff's judgment against the state, is problematic for several reasons.[10]

First, it is well established that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," and the FSIA—consistent with law in other countries—does "'not permit execution against the property of one agency or instrumentality to satisfy a judgment against another,'" unless the plaintiff overcomes that presumption. *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-28 (1983) ["*Bancec*"] (quoting H.R. Rep. No. 94-1487, at 29-30 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6628-29). The Supreme Court has recognized that this presumption is based on "[d]ue respect for the actions taken by foreign sovereigns and for

[10] The United States is not taking a position on all aspects of the discovery that may have been ordered in this case. It is not entirely clear, for example, to what extent the Asset Discovery Order compels information about property and transactions outside the United States, or whether it requires the production of information about military, diplomatic, or central bank property, which is categorically immune from execution under the FSIA. Iraq's appeal does not appear to challenge the Asset Discovery Order on such grounds, and the United States understands that the parties had engaged in some informal negotiations to limit the scope of discovery into the Republic's property in certain respects. In light of these uncertainties, the United States does not take a position on whether the Asset Discovery Order was otherwise improper in compelling information about assets that are not potentially subject to attachment, which would raise substantial issues of comity and other concerns.

principles of comity between nations." *Id*. at 626-27. Thus, this Court has recognized that the assets of a separate juridical entity cannot be executed against to satisfy a judgment against the foreign state unless "'the party seeking attachment carrie[s] its burden of demonstrating that the instrumentality's separate juridical status was not entitled to recognition.'" *Walters v. Indus. & Commercial Bank of China, Ltd*., 651 F.3d 280, 298 (2d Cir. 2011) (quoting *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 477 (2d Cir. 2007)). To make this showing, the party seeking attachment must show that "the instrumentality is 'so extensively controlled by its owner that a relationship of principal and agent is created,'" or that "recognizing the instrumentality's separate juridical status would 'work fraud or injustice.' " *EM*, 473 F.3d at 477 (quoting *Bancec*, 462 U.S. at 628-29).

Courts have concluded that the *Bancec* presumption of juridical separateness must inform questions relating to the propriety of post-judgment discovery. As noted above, that presumption is based on principles of comity and respect for the dignity and sovereignty of foreign states, particularly in their operations within their own jurisdiction. See *Bancec*, 462 U.S. at 626; see generally *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008); *In re Schooner Exchange*, 7 Cranch (11 U.S.) 116, 137 (1812). Courts, including this Court, have concluded that it would be inconsistent with *Bancec* and comity principles to order discovery into the property and finances of a separate instrumentality of a foreign-state judgment debtor without some threshold showing by a litigant that there is reason to think a separate juridical entity is an alter ego of the state and accordingly liable for its judgment. See, *e.g*., *Sejias v. Republic of Argentina*, 502 F. App'x 19, 20-21 (2d Cir. 2012); *Olympic Chartering, S.A. v. Ministry of Industry & Trade of Jordan*, 134 F. Supp. 2d 528, 530 (S.D.N.Y. 2001).

* * * *

The fact that the discovery requests at issue here were directed to Iraq (seeking information in its possession or custody) and did not request that Iraq's separate agencies and instrumentalities themselves produce information does not change the *Bancec* analysis. Indeed, the discovery in *Sejias* was sought from both the judgment debtor, Argentina, and its alleged alter ego, the bank, see *Sejias v. Republic of Argentina*, No. 10 Civ. 4300 (TPG), 2011 WL 1137942, at *1 (S.D.N.Y. Mar. 28, 2011), but the court found both requests to be inappropriate. The discovery sought in Olympic was from a third-party bank (neither the judgment debtor nor its alleged alter ego, the Central Bank of Jordan), 134 F. Supp. 2d at 529, but the court nevertheless quashed the subpoena.

* * * *

To allow broad, general asset discovery into government documents relating to assets and transactions of a wide range of presumptively separate agencies and instrumentalities in the absence of any threshold alter ego showing is likely to impose a considerable burden on the foreign state and be viewed as an affront by the sovereign. Foreign states may be acutely sensitive to the intrusiveness of such discovery requests because the "scope of American discovery is often significantly broader than is permitted in other jurisdictions." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S.D. of Iowa*, 482 U.S. 522, 542 (1987).

In addition, overly broad discovery of this nature can also lead to reciprocal adverse treatment of the United States in foreign courts. See *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc*., 179 F.3d 1279, 1295 (11th Cir. 1999). For a variety of reasons, the U.S. government may decide not to pay judgments entered in foreign courts (*e.g*., where the United States' position is that service did not comport with the requirements of customary international law, the court lacked jurisdiction over the dispute, payment of the judgment would conflict with a U.S. law, or the judgment is inconsistent with fundamental U.S. sovereign interests). In some cases, private litigants have sought post-judgment discovery in an effort to enforce such judgments. The United States would have serious concerns should a foreign court require it to respond to similarly intrusive inquiries from a private judgment creditor attempting to determine if any separate U.S. agencies might have property or commercial transactions with "ties" to the forum state, before coming forward with any threshold showing that such agencies are alter egos of the U.S. government such that their property could be levied upon to satisfy a judgment against the government.

* * * *

Point II

The District Court Erred in Imposing Monetary Contempt Sanctions on Iraq

The district court also erred in imposing monetary sanctions against Iraq for its failure to comply with the Asset Discovery Order. As an initial matter, to the extent the discovery ordered was overbroad, sanctions for noncompliance were unwarranted. Cf. *FG Hemisphere Assocs., LLC v. Dem. Rep. of Congo*, 637 F.3d 373, 379 & n.3 (D.C. Cir. 2011) (noting, but not deciding, "serious[ ]" concerns about a district court imposing sanctions for non-compliance with overbroad discovery); *In re Air Crash at Belle Harbor*, 490 F.3d 99, 106-07 (2d Cir. 2007) (explaining that, in order to appeal an overbroad discovery order, a party must sometimes subject itself to a potential contempt finding). Furthermore, even if some of the discovery into Iraq's property was permissible, it is generally inappropriate for courts to impose unenforceable orders of monetary contempt sanctions against a foreign state. The FSIA provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in United States courts. See *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434-35 (1989). As discussed below, orders of monetary contempt sanctions are unenforceable under the FSIA. As such, a number of factors weigh decisively against imposing them on a foreign sovereign: basic considerations of equity and comity, the fact that such orders are inconsistent with international practice, and foreign relations concerns, including issues of reciprocity raised by such orders.

This Court has not yet squarely addressed the propriety of imposing monetary contempt sanctions against a foreign sovereign. …

Other circuits have reached varying conclusions on the issue presented here. Consistent with the United States' position, the Fifth Circuit held that a district court errs in imposing monetary contempt sanctions on a foreign state because the FSIA establishes the "sole, comprehensive scheme" for enforcing judgments against foreign states, and orders imposing monetary sanctions for contempt are not enforceable under the FSIA. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428-29 (5th Cir. 2006). In contrast, the D.C. Circuit upheld an order of monetary contempt sanctions against a foreign state; however, that court's holding was narrow, focusing on the limited question of whether the inherent authority of a federal court to impose

contempt sanctions had been entirely displaced by the FSIA. See *FG Hemisphere*, 637 F.3d at 377-80 ("We hold today only that the FSIA does not abrogate a court's inherent power to impose contempt sanctions on a foreign sovereign, and that the district court did not abuse its discretion in doing so here.").

The United States is not arguing that U.S. courts lack inherent equitable authority or jurisdiction to entertain contempt proceedings against foreign states. Rather, in our view, district courts err when they exercise their authority to impose such unenforceable orders in light of the various considerations weighing against them in this context.

A. Orders of Monetary Contempt Sanctions Against a Foreign State Are Unenforceable

The FSIA establishes a general rule that property of a foreign state is immune from execution or attachment. See 28 U.S.C. § 1609. Absent a foreign state's waiver of immunity from execution of an order imposing monetary sanctions, such an order does not fall within any statutory exception to immunity from execution. See *id*. § 1610(a). The FSIA thus provides no mechanism for a U.S. court to enter an enforceable contempt order imposing monetary sanctions against an unwilling foreign state. See *Af-Cap*, 462 F.3d at 428 ("A review of the relevant sections, [28 U.S.C.] § 1610 and § 1611, shows that they do not present a situation in which the [sanctions] order could stand. Those sections describe the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included."). We are not aware of any courts concluding otherwise. See *FG Hemisphere*, 637 F.3d at 377 (acknowledging without reaching questions about enforceability of a monetary sanctions order against a foreign state); *Agudas Chasidei Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148, 152 (D.D.C. 2013) (recognizing that enforcement of a monetary sanctions order would be "carefully restricted by the FSIA").

The legislative history of the FSIA also supports the conclusion that contempt sanctions may not be enforceable in the absence of a waiver. For example, the accompanying House Report notes in the context of injunctions and specific performance orders that it may be appropriate to issue such orders in certain circumstances, but states that "this is not determinative of the power of the court to enforce such an order." H.R. Rep. No. 94-1487, at 22, reprinted in 1976 U.S.C.C.A.N. at 6621. In particular, the report recognized that a contempt "fine for violation of an injunction may be unenforceable if immunity exists under [28 U.S.C. §§] 1609-1610." *Id*.

B. Equitable Principles Weigh Against the Issuance of Unenforceable Orders Imposing Monetary Contempt Sanctions on Foreign States

As a general matter, a court "should not issue an unenforceable" order against a foreign state. *In re Estate of Marcos Human Rights Litig*., 94 F.3d 539, 545, 548 (9th Cir. 1996). In exercising its equitable authority, a court should consider whether its orders will be effective and should utilize the least amount of compulsion necessary to achieve the desired end. See, *e.g*., *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 637 n.8 (1988); see also *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 550 (1937) ("[A] court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.").

The Contempt Sanctions Order appears to have been motivated by a desire to compel Iraq's compliance with the Asset Discovery Order. … However, an award of monetary contempt sanctions is simply not a meaningful way to ensure a foreign state's compliance with district court orders; it is more likely to accumulate uncollectable penalties.

In *FG Hemisphere*, the D.C. Circuit concluded that a district court need not consider whether a monetary sanctions order is enforceable against a foreign state before imposing such sanctions, because the FSIA "is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution." 637 F.3d at 377-79. The court's analogy between monetary contempt sanctions and unsatisfied money judgments was erroneous, however. There are significant distinctions between entry of a judgment against a foreign state under 28 U.S.C. § 1605, which a plaintiff may or may not be able to enforce against a foreign state's property in the United States, and a court's exercise of its equitable powers to impose unenforceable monetary contempt sanctions. As an initial matter, there is widespread acceptance in modern international law that foreign states' immunity from adjudication may be restricted and judgments entered against foreign states in such cases, see generally Restatement (Third) of Foreign Relations Law, § 451 (1987); Hazel Fox, "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States," in *International Law*, 340, 355 (Malcolm D. Evans ed., 3d ed. 2010), and foreign states can and do voluntarily pay judgments entered under § 1605. Should a state fail to do so, a judgment entered against a foreign state is not categorically unenforceable against the state's property; the question is whether the foreign state has property in the United States that satisfies an applicable exception to execution immunity. Even in the absence of nonimmune property in the United States, a plaintiff may be able to locate attachable assets in the United States in the future; to register and enforce the judgment in another country; or to enlist the help of the U.S. State Department, which can urge the foreign state to pay the judgment.

In contrast, as discussed below, there is widespread acceptance in international practice that it is not appropriate to impose penalties on foreign states for noncompliance with a court order, so there is almost no possibility that a foreign state would voluntarily pay monetary contempt sanctions. Monetary contempt sanctions are generally viewed by foreign governments as inconsistent with principles of mutual respect and equality among sovereigns, so, rather than serving as an effective mechanism for encouraging compliance, such orders are likely to exacerbate existing disputes or lead to the foreign government's refusal to participate further in the litigation. Finally, a court issuing a monetary sanctions order against a foreign state has no possibility of enforcing its order: under the FSIA, the court lacks the authority to compel payment of the sanctions absent a specific waiver, and such an order will not be enforced in foreign courts. See infra Part II.C.

The conclusion that equitable considerations foreclose the imposition of monetary contempt sanctions in this case is buttressed by the statutory prohibition on awarding punitive damages against a foreign state in 28 U.S.C. § 1606. The district court ordered Iraq to pay significant monetary fines, totaling nearly $500,000 as of the date of this filing, and continuing to accrue at a rate of $2,000 per day. …It is hard to see how such orders can be squared with § 1606's categorical ban on punitive damages against a foreign state.

C. Monetary Contempt Sanctions Orders Are Inconsistent with International Practice

A review of international and foreign law sources demonstrates that orders of monetary contempt sanctions against a foreign sovereign are considered inappropriate.

For example, the European Convention on State Immunity bars a court from imposing monetary sanctions on a foreign state that is a party to judicial proceedings in another party state for "its failure or refusal to disclose any documents or other evidence." European Convention on

State Immunity, art. 18, May 16, 1972, E.T.S. No. 74, 11 I.L.M. 470 (1972), available at *http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm*. Under the Convention, a court faced with a foreign state's noncompliance is limited to remedies involving "whatever discretion [the court] may have under its own law to draw the Appropriate conclusions from a State's failure or refusal to comply." *Id*. Explanatory Report, art. 18, ¶ 70, available at *http://conventions.coe.int/Treaty/EN/Reports/Html/074.htm*.

Similarly, the United Nations Convention on Jurisdictional Immunities of States and Their Property provides that "[a]ny failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act . . . shall entail no consequence other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal." United Nations Convention on Jurisdictional Immunities of States and Their Properties, art. 24(1), G.A. Res. 59/38, annex, Dec. 2, 2004, 44 I.L.M. 803 (2005). The Convention is not yet in force, and the United States is not a signatory to it. Nevertheless, a number of the Convention's provisions, including Article 24(1), reflect current international norms and practices regarding foreign state immunity. Notably, the principle reflected in Article 24 of the Convention was uniformly supported by member states, which disagreed only about whether to extend even further a state's immunity from coercion. See Int'l Law Comm'n, *Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments*, U.N. GAOR Supp. No. 10, at 24, 33, 58, U.N. Doc. A/CN.4/410 24 (Feb. 17, 1988), available at *http://legal.un.org/ilc/documentation/english/a_cn4_410.pdf* (comments of the United Kingdom and Mexico).

Finally, a number of nations that have codified foreign sovereign immunity law, including Canada, the United Kingdom, Israel, and Australia, have prohibited monetary sanctions against a foreign state for its failure to comply with an injunctive order.

* * * *

D. Foreign Relations and Reciprocity Concerns Counsel Against the Imposition of Unenforceable Monetary Sanctions Orders

The potential adverse consequences for our foreign relations, as well as for the treatment of the U.S. government abroad, also counsel against U.S. courts issuing unenforceable monetary contempt sanctions orders. These concerns are not generic or theoretical. By way of example, in the *Chabad* case cited above, a district court imposed monetary contempt sanctions of $50,000 per day against the Russian Federation in an effort to compel its compliance with the court's specific-performance order directing Russia to transfer a collection of religious books and other documents to the plaintiff. See 915 F. Supp. 2d at 153-55.

The court's sanctions order has not led to compliance, however. Instead, it has created another obstacle in the diplomatic efforts aimed at resolving the dispute. See Statement of Interest of the United States, *Chabad*, No. 1:05-cv-01548-RCL, Ex. A, at 2 (D.D.C. filed Feb. 21, 2014) (letter from Mary E. McLeod, U.S. State Dep't, to Stuart Delery, U.S. Dep't of Justice (Feb. 20, 2014)) [ECF Docket No. 134-1]. In addition, following the sanctions order, the Russian Ministry of Culture and the Russian State Library filed a lawsuit in Moscow, naming the United States and the Library of Congress as defendants and requesting that the court issue a similar order compelling the United States and the Library of Congress to return to Russia seven of books from the collection, and imposing a $50,000 daily fine for each day of noncompliance. See

id. The Moscow court has since granted this request. See Decision, Case No. A40-82596/13, slip op. at 11 (Comm'l Ct. of Moscow May 29, 2014) (Russ.).

This case illustrates the risk that monetary contempt sanctions orders will undermine efforts to resolve underlying disputes, and have negative consequences for the United States overseas. While the D.C. Circuit declined to defer to the United States' foreign relations and reciprocity concerns in *FG Hemisphere*, *see* 637 F.3d at 380, these are matters on which particular deference is owed to "the considered judgment of the Executive." *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (concluding that "[t]he Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling").

More generally, while foreign courts for the most part have followed accepted international practice and not allowed monetary contempt sanctions against other sovereigns, orders of U.S. courts imposing monetary contempt sanctions on foreign states may embolden foreign courts to impose similar sanctions on the United States. The U.S. government has a significant presence abroad and is frequently subject to suit in foreign courts. As noted earlier, for a variety of reasons, there are circumstances in which the United States may not comply with orders of foreign courts. Orders of U.S. courts imposing monetary contempt sanctions risk creating a precedent that may be relied upon in such cases.

* * * *

d. Availability of monetary contempt sanctions to further enforcement

The United States filed an additional statement of interest in *Chabad v. Russian Federation*, No. 01548 (D.D.C.) in 2014. See *Digest 2012* at 319-23 for a discussion of the statement of interest of the United States filed in 2012 and *Digest 2011* at 445-47 for a discussion of the statement of interest of the United States filed in 2011. The 2014 statement of interest asserts that granting Chabad's motion for an interim judgment of accrued contempt sanctions would be inconsistent with the FSIA and unwarranted. The court imposed monetary contempt sanctions on the Russian government defendants in January 2013, following their failure to comply with a default judgment and order directing the defendants to return a collection of religious books and other documents to plaintiff Chabad. The U.S. statement of interest is excerpted below and available at *www.state.gov/s/l/c8183.htm*. The exhibit referenced in the statement of interest, a February 20, 2014 letter from Mary McLeod to Stuart Delery, is also available at *www.state.gov/s/l/c8183.htm*.

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A. Entry of an Interim Judgment Accruing Sanctions Would Be Improper Under the FSIA

As the United States discussed in its previous Statement of Interest, the FSIA does not authorize the imposition of contempt sanctions as a means of enforcing the Court's order directing Russia to surrender tangible property that is within Russia's possession and located within Russia's borders. See ECF No. 111 at 4-10. The FSIA provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in United States courts. See *Arg. Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434-435 (1989). The FSIA, furthermore, "explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution." *FG Hemispheres Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). As the United States has explained, rather than following the carefully crafted enforcement scheme set forth in the FSIA, Chabad has been pursuing an alternative enforcement framework for its judgment in which the Court would first issue a specific performance order for property overseas and then seek to enforce that order through contempt proceedings. Just as the question of whether sanctions can be enforced against a foreign state implicates the FSIA's enforcement provisions, …, so too do Chabad's request for sanctions and its most recent request for an interim judgment. See 28 U.S.C. § 1610(a); H.R. Rep. No. 94-1487, at 28 ("The term 'attachment in aid of execution' is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment.").

The FSIA is clear that any exception from execution immunity applies only where a foreign state possesses "property in the United States," and even that property is subject to execution in an extremely limited number of circumstances. 28 U.S.C. ' 1610(a); see also *Autotech Techs. LP v. Integral Research & Dev. Corp*., 499 F.3d 737, 750 (7th Cir. 2007) (observing that "the FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction."). These careful limitations on enforcing judgments on a foreign state's property—including an absolute prohibition on enforcing on a foreign state's property located outside of the United States—stem from the fact that, "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002) (emphasis added).

Imposition of sanctions against Russia in an effort to compel it to surrender property it holds within its own borders violates this basic principle of execution immunity under the FSIA. Although neither the Court's specific performance order nor its order for contempt sanctions was denominated as an order of attachment or execution on property, the substance of the order, not its form, controls. See *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) (noting that "[t]he FSIA would become meaningless" if the denomination of an order controlled over its substance); …. As explained in the United States' prior filing, the FSIA does not authorize enforcement of the Court's specific performance order regarding property in Russia through an order sanctioning Russia for its non-compliance with that order. …

Entry of an interim judgment accruing sanctions in these particular circumstances presents the same concerns because such a judgment would be designed to force Russia to comply with the specific performance order not authorized by the FSIA. Indeed, Chabad admits that the purpose of its motion for an interim judgment is "to provide an incentive for Russia to comply with the Court's ruling," and to speed the timing of [the Collection's] return." …. The FSIA, however, does not authorize a court to direct the disposition of property possessed by a foreign state within its own borders by any means. Entry of the requested interim judgment accruing sanctions for non-compliance with such an order is simply not consistent with the carefully defined, and limited, system of remedies authorized under the FSIA. Chabad's motion therefore should be denied.

B. Even If the Proposed Interim Judgment Were Consistent with the FSIA, the Court Should Exercise Its Discretion Not to Issue Such an Order, Which Implicates Significant Foreign Policy Interests of the United States

Should the Court conclude that it has authority to enter the interim judgment Chabad seeks, the Court should nevertheless deny the motion in the proper exercise of its equitable and remedial authority and discretion. Chabad's request for another order seeking to compel the disposition of property possessed by a foreign state within its own borders implicates significant foreign policy interests of the United States. Although Chabad's motion indicates that it is seeking the interim judgment in order to "speed the timing of [the Collection's] return," the United States' view is that the Court's sanctions order has instead created another obstacle in the ongoing diplomatic efforts to resolve the dispute, and it is the United States' position that an interim judgment of sanctions will not facilitate the return of the Collection. See Exhibit A, Letter dated February 20, 2014, from Mary E. McLeod, Principal Deputy Legal Adviser, United States Department of State, to Stuart Delery, Assistant Attorney General, United States Department of Justice ("We continue to believe that an out-of-court dialogue presents the best means towards an ultimate resolution, and we have emphasized to Chabad the Department's belief that further steps in the litigation will not be productive.").

Moreover, it is clear from Chabad's motion that it sees the entry of an interim judgment as a step that will allow it to seek enforcement of that judgment through steps that include discovery into and actual attachment of Russian government property. ECF 127 at 6 (referring to "registration of the monetary judgment in other jurisdictions, discovery regarding Russian Federation property, and ultimately, attachment and liquidation of that property"). The Court should be aware that these further enforcement actions would cause even greater harm to the United States' foreign policy interests, including the United States' interest in promoting a resolution of the dispute between Chabad and Russia over the Collection.

It is widely recognized that efforts to enforce judgments or orders against a foreign state's property can cause significant harm to the foreign policy interests of the United States, and that this harm may be materially more grave than the adverse consequences that follow from the issuance of a judgment or order against a foreign state. As the Court recognized in its Memorandum Opinion accompanying the sanctions order, actions to enforce a sanctions award issued against a foreign state are "carefully restricted by the FSIA." Mem. Op. on Contempt Sanctions, ECF No. 116, at 6. These restrictions were deliberately put in place by Congress, based on its understanding that "enforcement [of] judgments against foreign state property remains a somewhat controversial subject in international law." H.R. Rep. No. 94-1487, at 27. Indeed, Congress was made aware that, prior to passage of the FSIA, many plaintiffs had sought to establish jurisdiction over a foreign state by obtaining a pre-judgment attachment on the

sovereign's property, a practice that gave rise to "serious friction in the United States' foreign relations." Id. at 26-27; …. The Supreme Court likewise has taken note of the serious foreign policy consequences that may flow from attachment of foreign state property, observing that "[t]he judicial seizure" of the property of a foreign sovereign may well "be regarded as an affront to its dignity and may affect our relations with it." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (internal quotation and ellipses omitted; brackets in original). As a basic principle, "[t]he FSIA's purpose was to promote harmonious international relations," *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998), and permitting a plaintiff to enforce a judgment or sanctions order such as those at issue here, whether through attachment or by other means, poses a serious threat to those relations.

With respect to this matter in particular, the Department of State has concluded that, if Chabad were to take the further enforcement steps it has outlined in its recent motion, such actions would cause significant harm to the foreign policy interests of the United States, including "considerable damage to any prospects for securing the transfer of the Collection." See Exhibit A.

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B. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*, including the *amicus* brief filed by the United States and the Supreme Court's opinion. The cases discussed below involve the consideration of foreign official immunity post-*Samantar*.

2. President Zedillo of Mexico

As discussed in *Digest 2013* at 286 and *Digest 2012* at 345-46, the United States filed a suggestion of immunity in a case brought against the former president of Mexico, Ernesto Zedillo Ponce de Leon, in U.S. district court in Connecticut. *Doe v. Zedillo*, No. 3:11-cv-01433. After the district court dismissed the case, plaintiffs appealed. The United States filed its brief as *amicus* on appeal in the U.S. Court of Appeals for the Second Circuit in January 2014, arguing that the district court correctly deferred to the State Department's immunity determination and dismissed the case. Excerpts follow from the *amicus* brief of the United States (with footnotes omitted). On February 18, 2014, the Court of Appeals affirmed the district court's dismissal of the case. *Zedillo v. De Leon*, 555 Fed. Appx. 84 (2d Cir. 2014).

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A. The Supreme Court and this Court have long recognized that Executive Branch determinations concerning foreign sovereign immunity are binding on the courts. See, *e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945) ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow."); *Ex Parte Peru*, 318 U.S. 578, 587-589 (1943) ("'[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' ") (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)).

In *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), the Supreme Court held that although the Foreign Sovereign Immunities Act (FSIA) transferred determination of immunity for states from the Executive Branch to the Judicial Branch, the Act left in place the Executive Branch's historical authority to determine the immunity of foreign officials. *Id*. at 2290-2292. Under that rule, if the State Department determines that an individual is immune and makes a Suggestion of Immunity, "the district court surrender[s] its jurisdiction." *Id*. at 2284-2285. If the State Department takes no position on immunity, "a district court ha[s] authority to decide for itself whether all the requisites for such immunity existed," applying "the established policy" of the State Department to make that determination. *Ibid*. (citations and internal quotation marks omitted). *Samantar* made clear that this same rule applies to "cases involving foreign officials." *Ibid*. (citing *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971), and *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960), which involved consular officials, who were immune only for acts carried out in their official capacity).

The pre-FSIA immunity decisions that the Supreme Court cited in *Samantar* confirm that the State Department's determination regarding immunity is, and historically has been, binding in judicial proceedings. In *Ex Parte Peru*, 318 U.S. 578, for example, the Supreme Court held that in suits against foreign governments, "'the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' " *Id*. at 588 (quoting *Lee*, 106 U.S. at 209). In *Republic of Mexico v. Hoffman*, 324 U.S. 30, the Supreme Court made clear that "[e]very judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government." *Id*. at 35 (emphasis added). The Court instructed that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Ibid*.; see also, *e.g.*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim [of immunity] is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General.").

There is a longstanding recognition that foreign officials are immune "from suits brought in [United States] tribunals for acts done within their own [S]tates, in the exercise of governmental authority." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see, *e.g.*, *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794) ("[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant . . ., [that] will of itself be a sufficient answer to the plaintiff's action."). In pre-FSIA suits against foreign officials, courts followed the same procedure as in suits against foreign states. See, *e.g.*, *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976) ("The Suggestion of Immunity removes the individual defendants from this case. When the State Department formally recognizes and allows sovereign immunity of a defendant, a federal court will not exercise jurisdiction over that defendant.") (cited in *Samantar*, 130 S. Ct. at 2290); *Heaney*, 445 F.2d at 504-506 (applying

principles articulated by the Executive Branch because the Executive did not express a position in the case); see also *Samantar*, 130 S. Ct. at 2284-2285.

Thus, both before and after *Samantar*, courts of appeals have recognized that the Executive Branch's suggestions of immunity are binding and conclusive, including in civil cases that involve present or former foreign officials. See, *e.g.*, *Manoharan v. Rajapaksa*, 711 F.3d 178, 179 (D.C. Cir. 2013) (per curiam) (explaining that the United States submitted a Suggestion of Immunity and "[a]ccordingly," the district court "was without jurisdiction"); *Habyarimana v. Kagame*, 696 F.3d 1029, 1031-1033 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit . . . 'as a conclusive determination by the political arm of the Government[.]' ") (quoting *Ex Parte Peru*, 318 U.S. at 589); *Giraldo v. Drummond Co.*, 493 F. App'x 106 (D.C. Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 1637 (2013); *Matar v. Dichter*, 563 F.3d 9, 13-15 (2d Cir. 2009) ("defer[ring] to the Executive's determination of the scope of immunity"); *Ye v. Zemin*, 383 F.3d 620, 625, 627 (7th Cir. 2004) ("[T]he Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry. . . . We are no more free to ignore the Executive Branch's determination than we are free to ignore a legislative determination concerning a foreign state."); see also *Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974) (rejecting argument that district court "erred . . . in accepting the executive suggestion of immunity without conducting an independent judicial inquiry"); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere."); *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("[W]e conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry.").

Indeed, this Court's decision in *Dichter*, 563 F.3d 9, controls the outcome of this case. In *Dichter*, the Court held that it must defer to the Executive Branch's Suggestion of Immunity even when (as here) the former foreign official has been accused of *jus cogens* violations in a civil suit. *Id*. at 13-15. The Court explained that when "[t]he United States—through the State Department and the Department of Justice—file[s] a Statement of Interest in the district court specifically recognizing [a defendant's] entitlement to immunity and urging that [plaintiffs'] suit 'be dismissed on immunity grounds,' " the defendant is "immune from suit." *Ibid*.

B. Plaintiffs argue that the district court should have permitted them to amend their complaint. If permitted to do so, plaintiffs state that they would add allegations about Zedillo's direct involvement in *jus cogens* violations and about the legality, under Mexican law, of the Mexican government's request for immunity. They assert that these allegations would undermine the stated bases of the Executive Branch's Suggestion of Immunity.

1. Plaintiffs offer no authority for this position, that they be allowed to amend their complaint after the court has ruled, in an effort to have the State Department consider the question of immunity further. Once the Executive Branch has determined that a foreign official is immune from suit, that determination stands unless the Executive decides to reconsider it. See,

e.g., *Dichter*, 563 F.3d at 13-15. The Executive Branch is not required to issue repeated affirmations of the Suggestion in response to additional factual allegations. See *Samantar*, 130 S. Ct. at 2284-2285 (Once the Executive Branch makes a suggestion of immunity, "the district court surrender[s] its jurisdiction"); *Hoffman*, 324 U.S. at 34-36 ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow."); *Ex Parte Peru*, 318 U.S. at 587-589 ("[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.") (internal

quotation marks omitted); *Isbrandtsen Tankers, Inc.*, 446 F.2d at 1201 ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

A district court would not be free to set aside a Suggestion of Immunity simply because a plaintiff had filed an amendment to his complaint. Nor, by presenting facts to the court and positing that the State Department did not consider those facts, can a plaintiff "vitiate the degree of deference that should be afforded the suggestion" (Pl. Br. 39). See *Samantar*, 130 S. Ct. at 2284-2285; *Hoffman*, 324 U.S. at 34-36; *Ex Parte Peru*, 318 U.S. at 587-589; *Dichter*, 563 F.3d at 13-15; *Isbrandtsen Tankers, Inc.*, 446 F.2d at 1201. Further, because the Executive's determination is entitled to absolute deference, it is not for courts to decide, in a case in which the Executive has filed a Suggestion of Immunity, that new allegations might affect the Executive's determination. If the Executive decides that developments subsequent to its immunity determination warrant further consideration, the government may so inform the court.

The need for that rule is underscored by the fact that the Executive's immunity determination reflects the application of customary international law principles recognized by the Executive Branch to the circumstances of the case. The Executive may consider, among other things, nonpublic information, such as information gleaned through intelligence sources or diplomatic communications. Thus, while a Suggestion of Immunity may explain the Executive Branch's principal reasoning in recognizing or not recognizing immunity, it does not necessarily disclose every piece of information on which the Executive relied.

If a plaintiff believes that the Executive Branch lacks necessary information, he may communicate that information to the State Department. But communications with the Executive Branch need not occur through amended complaints. And a plaintiff cannot demand that the Executive Branch make repeated affirmations of its immunity determination in response to serial complaints.

In short, a Suggestion of Immunity cannot be nullified by an amendment to a complaint. If a plaintiff believes that the Executive Branch lacks necessary information, he may communicate that information to the Executive Branch. And only if the Executive Branch withdraws or alters its Suggestion may the case proceed.

2. Even if plaintiffs here could properly demand that this Court analyze whether the additional allegations would bear on the Executive Branch's immunity determination (which they cannot), there would be no basis for concluding that the Executive Branch would withdraw its Suggestion and that the outcome of the case would be any different.

The circumstances that the plaintiffs argue undermine the immunity determination—arguments about the legality of Mexico's request and new allegations that Zedillo was directly involved in the massacre—were presented to the district court before the Executive Branch informed the court that it would not participate in oral argument and instead "rest[ed] on its Suggestion of Immunity," A 678.

Moreover, before the Executive Branch filed the Suggestion of Immunity, plaintiffs also provided the State Department and Department of Justice with substantially the same information that they now wish to place in an amended complaint. That information includes the same declarations about the Acteal massacre on which plaintiffs say they would base the amendments to their complaint, see Pl. Br. 35-36, as well as other materials about that event. Likewise, plaintiffs' counsel communicated to the State Department their theory that the Mexican Ambassador's request for immunity violated Mexican law, including the "Opinion [of] Attorney Lopez Padilla" that they reference in their brief. See Pl. Br. 33-34. The Executive

Branch was thus aware of the material that plaintiffs state they would include in an amended complaint when it made a Suggestion of Immunity and as the litigation proceeded to dismissal.

Although the Statement of Interest filed in district court referred primarily to the publicly-filed complaint, it does not follow that the Executive Branch "considered solely" (Pl. Br. 37) Mexico's request and the exact language of plaintiffs' complaint. And there is no basis for concluding that had that additional information been formally placed into the district court record, the Executive Branch would have rescinded its determination.

* * * *

3. Immunity from Testimony of Former Israeli Official: *Wultz v. Bank of China*

On July 21, 2014, a district court judge in the Southern District of New York issued an opinion and order granting a motion brought by the State of Israel to quash the subpoena of Uzi Shaya, a former Israeli government official. *Wultz v. Bank of China*, No. 11-1266 (S.D.N.Y. 2014). The United States did not participate in the court's consideration of the motion. The court applied the reasoning in *Samantar* and *Giraldo v. Drummond* (discussed in *Digest 2012* at 326-31) to determine that Shaya is immune from testifying as to information regarding acts taken or knowledge obtained in his official capacity as a government official. Excerpts follow from the opinion and order of the court (with some footnotes omitted).

* * * *

This suit arises out of the death of Daniel Wultz and the injuries of Yekutiel Wultz, suffered in a 2006 suicide bombing in Tel Aviv, Israel. Four members of the Wultz family brought suit against Bank of China ("BOC"), alleging acts of international terrorism under the Antiterrorism Act ("ATA"), among other claims.

…. Plaintiffs' only remaining claim against BOC is for acts of international terrorism under the ATA, based on BOC allegedly having provided material support and resources to a terrorist organization.

…Before this Court is a motion filed by nonparty the State of Israel ("Israel") to quash a deposition subpoena served on Uzi Shaya, a former Israeli national security officer. Israel argues that the subpoena should be quashed because it (1) violates Israel's sovereign immunity, (2) seeks sensitive national security information that constitutes foreign state secrets, and (3) contravenes Federal Rule of Civil Procedure 45. For the following reasons, Israel's motion is GRANTED.

* * * *

…Shaya was an official in Israel's National Security Council working with the Interagency Task Force for Combating Terrorist Financing and Financing of State Sponsors of Terrorism ("Task Force"). The Task Force worked to prevent terrorism by preventing the flow of funds to terrorist organizations. According to Plaintiffs, the Task Force learned in 2004 of a terrorist financing cell involving BOC. …

In 2005, Shaya and other members of the Task Force met with representatives of the People's Bank of China—BOC's chief regulator—to inform them that [accounts] were being used to finance [terrorist organizations including the Palestinian Islamic Jihad ("PIJ"),and] asked the Chinese representatives to close the [accounts]. The Chinese representatives declined to do so. One year later, on April 17, 2006, PIJ operatives executed a suicide bombing that killed Daniel Wultz and seriously injured Yekutiel Wultz.

* * * *

B. Foreign Official Immunity

In *Samantar v. Yousuf*, the United States Supreme Court clarified that the Foreign Sovereign Immunities Act ("FSIA") governs determinations of sovereign immunity for foreign states, but not for foreign officials. The Court explained that when Congress enacted the FSIA, it did not intend to "eliminate[ ] the State Department's role in determinations regarding individual official immunity," a procedure that developed as a matter of common law. In addition, "from the time of the FSIA's enactment [the State Department has] understood the Act to leave intact the Department's role in official immunity cases." Therefore, "[e]ven if a suit [against a foreign official] is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law."

Courts apply a "two-step procedure" to assess common-law claims of foreign sovereign immunity. "Under that procedure, the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department." If the State Department grants the request, "the district court surrender[s] its jurisdiction." But if the State Department declines the request or provides no response, "a district court ha[s] authority to decide for itself whether all the requisites for such immunity exist[]." When deciding for itself, "a district court inquire[s] whether the ground of immunity is one which it is the established policy of the State Department to recognize."

Case law involving immunity of nonparty foreign officials is scarce. But a D.C. District Court recently held—and the D.C. Circuit unanimously affirmed—that nonparty, Alvaro Uribe, a former president of Colombia, could not be deposed even though he was served with a subpoena while visiting the District of Columbia.[54] In that case, the State Department granted a Suggestion of Immunity that "former President Uribe enjoys residual immunity from this Court's jurisdiction insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official." The court agreed that Uribe could not be compelled to testify about "information he received and acts he took in his official capacity as a government official."

[54] See *Giraldo v. Drummond Co., Inc.*, 808 F. Supp. 2d 247, 249 (D.D.C. 2011), aff'd, 493 Fed. App'x 106 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1637 (2013).

The Supreme Court has similarly observed that it "may be correct as a matter of common-law principles" that "foreign sovereign immunity extends to an individual official 'for acts committed in his official capacity.'"[57] As the court in *Giraldo v. Drummond* recognized, this immunity protects non-parties from compelled testimony because "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." Moreover, "[t]he common law of foreign sovereign immunity made no distinction between the time of the commission of official acts and the time of suit."[59] Thus, unlike head-of-state immunity, which is based on status, "immunity based on acts ... does not depend on tenure in office" and is available to officials even after leaving office.[60]

IV. DISCUSSION

A. Israel Has Standing to Challenge the Subpoena

Both Plaintiffs and Intervenors contend that Israel lacks standing to challenge the subpoena because Shaya—the subpoenaed party—has not objected. However, "[t]he basis for recognizing [foreign official immunity] is that 'the acts of[] official representatives of the state are those of the state itself, when exercised within the scope of their delineated powers.'"[62] And as the State Department has asserted, the "immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official."[63] As such, regardless of whether Shaya is willing to testify, Israel has standing to protect its rights and interests.

Moreover, Israel has standing to prevent disclosure of sensitive information that implicates its national security. Under Rule 45, any person or entity—even those not subject to the subpoena—may move to quash a subpoena that "requires disclosure of privileged or other protected matter .... " Here, Israel's National Security Advisor, Yaacov Amidror, declared that the subpoena requires disclosure of "sensitive and classified information" that Shaya learned in his official capacity. In addition, "[a]ny disclosure of such information would implicate the methods and activities used by the State of Israel to prevent terrorism, would harm Israel's national security, would compromise Israel's ability to protect the lives of its citizens, residents, and tourists from terrorism ...."

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[57] *Samantar*, 560 U.S. at 322 n.17 (quoting *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990)). Accord *Rosenberg v. Lashkar-eTaiba*, 980 F. Supp. 2d 336, 342 (E.D.N.Y. 2013) (deferring to the State Department determination that "former [officials of the Government of Pakistan] are entitled to foreign sovereign immunity under the common law as foreign officials who were sued in their official capacity for acts conducted in their official capacity").

[59] *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008). Accord *Yousuf v. Samantar*, 699 F.3d 763, 769 (4th Cir. 2012) (stating that foreign official immunity is "conduct-based immunity that applies to current and former foreign official"); *Giraldo*, 808 F. Supp. 2d at 249 (holding that "'*former* President Uribe enjoys *residual* immunity as to information relating to acts taken or obtained in his official capacity as a government official") (emphasis added).

[60] *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009).

[62] Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousef*, 560 U.S. 305 (2013), 2010 WL 342031, at *12 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). Accord *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), aff'd, 946 F.2d 1564 (D.C. Cir. 1991) (recognizing that a foreign sovereign "does not act but through its agents").

[63] Statement of Interest of the United States, *Yousef v. Samantar*, 04 Civ. 1360 (E.D. Va. Feb. 14, 2011) ("*Samantar* SOI"), ¶ 10. Accord *In re Doe*, 860 F .2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders.").

Plaintiffs insist that the subpoena does not "infringe on [Israel's] national security interests." But the D.C. Circuit has "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."[70] Accordingly, I will not second-guess the assessment of the National Security Advisor.

B. Shaya Is Immune from Testifying

On June 12, 2014, Israel requested a Suggestion of Immunity from the State Department. Because the State Department has yet to respond, this Court "ha[s] authority to decide for itself whether all the requisites for such immunity exist[]."[73] In doing so, I must determine "whether the ground of immunity is one which it is the established policy of the State Department to recognize."[74]

The State Department recently defined the contours of immunity for foreign officials in *Giraldo*. There, the plaintiffs, legal representatives of terror victims, served a subpoena on former Colombian President Alvaro Uribe, a nonparty. Plaintiffs sought to depose Uribe regarding information about terrorist activity in Colombia. The State Department granted a Suggestion of Immunity that "former President Uribe enjoys residual immunity from this Court's jurisdiction insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official." The district court adopted the State Department's Suggestion of Immunity, agreeing that Uribe could not be compelled to testify about "information he received and acts he took in his official capacity as a government official." The D.C. Circuit unanimously affirmed.

Plaintiffs argue that *Giraldo* is distinguishable. First, they contend that because Uribe was a former head of state, he was entitled to "far greater immunity than other officials, such as Shaya." But head-of-state immunity was unavailable to Uribe—a former president—because it only applies to sitting heads of state. Instead, the court recognized Uribe's immunity as a former "foreign official." Unlike head-of-state immunity, foreign official immunity "does not depend on tenure in office" and extends to former officials, like Uribe and Shaya.

Second, Plaintiffs argue that the *Giraldo* plaintiffs sought to depose Uribe in order to "challenge the actions of the [Colombian] government." By contrast, their subpoena would not "call into question" the actions of Israel or Shaya. But official immunity operates not only as shield from accusations or claims of wrongdoing. It also offers broad protection from a domestic court's jurisdiction. As the D.C. Circuit has explained, "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits."[88] As such, in *Giraldo*, the court found Uribe to be immune from compelled testimony even though neither he nor Colombia faced any claim of wrongdoing.

Third, Plaintiffs argue that *Giraldo* is distinguishable because Uribe "failed to appear at his deposition and opposed the plaintiffs motion to compel." This is a distinction without a difference because foreign official immunity "ultimately belongs to the sovereign rather than the official." Thus, in *Giraldo*, it was the Colombian Government's "formal[] request[]" for immunity that prompted the State Department to issue its Suggestion of Immunity for Uribe.

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[70] *Center for Nat. Sec. Studies v. US. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (citing *King v. United States Dep't of Justice*, 830 F .2d 210, 217 (D.C. Cir. 1987)).

[73] *Samantar*, 560 U.S. at 311 (citing *Ex parte Peru*, 318 U.S. at 587).

[74] *Id*. at 312 (citing *Hoffman*, 324 U.S. at 36).

[88] *Belhas*, 515 F.3d at 1293 (citing *Foremost-McKesson, Inc.*, 905 F.2d at 443. Accord *Giraldo*, 808 F. Supp. 2d at 150-51 (same as to foreign official immunity).

C. Israel Has Not Waived Immunity

Next, Plaintiffs and Intervenors argue that Israel waived immunity by encouraging Plaintiffs to bring the underlying lawsuits. In the D.C. Circuit,"[e]xplicit waivers of sovereign immunity are narrowly construed 'in favor of the sovereign.'"[93] "[A] foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so."[94] Furthermore, "[t]he theory of implied waiver contains an intentionality requirement, and that a finding of 'an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit.'"[95]

For obvious reasons, sovereigns that wish to waive an official's immunity tend to do so expressly. Here, Plaintiffs cannot—and do not—contend that Israel expressly waived immunity. At most, Plaintiffs suggest that Israel "commit[ted]" to make Shaya available to testify. Intervenors similarly complain that Israel "initially agreed to provide [] access to [] Shaya." But no evidence suggests that Israel intended to waive Shaya's immunity with respect to this Court's jurisdiction. Because I find that Shaya is immune as to information regarding acts taken or knowledge obtained in his official capacity as a government official, I need not determine whether Shaya's testimony is also protected as a foreign state secret.

* * * *

4. *Rosenberg v. Pasha*

In *Rosenberg v. Pasha*, discussed in *Digest 2013* at 286-89 and *Digest 2012* at 293-95 and 331-33, relatives of victims of the 2008 Mumbai terrorist attacks asserted that defendants, the Inter-Services Intelligence Directorate of Pakistan ("ISI") and its former directors, Ahmed Shuja Pasha and Nadeem Taj, were not immune from suit because they engaged in violations of *jus cogens* norms by providing support for acts of terrorism. The lower court dismissed the case as to defendants ISI, Pasha, and Taj based on the U.S. statement of interest and suggestion of immunity. Plaintiffs appealed as to Pasha and Taj and the U.S. Court of Appeals for the Second Circuit affirmed in an August 27, 2014 decision. *Rosenberg v. Pasha et al.*, 577 Fed. App. 22 (2d Cir. 2014). Excerpts follow from the decision of the court of appeals.

* * * *

Appellants argue that common law sovereign immunity cannot protect foreign officials from suit for *jus cogens* violations, which are "norm[s] accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[93] *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002)(quoting *Library of Cong. v. Shaw*, 4 78 U.S. 310, 318 (1986)).
[94] *Gutch v. Federal Republic of Germany*, 255 Fed. App'x 524, 525 (D.C. Cir. 2007).
[95] *Odhiambo v. Republic of Kenya*, 930 F. Supp. 2d 17, 24 (D.D.C. 2013) (quoting *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994)).

Belhas v. Ya'alon, 515 F.3d 1279, 1286 (D.C.Cir.2008) (quoting *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 714 (9th Cir.1992)). They also argue that formal suggestions of immunity submitted by the State Department should not be dispositive in a court's immunity determination. They base their claim upon the decision of the Fourth Circuit in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir.2012) (*"Samantar III* "), in which the Court of Appeals held that foreign officials "are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity," *id.* at 777, and that Statements of Interest provided by the State Department were given "considerable, but not controlling, weight" in the immunity determination, *id.* at 773.

In so arguing, appellants acknowledge that their position is in tension with the precedent of this Court, expressed in *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir.2009). There, we addressed the question of common law immunity for foreign officials accused of *jus cogens* violations, and explicitly held that "in the common-law context, we defer to the Executive's determination of the scope of immunity" and that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." *Id.* at 15. However, appellants assert that: (1) we should instead adopt a "cogent litmus test similar to the Fourth Circuit," Appellants' Br. at 14; and (2) our holding in *Matar* was called into question by the Supreme Court's decision in *Samantar v. Yousuf*, 560 U.S. 305, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010) (*"Samantar II* ") (affirming a Fourth Circuit opinion, *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir.2009) (*"Samantar I* "), which held that an individual foreign officer is not protected by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611).

We reject both of these arguments. First, *Matar* was a decision of a panel of this Court. We are bound to follow that precedent, unless and until it is overruled implicitly or expressly by the Supreme Court, or by this Court sitting *in banc. See United States v. Santiago*, 268 F.3d 151, 154 (2d Cir.2001). Appellants do not suggest that the *Matar* holding has been overruled by an *in banc* proceeding of this Court, so we turn to the Supreme Court's opinion in *Samantar II.*

We disagree with appellants' assertion that the Supreme Court's opinion in *Samantar II* constitutes intervening Supreme Court precedent that requires us to alter our clear precedent. The question before the Supreme Court in *Samantar II* was whether the Fourth Circuit correctly determined in *Samantar I* that "the [Foreign Sovereign Immunities Act] does not govern [a foreign official's] claim of immunity." *Samantar II*, 560 U.S. at 325, 130 S.Ct. 2278. The Supreme Court's opinion did not address common law immunity in any significant way, and certainly did not overrule—either explicitly or implicitly—our holding in *Matar.* Rather, in affirming the Fourth Circuit, the Supreme Court noted at the end of its opinion that "[w]hether [the foreign official] may be entitled to immunity under the common law ... [is a] matter [ ] to be addressed in the first instance by the District Court on remand." *Id.* at 325–26, 130 S.Ct. 2278.

Upon remand, the Fourth Circuit held in *Samantar III* that common law foreign official immunity did *not* apply to alleged violations of *jus cogens* norms, and the Fourth Circuit's holding there is what appellants ask us to adopt. However, we are bound by our own precedent, not that of the Fourth Circuit, and we conclude that nothing in the Supreme Court's opinion even suggests, let alone mandates, that we abandon our clear precedent in *Matar. Matar* remains binding precedent in this Circuit, and in applying it, the District Court correctly determined that, in light of the Statement of Interest filed by the State Department recommending immunity for Pasha and Taj, the action must be dismissed.

* * * *

C. HEAD OF STATE IMMUNITY

1. President Funes of El Salvador

On May 23, 2014, the United States filed a suggestion of immunity on behalf of President Funes of El Salvador in a case brought in state court in Florida. *Rendon v. Funes*, Case No. 2014-2756-CA-01 (11th Cir. Ct. Fla.). The U.S. suggestion of immunity follows (with footnotes omitted) and is also available at *www.state.gov/s/l/c8183.htm*. On May 27, 2014, the court granted defendant's motion to dismiss based on head of state immunity.

* * * *

The United States of America, pursuant to 28 U.S.C. § 517, respectfully informs the Court of the interest of the United States in the pending claims against President Carlos Mauricio Funes, the sitting head of state of the Republic of El Salvador, and hereby informs the Court that President Funes is immune from this suit. In support of its interest and determination, the United States sets forth as follows:

1. The United States has an interest in this action because Defendant Funes is the sitting head of a foreign state, thus raising the question of President Funes's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of sitting heads of state. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Funes's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Thus, no court has ever subjected a sitting head of state to suit once the Executive Branch has determined that he or she is immune.

2. The Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the Embassy of the Republic of El Salvador has formally requested the Government of the United States to determine that President Funes is immune from this lawsuit. The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Mauricio Funes as a sitting head of state from the jurisdiction of the Florida Circuit Court in this suit." Letter from Mary E. McLeod to Stuart Delery (copy attached as Exhibit A).

3. For many years, the immunity of both foreign states and foreign officials was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. *See, e.g.*, *Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the

government has not seen fit to recognize."). In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. 28 U.S.C. §§ 1602 *et seq.*; *see id*. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

4. As the Supreme Court explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id*. at 2291 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity from suit, including the immunity of foreign heads of state and heads of government. *See id*. at 2284–85 & n.6 (noting the Executive Branch's role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity determinations are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch's immunity determination, declared that such a determination "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. After a Suggestion of Immunity is filed, it is the "court's duty" to surrender jurisdiction. *Id.* at 588. The courts' deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

6. For the same reason, courts also have routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state. *See Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit . . . as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations." (quotation omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."). When the Executive Branch determines that a sitting head of state is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the Executive Branch in these matters, the Seventh Circuit noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the

conduct of foreign affairs is involved." *Id. See also Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citing *United States v. Lee*, 106 U.S. 196, 209 (1882))); *Ex parte Peru*, 318 U.S. at 588. As noted above, in no case has a court (state or federal) subjected a sitting head of state to suit after the Executive Branch has determined that the head of state is immune.

7. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's status as the current holder of the office. Because the Executive Branch has determined that President Funes, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts, President Funes is entitled to immunity from the jurisdiction of this Court over this suit.

* * * *

2. Prime Minister Lee of Singapore

The United States submitted a suggestion of immunity on behalf of Prime Minister Lee Hsien Loong of Singapore on March 14, 2014 in the U.S. District Court for the Northern District of California. *Jibreel v. Hock Seng Chin et al.*, No. 13-3470 (N.D. Cal.). The U.S. suggestion of immunity in *Jibreel* is similar to the suggestion of immunity excerpted above that was submitted on behalf of President Funes. The suggestion of immunity, and the letter attached as Exhibit A from the State Department's Office of the Legal Adviser to the Department of Justice, are available at *www.state.gov/s/l/c8183.htm*. On May 5, 2014, the district court judge issued an order adopting the magistrate judge's report and recommendation dismissing the claims against the prime minister.

3. Prime Minister Modi of India

On October 19, 2014, the United States filed a suggestion of immunity on behalf of Prime Minister Narendra Modi of India, in the U.S. District Court for the Southern District of New York. *American Justice Center v. Modi*, No. 14. Civ. 7780 (S.D.N.Y.).[****] The suggestion of immunity with its attached exhibit and a supplemental brief filed on December 10, 2014 are available at *www.state.gov/s/l/c8183.htm*.

[****] Editor's note: On January 14, 2015, the court dismissed the case on the basis of Prime Minister Modi's immunity.

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Consular and Diplomatic Immunity

a. Khobragade Case

On January 29, 2014, the United States submitted to the U.S. District Court for the Southern District of New York a brief and accompanying declaration by Stephen Kerr, attorney-adviser in the Office of the Legal Adviser at the U.S. Department of State, explaining that Devyani Khobragade, a consular officer at the Consulate General of India in New York, did not enjoy immunity from prosecution for the acts at issue. Dr. Khobragade had been arrested in 2013 and charged by U.S. authorities with committing visa fraud and providing false statements in order to obtain a visa for Sangeeta Richard to work for Dr. Khobragade in New York. Excerpts follow from Mr. Kerr's declaration. The declaration in its entirety is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

For the reasons summarized below, Devyani Khobragade does not currently enjoy immunity from criminal prosecution for the crimes with which she is charged in the indictment captioned *United States v. Devyani Khobragade*, 14 Cr. 008 (SAS) (the "Indictment"). In addition, Dr. Khobragade did not enjoy immunity from arrest or detention at the time of her arrest on felony criminal charges of visa fraud and false statements on December 12, 2013.

3. The records of the Department of State reflect that on December 12, 2013, Devyani Khobragade was registered as Deputy Consul General at the Consulate General of India at New York, New York, a position she held from October 26, 2012, until her duties were terminated on January 8, 2014. In that capacity, she enjoyed "immunity from the jurisdiction of the judicial and administrative authorities of the receiving State with respect of acts performed in the exercise of consular functions," pursuant to Article 43(1) of the Vienna Convention on Consular Relations (the "VCCR"). I understand that Dr. Khobragade submitted an application for an A-3 visa for Ms. Richard, which is a visa for "aliens employed in a domestic or personal capacity by a principal alien, who are paid from the private funds of the principal alien and seek to enter the United States solely for the purpose of such employment." 22 C.F.R. § 41.21(a)(4). The Department of State does not issue an A-3 visa unless the visa applicant has executed a contract with the principal alien documenting the personal employment relationship. Accordingly, Dr. Khobragade did not employ Ms. Richard in her capacity as Deputy Consul General, and thus did not enjoy immunity from prosecution for the crimes for which she was arrested on December 12, 2013.

4. Dr. Khobragade was registered as Counselor at the Permanent Mission of India to the United Nations enjoying privileges and immunities incident to that assignment from only January 8, 2014 to January 9, 2014. In that capacity, Dr. Khobragade enjoyed "immunity from the criminal jurisdiction of the receiving State" pursuant to Article 31(1) of the Vienna Convention on Diplomatic Relations (the "VCDR") incorporated by the reference to "the immunities of diplomatic envoys" in Article V, section 15, of the United Nations Headquarters Agreement. On January 9, 2014, Dr. Khobragade departed the United States and her duties as Counselor at the Permanent Mission of India to the United Nations were terminated. Pursuant to Article 39(2) of the VCDR, "when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so.... However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." Accordingly, from the time of Dr. Khobragade's departure from the United States on January 9, 2014, through the present, Dr. Khobragade enjoys residual diplomatic immunity only for acts she performed in the exercise of her functions as a member of the mission from January 8, 2014 to January 9, 2014. (She does not enjoy immunity for any other acts committed during her time as a member of the mission.) The acts giving rise to the charges in the Indictment were not performed in Dr. Khobragade's exercise of her functions as a member of the mission, both because they were performed well before Dr. Khobragade's assignment to the Permanent Mission of India to the United Nations and because the hiring of Ms. Richard was not an official act. Accordingly, Dr. Khobragade does not presently enjoy immunity from prosecution for the crimes with which she is charged in the Indictment.

5. Dr. Khobragade's motion to dismiss the Indictment asserts that she enjoyed diplomatic immunity on December 12, 2013—the day of her arrest—by virtue of her accreditation to the United Nations as a member of India's delegation to the UN General Assembly ("UNGA") from August 26 to December 31, 2013. That assertion is incorrect.

6. First, there is no basis for the application of section 11 of the Convention on the Privileges and Immunities of the United Nations (the "General Convention") to the present matter, as there is no evidence that Dr. Khobragade was exercising any function related to UN representation at, or immediately before or after, the time of her arrest.

7. Section 11 of the General Convention provides that "[r]epresentatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy [certain listed] privileges and immunities." These include "such other privileges, immunities and facilities ... as diplomatic envoys enjoy," which in tum include immunity from the criminal jurisdiction of the receiving State under Article 31(a) of the VCDR. Section 16 of the General Convention provides that "the expression 'representatives' shall be deemed to include all delegates, deputy delegates, advisers, technical experts, and secretaries of delegations."

8. The United States has consistently interpreted section 11 of the General Convention to provide diplomatic level immunity to those foreign government representatives of the ranks listed in section 16 of the General Convention who travel to the United States for UN business. Dr. Khobragade, however, did not travel from India to New York for business

before the UN; rather, she was accredited to the Department of State's Office of Protocol as a bilateral representative to the United States, specifically as India's Deputy Consul General at the Indian Consulate General in New York City. On that basis the Department of State accorded her the privileges and immunities commensurate with such status and permitted her to continuously reside in New York for a period of time. The Department of State issued her an identification card and tax exemption card, both relating to her status as Deputy Consul General. In short, the Government of India represented her to the Department of State as a consular officer and the Department accepted her in that capacity.

9. Moreover, there is strong support for the general proposition that section 11 of the General Convention was not intended to cover individuals residing in New York as consular officers who are subsequently accredited as a member of a UN delegation. The legislative history of U.S. consideration of the Convention indicates that section 11 was viewed as extending the diplomatic privileges and immunities already enjoyed by resident diplomatic personnel at UN missions under the UN Headquarters Agreement to certain high-level, non-resident representatives to the UN. See, *e.g.*, Exec. Rep. No. 91-17 at 3 (March 17, 1970) ("With regard to representatives of members, currently only resident representatives of permanent missions to the UN have full diplomatic immunities. Nonresident representatives enjoy only functional immunities [under the International Organization Immunities Act]; that is, immunities with respect to their official acts. Under the convention, these nonresident representatives will also be entitled to full diplomatic immunities. The group covered here consists of foreign officials coming to the United Nations for a short time to attend specific meetings—such as the annual fall meetings of the General Assembly. Foreign ministers and other high government officials, distinguished parliamentarians, and representatives of that caliber, fall into this category, which is estimated to number about 1,000 people a year.")

10. Also, the UN requests the dates of arrival and departure from the United States for members of the UN delegations and presents this information, and not dates of business before the UN, to the United States Mission to the UN.

11. In any event, the documentation that Dr. Khobragade presented in support of her motion to dismiss fails to establish that she had Section 11 immunity at the time of her arrest, if she had it at any point in time.

a. First, the "UN accreditation record" that defense counsel attached as exhibit 1 to Defendants' motion to dismiss indicates Dr. Khobragade's date of arrival in the United States as August 26, 2013 and her date of departure as August 31, 2013. Such dates are plainly wrong since she was present in the United States both before and after that date.

b. Second, while Dr. Khobragade's name appears on a list sent to the United States Mission to the United Nations by the UN Office of Protocol on August 26, 2013, as part of the Indian delegation for the main part of the regular session of the 68th UN General Assembly, which took place in September 2013, the dates given for her appear as August 2013-August 2016. Again, those dates are incorrect or meaningless since the 68th General Assembly meeting was not going to extend past December 2013, and the main part of the regular session took place in September 2013.

c. Third, Dr. Khobragade's name does not appear on the consolidated list of UNGA delegation members produced by the UN. That makes sense, because at all times she remained notified to the Department of State's Office of Protocol as Deputy Consul General and no dual-accreditation request was sent to State Department's Office of Protocol.

12. Finally, no information had been brought to my attention indicating that Dr. Khobragade was exercising any functions as a member of the Indian UN delegation at the time of her arrest, or that she was traveling to or from the place of a UN General Assembly meeting. Her motion to dismiss states that she was appointed as a Special Advisor to the UN during the Indian Prime Minister's visit. The Indian Prime Minister's visit concluded in September 2013, close to three months before the arrest.

13. Dr. Khobragade's assertions that she possessed full diplomatic immunity at various times in the past, even if true, are no bar to a current prosecution for past conduct now that such immunity has unquestionably terminated, unless the past conduct for which she is being prosecuted was official in nature. This has been the State Department's formal interpretation of the Vienna Convention on Diplomatic Relations since at least 1984, when the Secretary of State stated the following to all foreign missions in a circular diplomatic note: "On the termination of criminal immunity, the bar to prosecution in the United States would be removed and any serious crime would remain as a matter of record. If a person formerly entitled to privileges and immunities returned to this country and continued to be suspected of a crime, no bar would exist to arresting and prosecuting him or her in the normal manner for a serious crime allegedly committed during the period in which he or she enjoyed immunity. This would be the case unless the crime related to the exercise of official functions, or the statute of limitations for that crime had not imposed a permanent bar to prosecution." Circular Diplomatic Note, March 21, 1984, at 2–3.

14. For all of the foregoing reasons, the Department of State concludes that Dr. Khobragade did not enjoy immunity from arrest or detention at the time of her arrest in this case, and she does not presently enjoy immunity from prosecution for the crimes charged in the Indictment.

* * * *

On March 12, 2014, the district court judge in the case filed an opinion and order, granting Dr. Khobragade's motion to dismiss. Excerpts follow from the court's decision (with footnotes omitted). Dr. Khobragade was subsequently reindicted, and the charges remained pending in early 2015.

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* * * *

It is undisputed that Khobragade acquired full diplomatic immunity at 5:47 PM on January 8, 2014, and did not lose that immunity until her departure from the country on the evening of January 9, 2014. On January 9, immediately following the return of the Indictment, Khobragade appeared before the Court through counsel and moved to dismiss the case. Because the Court lacked jurisdiction over her at that time, and at the time the Indictment was returned, the motion must be granted.

The Government argues that the Indictment should not be dismissed because Khobragade did not have diplomatic immunity at the time of her arrest, and has no immunity at the present time. In support, the Government submits a declaration from Steven Kerr, Attorney-Advisor in the Office of the Legal Advisor of the United States Department of State. Kerr concludes that "Dr. Khobragade did not enjoy immunity from arrest or detention at the time of her arrest in this case, and she does not presently enjoy immunity from prosecution for the crimes charged in the Indictment."

Even assuming Kerr's conclusions to be correct, the case must be dismissed based on Khobragade's conceded immunity on January 9, 2014. The fact that Khobragade lost full diplomatic immunity when she left the country does not cure the lack of jurisdiction when she was indicted. Courts in civil cases have dismissed claims against individuals who had diplomatic immunity at an earlier stage of proceedings, even if they no longer possessed immunity at the time dismissal was sought. These courts reasoned that the lack of jurisdiction at the time of the relevant procedural acts, such as service of process, rendered those acts void. Because Khobragade moved to dismiss on January 9, 2014, the motion must be decided in reference to her diplomatic status on that date.

Similarly, Khobragade's status at the time of her arrest is not determinative. The State Department has explained that "criminal immunity precludes the exercise of jurisdiction by the courts over an individual whether the incident occurred *prior to* or during the period in which such immunity exists." Furthermore, several courts have held that diplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied. For example, in *Abdulaziz v. Metropolitan Dade County*, the Eleventh Circuit concluded that diplomatic immunity "serves as a defense to suits already commenced." The court found that the "action was properly dismissed when immunity was acquired and the court was so notified." Lower courts have cited and followed *Abdulaziz* in the absence of binding case law in other circuits.

The Court notes that *Abdulaziz* involved civil claims rather than criminal charges. However, the Government has not cited any criminal case in which immunity was acquired after arrest, and the Court is not aware of any such case. *Abdulaziz* is persuasive precedent given that the standard for dismissing criminal and civil cases based on diplomatic immunity is the same. Furthermore, because diplomatic immunity is a jurisdictional bar, it is logical to dismiss proceedings the moment immunity is acquired. Even if Khobragade had no immunity at the time of her arrest and has none now, her acquisition of immunity during the pendency of proceedings mandates dismissal.

The Court has no occasion to decide whether the acts charged in the Indictment constitute "official acts" that would be protected by residual immunity. However, if the acts charged in the Indictment were not "performed in the exercise of official functions," then there is currently no bar to a new indictment against Khobragade. Khobragade concedes that "[t]he prosecution is clearly legally able to seek a new indictment at this time or at some point in the future now that [she] no longer possesses [] diplomatic status and immunity ...." However, the Government may not proceed on an Indictment obtained when Khobragade was immune from the jurisdiction of the Court.

* * * *

b. Nsue Case

On December 11, 2014, the United States filed a brief explaining the Government's position that a defendant in a criminal case being prosecuted in the U.S. District Court for the Eastern District of Virginia did not enjoy immunity from prosecution. *United States v. Nsue*, No. 1:14-CR-312 (E.D. Va. 2014). Defendant, Jesus Monsuy Nsue, was indicted on charges of cash smuggling, failing to file the required report of transporting currency, and false statements. Defendant filed a motion to delay his trial due to unspecified purported immunity. The U.S. brief, excerpted below (with footnotes omitted), explains that Mr. Nsue is not entitled to any form of diplomatic or consular immunity in the United States. The brief, with the referenced attachments, is available at *www.state.gov/s/l/c8183.htm*. On December 18, 2014, the district court issued an order, finding a lack of sufficient evidence of immunity and denying any claim that the indictment should be dismissed on the basis of diplomatic immunity.

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* * * *

A proceeding or action must be dismissed if it is brought against a person entitled to diplomatic immunity with respect to such action or proceeding. *See* 22 U.S.C. § 254d. In particular, dismissal is required when a defendant enjoys immunity under the Vienna Convention on Diplomatic Relations (VCDR), under Title 22 of the United States Code, or under any other laws extending diplomatic privileges and immunities. *Id*. Immunity may be established upon motion or suggestion by or on behalf of a defendant. *See* 22 U.S.C. § 254d.

The determination whether a person has diplomatic immunity is a mixed question of fact and law. *United States v. Al-Hamdi*, 356 F.3d 564, 569 (4th Cir. 2004). The Fourth Circuit applies a "hybrid standard to mixed questions of law and fact, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining *de novo* the legal conclusions derived from those facts." *Id*. (quoting *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 905 (4th Cir.1996)).

As the Supreme Court explained more than a century ago, however, courts "do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister." *In re Baiz*, 135 U.S. 403, 432 (1890). Consistent with that well-settled approach, the Fourth Circuit has held that the State Department's certification is "conclusive evidence as to the diplomatic status of an individual." *Al-Hamdi*, 356 F.3d at 573. Notably, in its leading case on this issue, the Fourth Circuit declined to "review the State Department's factual determination" regarding the information underlying a defendant's assertion of immunity. *Id*. at 573.

ARGUMENT

The defendant is not entitled to any form of diplomatic or consular immunity in the United States, and so the criminal case against him may proceed. Although the United States takes very seriously its obligations to foreign countries and diplomats, defendant's suggestion falls short of any legitimate claim for immunities and privileges. Significantly, defendant has not yet explained the legal basis for his immunity claim. The government's only information about defendant's immunity claim is based on the documents attached to his motion to continue trial and the motion itself, which does not cite any source of law. In fact, his motion for a continuance merely suggests that "a diplomatic process has been started which might lead to a resolution of the situation of Mr. Nsue without the need for a criminal prosecution (perhaps through an administrative or civil remedy)." Deft's Emergency Motion to Continue Trial Date at 2 (Dkt.40). But the United States Department of State has determined that the "defendant does not enjoy any form of diplomatic or consular immunity, and that the Department of State is not aware of a basis for any other immunity from prosecution in this case." *See* Attachment A (Declaration of Chenobia C. Calhoun at ¶ 8). The State Department has communicated this conclusion to the Embassy of Equatorial Guinea. *Id*. As such, it is not clear at this point what the defendant hopes to obtain through any "diplomatic process."

In any event, the State Department has certified that the defendant is not entitled to any form of immunity. *See id*. at ¶ 3 ("I certify that defendant is not entitled to any form of diplomatic or consular immunity in the United States."). That determination, in itself, "conclusively" establishes that the defendant is not entitled to immunity. *See Al-Hamdi*, 356 F.3d at 573. Accordingly, the trial currently scheduled for January 26, 2014, should proceed without any further delay.

* * * *

2. Determinations under the Foreign Missions Act

On March 9, 2014, the Under Secretary for Management, U.S. Department of State, determined that the Taipei Economic and Cultural Representative Office in the United States ("TECRO"), including its real property and personnel, is a ''foreign mission'' within the meaning of section 202(a)(3) of the Foreign Missions Act (22 U.S.C. 4302(a)(3)) and therefore eligible to be designated for certain benefits under the Act. 79 Fed. Reg. 16,090 (Mar. 24, 2014). Excerpts follow from the Federal Register notice regarding the designation and determination of TECRO's status under the Act. See *Digest 2013* at 292 for a discussion of the agreement on privileges, exemptions, and immunities signed by the American Institute in Taiwan ("AIT") and TECRO in 2013.

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* * * *

After due consideration of the benefits, privileges, and immunities provided to AIT, as well as matters related to the protection of the interests of the United States, on the basis of reciprocity between AIT and TECRO, I hereby designate the following as benefits for purposes of the Act:

• For TECRO designated employees, exemption from all taxes and dues imposed by state, county, municipality and territorial authorities in the United States in connection with the ownership or operation of a motor vehicle;

• For qualifying dependents of a TECRO designated employee, exemption from state, county, municipality and territorial sales or other similarly imposed consumption taxes in the United States, except those normally included in the price of goods and services, or charges for specific services rendered; and

• Exemption from state, county, municipal and territorial taxes in the United States ("real estate taxes")—including, but not limited to, annual property tax, recordation tax, transfer tax, and the functional equivalent of deed registration charges and stamp duties—on the basis of real property's authorized use for the performance of TECRO's authorized functions and for which TECRO would otherwise be liable.

For purposes of this determination, the term "TECRO designated employees" means persons duly notified to and accepted by AIT as designated employees of TECRO at its primary office or one of its subsidiary offices, including the heads of such offices. It shall not apply with respect to any person who is a national of, or is permanently resident in, the United States.

* * * *

3. Protection of Diplomatic and Consular Missions and Representatives

Excerpted below are remarks by Mark Simonoff, Minister Counselor for Legal Affairs for the U.S. mission to the UN, at the UN General Assembly's Sixth Committee during the Committee's consideration of the topic of protecting the security and safety of diplomatic and consular missions and representatives, delivered on October 21, 2014. Mr. Simonoff's remarks are available in full at *http://usun.state.gov/briefing/statements/233216.htm*.

* * * *

Thank you, Mr. Chairman. The rules protecting the sanctity of ambassadors, other diplomats, and consular officials enable them to carry out their vital functions. Respect for these rules is a basic prerequisite for the normal conduct of relations among states.

Rules providing protections for diplomats have a long and deep history. …

While the rules are old and a common substantive core has characterized them, the facts and circumstances of attacks on diplomatic and consular officials have changed. Indeed, in recent years, such attacks have increased in number, more often involving non-state armed groups, and have become if anything more brazen. Just this summer, the United States temporarily relocated all of our personnel out of Libya due to the ongoing violence resulting from clashes between Libyan militias. Earlier, on February 1, 2013, the U.S. Embassy in Ankara,

Turkey was attacked. And in April 2013, a U.S. Foreign Service officer—along with members of our military service—was killed by an improvised explosive device attack in Zabul Province, Afghanistan. These are just two of the over 200 attacks against U.S. diplomatic facilities and personnel in the last 10 years, which resulted in the deaths of over 40 personnel, including U.S. Ambassador to Libya Chris Stevens and three other Americans in September 2012. Nor is the United States alone in this regard.

These brutal acts by armed groups should be universally condemned.

The Convention on Internationally Protected Persons was adopted by the General Assembly in 1973, and has 176 UN States parties. This Convention, which requires the punishment of violent attacks against foreign government officials, including diplomats and consular officials, also requires States Parties to prevent the commission of such crimes, including the exchanging of information and other coordination. Since 1980, the General Assembly has been adopting resolutions condemning acts of violence against diplomatic and consular missions and representatives. We look forward to discussion of another such resolution this year, to reemphasize the importance of these issues. But the 2012 resolution also stressed practical measures to prevent violence against diplomatic and consular missions and representatives. And, indeed, prevention is a critical element of the obligation of receiving states. The steps that are appropriate to protect a mission, and that are therefore required of the receiving state, will depend on the potential threats to a particular mission in that state. Thus, as the facts and circumstances of attacks on diplomatic and consular personnel continue to change, so too must our preventive measures. For our part, we place an emphasis on enhanced security training and good personal security practices to help mitigate the risks our personnel face every day. But prevention is also facilitated by collaboration. Thus, our embassies overseas often work with local law enforcement and other authorities to prepare for eventualities, for instance by conducting drills and sharing information when appropriate.

* * * *

E. INTERNATIONAL ORGANIZATIONS

Georges v. United Nations

On March 7, 2014, the United States submitted a statement of interest regarding the immunity of the United Nations and UN officials in a lawsuit brought relating to a cholera outbreak in Haiti. Excerpts follow (with footnotes omitted) from the U.S. statement of interest, which is available in full at *www.state.gov/s/l/c8183.htm*.[*]

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[*] Editor's note: The Court dismissed the case in January 2015 on the basis of the immunity asserted in the U.S. statement of interest.

[A]ll of the defendants in this matter are immune from legal process and suit. The UN, including its integral component, defendant the United Nations Stabilization Mission in Haiti ("MINUSTAH"), is absolutely immune from legal process and suit absent an express waiver, pursuant to the Charter of the United Nations ("UN Charter"), June 26, 1945, 59 Stat. 1031, TS 993, 3 Bevans 1153, and the Convention on the Privileges and Immunities of the United Nations ("General Convention"), adopted Feb. 13, 1946,21 U.S.T. 1418, 1 U.N.T.S. 16. In this case, the UN, including MINUSTAH, has not waived its immunity from legal process and suit, and instead has repeatedly and expressly asserted its absolute immunity. Defendants Ban Ki-Moon, the Secretary-General of the UN ("Secretary-General Ban"), and Edmond Mulet, former Under-Secretary-General for the United Nations Stabilization Mission in Haiti and current Assistant Secretary-General for UN Peacekeeping Operations ("Assistant Secretary-General Mulet"), are similarly immune from legal process and suit, pursuant to the UN Charter, the General Convention, and the Vienna Convention on Diplomatic Relations ("Vienna Convention"), 23 U.S.T. 3227, TIAS No. 7502, 500 UNTS 95.

In light of each defendant's immunity, the Court lacks subject matter jurisdiction over this matter, and this action should be dismissed. *See Brzak v. United Nations,* 551 F. Supp. 2d 313,318 (S.D.N.Y. 2008), *aff'd,* 597 F.3d 107 (2d Cir. 2010); *see also* Fed. R. Civ. P. 12(h)(3). Further, because each defendant's immunity encompasses immunity from service of process, plaintiffs' attempted service on defendants was ineffective.

BACKGROUND

A. The Complaint

Plaintiffs allege that the UN, MINUSTAH, Secretary-General Ban and Assistant Secretary-General Mulet are responsible for an epidemic of cholera that broke out in Haiti in 2010, killing approximately 8,000 Haitians and injuring approximately 600,000 more. *See* Complaint, dated October 9, 2014, at1-2. Specifically, plaintiffs allege that the UN failed to screen and immunize Nepalese peacekeepers who were deployed to Haiti from Nepal, which had recently experienced a surge in cholera infections. *See id.* at 5. …

Plaintiffs allege that "Ban Ki-moon is and was at all relevant times the Secretary-General of the UN" and had "overall responsibility for the management of the UN and its operations, including all operations in Haiti." *Id.* at21. Plaintiffs allege that the Secretary-General also appointed and oversaw defendant Mulet in his capacity as Special Representative of the Secretary General. *See id.* Plaintiffs further allege that "Mulet had 'overall authority on the ground for the coordination and conduct of all activities of the United Nations agencies, funds and programmes in Haiti.'" *Id.* at 22 (quoting UN Security Council Resolution 1542, which established MINUSTAH). Plaintiffs allege that both individuals "knew or reasonably should have known that hazardous conditions or activities under [their] authority or control could injure Plaintiffs, and [they] negligently failed to take or order appropriate action to avoid the harm." *Id.* at21-22.

In addition, plaintiffs allege that the UN has failed to establish a "standing claims commission" to address third-party claims of individuals injured by the cholera epidemic, in violation of the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti ("Status of Forces Agreement"). …

The named plaintiffs are Haitian and United States citizens who allege that they either have been personally injured by the cholera epidemic or are the personal representatives of those who have died as a result of it. *See id.* at10, 30. Plaintiffs bring this action on behalf of

themselves and a class of all other persons who have been or will be personally injured by the cholera outbreak, and personal representatives of those who have died or will die from the cholera outbreak. *See id.* at 29-30.

B. Procedural History

Plaintiffs now seek an order confirming that service of process on the UN has been perfected, or alternatively an order providing for service of process on the UN by other means. …

The United States makes this submission pursuant to 28 U.S.C. § 517, consistent with the United States' obligations as host nation to the UN and as a party to treaties governing the privileges and immunities of the UN.

DISCUSSION

A. The UN Enjoys Absolute Immunity

1. The UN's Immunity

The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment [sic] of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN adopted shortly after the UN Charter, defines the UN's privileges and immunities, and specifically provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2.

As courts in this district have long recognized, the United States is a party to both the UN Charter and the General Convention. *See, e.g., Brazk,* 597 F.3d at 111; *Sadikoglu v. United Nations Development Programme,* No. 11 Civ. 0294(PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011) ("[t]he scope of immunity for the UN and its subsidiary bodies derives primarily from two multilateral agreements to which the United States is a party: the Charter of the United Nations **...** and the Convention on Privileges and Immunities of the United Nations"); *Askir v. Boutros-Ghali,* 933 F. Supp. 368, 371 (S.D.N.Y. 1996). The United States understands the General Convention, Article II section 2, to mean what it unambiguously says: the UN enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity.

To the extent there could be any alternative reading of the General Convention's text, the Court should defer to the Executive Branch's interpretation. *See Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Tachiona v. United States,* 386 F.3d 205, 216 (2d Cir. 2004) (interpreting the General Convention and noting, "in construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch"') (quoting *El AI Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 168, 576 (1999)).

Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference. The Executive Branch's interpretation should be given particular deference in this case because the interpretation is shared by the UN. *See* Letters dated December 20, 2013, and February 10, 2014, from Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Samantha Power, Permanent Representative of the United States to the United Nations, annexed hereto as Exhibits 1 and 2, respectively (stating that, *inter alia,* the UN, including MINUSTAH, is entitled to immunity from suit pursuant to the

UN Charter and the General Convention); *see also, e.g.*, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (where parties to a treaty agree on meaning of treaty provision, and interpretation "follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation").

Consistent with the applicable treaty language and the Executive Branch's and the UN's views, courts repeatedly, and indeed to the United States' knowledge uniformly, have recognized that "[u]nder the Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases." *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987); *see also, e.g.*, *Askir*, 933 F. Supp. at 371. Controlling Second Circuit authority recognizes the UN's absolute immunity. *See Brzak*, 597 F.3d at 112 ("The United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity'"). As the *Brzak* district court held, "where, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction." *Brzak*, 551 F. Supp. 2d at 318.

MINUSTAH, as a subsidiary organ of the UN, enjoys this same absolute immunity. MINUSTAH is a UN peacekeeping mission that reports directly to the Secretary-General, and is therefore an integral part of the UN. *See* United Nations: Structure and Organization, *http://www.un.org/en/aboutun/structure/* (last visited February 21, 2014)…. Indeed, the Status of Forces Agreement explicitly provides that MINUSTAH "shall enjoy the privileges and immunities ... provided for in the [General] Convention." Status of Forces Agreement, art. III, § 3. Accordingly, MINUSTAH is entitled to the immunities established by the UN Charter and General Convention. *See, e.g.*, *Emmanuel v. United States*, 253 F.3d 755, 756 (1st Cir. 2001) (noting that Article II immunity under the General Convention applies to the UN Mission in Haiti pursuant to the applicable Status of Forces Agreement); *see also Sadikoglu*, 2011 WL 4953994, at *3 (finding that "because [defendant UN Development Programme]—as a subsidiary program of the UN that reports directly to the General Assembly—has not waived its immunity, 'the [General Convention] mandates dismissal of Plaintiff['s] claims against the United Nations for lack of subject matter jurisdiction'" (quoting *Brzak*, 551 F. Supp. 2d at 318))….

Therefore, absent an express waiver, the UN, including MINUSTAH, enjoys absolute immunity from suit, and this action should be dismissed as against the UN for lack of subject matter jurisdiction. *See Brzak*, 551 F. Supp. 2d at 318.

2. The UN Has Not Waived Its Immunity

To the extent plaintiffs argue that the UN, including MINUSTAH, has waived its immunity in this case because it has not established a venue for plaintiffs to pursue legal remedies, *see, e.g.*, Complaint at 172-83 (asserting that, by failing to provide procedures by which injured parties can make claims for compensation, the UN has "refus[ed] to comply with its legal obligations," and that "[p]ursuing this action in a court of law is the only option left for Plaintiffs ... to seek enforcement of their right to a remedy"), such an argument should be rejected because the UN has repeatedly and expressly asserted its absolute immunity.

Whether the UN has established a claims commission or other means by which aggrieved persons can seek compensation is irrelevant to the question of waiver. As established by the General Convention, any waiver of the UN's absolute immunity from suit or legal process must be "express[]." General Convention, art. II, § 2; *see also Brzak*, 597

F.3d at 112 ("Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention].").

In this case, there has been no express waiver. To the contrary, the UN has repeatedly asserted its immunity. On December 20, 2013, Miguel de Serpa Soares, the United Nations Legal Counsel, wrote to Samantha Power, Permanent Representative of the United States to the United Nations, stating: "I hereby respectfully wish to inform you that the United Nations has not waived and is expressly maintaining its immunity with respect to the claims in [the instant] Complaint." Exhibit 1 at 2 …. The UN reasserted its absolute immunity on February 10, 2014. *See* Exhibit 2 at 2 ("The United Nations has not waived its immunity in the present case."); *id.* ("reaffirm[ing] that the United Nations continues to maintain its immunity and the immunity of its officials in connection with this matter"). The UN has requested that the United States advise the Court of its immunity and that of its officials and take steps to ensure that these immunities are protected. *See id.* ("request[ing] that the relevant United States authorities inform the Court that the United Nations maintains its immunity in respect [to this matter]"); *id.* ("further request[ing] that the relevant United States authorities take the necessary steps to ensure that the immunity of the United Nations and its officials is respected").

Accordingly, because the UN has not waived its immunity in this case, the UN, including MINUSTAH, enjoys absolute immunity from suit, and this action should be dismissed as against the UN for lack of subject matter jurisdiction.

B. Secretary-General Ban and Assistant Secretary-General Mulet Enjoy Immunity

The UN Charter, the General Convention and the Vienna Convention also provide immunity from legal process and suit for UN officials such as Secretary-General Ban and Assistant Secretary-General Mulet.

The UN Charter provides that "officials of the Organization shall … enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion [sic] of the organization." UN Charter, art. 105, § 2. In addition, Article V, Section 19 of the General Convention specifically provides that "the Secretary-General and all Assistant Secretaries-General shall be accorded … the privileges and immunities… accorded to diplomatic envoys, in accordance with international law." *Id.*, art. V, § 19.

In the United States, the privileges and immunities enjoyed by diplomats are governed by the Vienna Convention, which entered into force with respect to the United States in 1972. 23 U.S.T. 3227, TIAS No. 7502, 500 U.N.T.S. 95. Article 31 of the Vienna Convention provides that diplomatic agents "enjoy immunity from the civil and administrative jurisdiction" of the receiving State—here, the United States—except with respect to: (a) privately-owned real estate; (b) performance in a private capacity as an executor, administrator, heir or legatee; and (c) professional or commercial activities other than official functions. *See id.* at art. 31. As this Court has noted, the purpose of diplomatic immunity under the Vienna Convention is "to protect the interests of comity and diplomacy among nations ….'' *Devi v. Silva*, 861 F. Supp. 2d 135, 142-43 (S.D.N.Y. 2012). Federal courts, including the Second Circuit, repeatedly have recognized the immunity of United Nations officials pursuant to the General Convention and the Vienna Convention. *See, e.g.*, *Brzak*, 597 F.3d at 113 (noting that, under the Vienna Convention, "current diplomatic envoys enjoy absolute immunity from civil and criminal process").

Moreover, Article V, Section 18(a) of the General Convention provides that UN officials are "exempt from legal process in respect of words spoken or written and all acts performed by them in their official capacity ...." General Convention, art. V, § 18(a). Under this provision, both current and former UN officials, regardless of rank, enjoy immunity from suit for all acts performed in their official capacity. *See Van Aggelen v. United Nations,* 311 F. App'x 407, 409 (2d Cir. Feb. 20, 2009) (applying this immunity to a UN official who did not enjoy diplomatic immunity); *McGehee v. Albright,* 210 F. Supp. 2d 210, 218 n.7 (S.D.N.Y. 1999) (applying this immunity to then-Secretary-General Annan), *aff'd,* 208 F.3d 203 (2d Cir. 2000); *see also DeLuca v. United Nations Org.,* 841 F. Supp. 531, 534 (S.D.N.Y. 1994) (recognizing former high-level UN officials as entitled to immunity), *aff'd,* 41 F.3d 1502 (2d Cir. 1994); *Askir,* 933 F. Supp. at 371 (dismissing complaint against UN official for lack of subject matter jurisdiction because he was immune from suit under the General Convention).

Because none of the three exceptions outlined in the Vienna Convention is relevant in the instant case, and because the UN has expressly asserted the immunity of Secretary-General Ban and Assistant Secretary-General Mulet in this matter, Secretary-General Ban and Assistant Secretary-General Mulet enjoy immunity from suit, and this action should be dismissed as against them for lack of subject matter jurisdiction.

C. Because All Defendants Are Immune, Plaintiffs' Attempted Service Was Ineffective

Consistent with its absolute immunity, the UN, including MINUSTAH, is also immune from service of legal process. *See* General Convention, art. II, § 2 (the UN "shall enjoy immunity from every form of legal process"); Status of Forces Agreement, art. III, § 3 (stating that MINUSTAH "shall enjoy the privileges and immunities ... provided for in the [General] Convention," which include immunity "from any form of legal process"). In addition, the General Convention specifically provides that the "premises of the United Nations shall be inviolable." *Id.,* art. II, § 3. Moreover, the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("Headquarters Agreement"), June 26, 1947,61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Oct. 21, 1947), art. III, § 9(a), provides that "service of legal process ... may take place within the headquarters district only with the consent of and under conditions approved by the [UN] Secretary-General." And pursuant to the Headquarters Agreement, "the Secretary-General of the United Nations has not prescribed any conditions under which service by mail or facsimile would be allowed." Exhibit 2 at 2. Accordingly, plaintiffs' attempts to serve the UN, including MINUSTAH, in New York, and their attempts to serve MINUSTAH in Haiti, *see* Docket Nos. 5 and 8, were ineffective. Moreover, any attempt at an alternative method of service, including by publication, would likewise be ineffectual.

For similar reasons, plaintiffs' attempts to serve Secretary-General Ban and Assistant Secretary-General Mulet at UN headquarters, *see* Docket Nos. 7 and 9, were ineffective. *See* General Convention, art. II; Headquarters Agreement, art. III, § 9(a); Exhibit 2 at 2. Moreover, the General Convention specifically provides that "[t]he person of a diplomatic agent shall be inviolable," and that the "private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." General Convention, art. 29, 30; *see also* Vienna Convention, art. 22 ("The premises of the mission shall be inviolable."). Accordingly, plaintiffs' attempts to serve Secretary- General Ban and Assistant Secretary-General Mulet by delivering mail to, or leaving process at, their residences, *see* Docket Nos. 7

and 9, were ineffective. Plaintiffs have therefore failed to effect service on Secretary-General Ban and Assistant Secretary- General Mulet, in light of their diplomatic immunity, the inviolability of the UN headquarters district, and the inviolability of the premises of the UN.

* * * *

On July 7, 2014, the United States submitted a further letter in support of its statement of interest. Excerpts follow (with most footnotes omitted) from the letter, which is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

A. The Immunity of the UN and Its Officials Is Absolute and Unaffected by Any Alleged Breach of the General Convention or SOFA

Plaintiffs' argument that the UN's immunity from suit under the General Convention is conditioned on providing a mechanism to resolve Plaintiffs' tort claims is erroneous. Nothing in the General Convention, or in the Status of Forces Agreement between the UN and the Government of Haiti ("SOFA"), suggests that the UN's immunity is conditional. To the contrary, as reflected by the text and drafting history of the General Convention, and as confirmed by every court to have considered the issue, the UN's immunity is absolute.

The Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views on the General Convention are entitled to deference. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004). Such deference is particularly warranted where, as here, the Government's views are shared by the UN. *See … e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). Because the Government's interpretation is supported by the General Convention's text and drafting history, as well as the courts (*see infra*, Points A.2-3), the Government's views are reasonable and accordingly entitled to "great weight." *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366, 399 (2d Cir. 2004) ("The government's interpretation of Article 17 is faithful to the Warsaw Convention's text, negotiating history, purposes, and the judicial decisions of sister Convention signatories; as such, we ascribe 'great weight' to the government's views concerning the meaning of that provision.") (citation omitted); *see also Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 414 (S.D.N.Y. 2005) (when "faced with two opposing constructions," granting deference to Executive Branch's interpretation of a treaty which was consistent with language and history of the treaty), *aff'd*, 538 F.3d 124 (2d Cir. 2008). The Court should therefore conclude that the UN's immunity from suit bars this action.

1. The Text of the General Convention Requires That A Waiver of Immunity Must Be Express

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506 (2008). The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment [sic] of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN adopted shortly after the UN Charter, defines the UN's privileges and immunities, and specifically provides that "[t]he United Nations, its property and assets wherever located and by

whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has *expressly waived* its immunity." General Convention, art. II, § 2 (emphasis added). The SOFA similarly provides that MINUSTAH "shall enjoy the privileges and immunities . . . provided for in the [General Convention]." SOFA, art. III, § 3.

The Second Circuit and other courts have uniformly construed the General Convention to mean exactly what the text states: any waiver of the UN's immunity must be express. *See, e.g.*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010) ("The United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity.'") (citation omitted); *Emmanuel v. United States*, 253 F.3d 755, 756 n.2 (1st Cir. 2001) ("United Nations immunity is absolute unless expressly waived.")….

Plaintiffs' position that the UN's immunity under Section 2 is conditional on its providing appropriate modes of settling disputes of a private law character under Section 29 is contrary to the plain language of the General Convention, which provides that the UN "shall enjoy absolute immunity from every form of legal process *except* insofar as in any particular case it has expressly waived its immunity." General Convention § 2 (emphasis added). The word "except" is followed by a category of one: express waiver. The UN's obligation to provide for dispute resolution mechanisms for claims by third parties against it under Section 29(a) is not included in the category of the exceptions to immunity. Plaintiffs argue, in effect, that such an exception should exist, but the text of the General Convention makes clear that it does not.

Nor has there been an express waiver by the UN of its immunity in this case. An express waiver of immunity "requires a clear and unambiguous manifestation of the intent to waive." *United States v. Chalmers*, 05 Cr. 59 (DC), 2007 WL 624063, at *2 (S.D.N.Y. Feb. 26, 2007); *see also Baley v. United Nations*, No. 97-9495, 1998 WL 536759, at *1 (2d Cir. June 29, 1998) (affirming dismissal where the UN "informed this Court by letter that it has not waived its immunity from suit" and plaintiff "presented no evidence of such a waiver"); … *Klyumel v. United Nations*, No. 92 Civ. 4231 (PKL), 1992 WL 447314, at *1 n.1 (S.D.N.Y. Dec. 4, 1992) ("There is no allegation in the complaint of any express waiver in the instant case, and the [UN's] rejection of attempted service on two occasions would appear to 'manifest [ ] an intent not to waive immunity in this particular instance.'") (citation omitted). As the D.C. Circuit has observed, "[t]he requirement of an express waiver suggests that courts should be reluctant to find that an international organization has inadvertently waived immunity when the organization might be subjected to a class of suits which would interfere with its functions." *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983).

* * * *

2. The UN Has Not Expressly Waived, But Rather Has Expressly Asserted, Its Immunity in This Case

In this case, the UN has repeatedly asserted its immunity. *See* Exhibits 1 and 2 attached to the Government's March 7, 2014, submission (UN twice asserting its immunity in this case). Plaintiffs have not presented—and cannot present—any evidence to the contrary. Accordingly, the UN is entitled to absolute immunity from suit, and the Court lacks subject matter jurisdiction over this action. *See, e.g.*, *Baley*, 1998 WL 536759, at *1….

Any purported inadequacies in the claims resolution process referred to in Section 29 of the General Convention, or even the absence of such a process, fails to establish that the UN has expressly waived its immunity from suit. That the UN allegedly has not complied with this

obligation under the Convention does not amount to an express waiver of immunity. Indeed, as the Second Circuit has found, "crediting this argument would read the word 'expressly' out of the [General Convention]." *Brzak*, 597 F.3d at 112. In *Bisson*, for example, the plaintiff, a UN employee, filed suit against the UN for injuries she sustained during an attack on a UN facility in Baghdad. *See* 2007 WL 2154181, at *1. The plaintiff alleged that "the staff compensation system through which the plaintiff ha[d] been trudging for nearly four years did not provide for compensation for personal injury claims," and that "*there is absolutely no system whatsoever through which a third party tort victim may resolve a claim with the United Nations*." *Id.* at *9 n.21 (emphasis in original). Because the UN had allegedly failed to provide an "appropriate mode of settlement" for her tort claim in violation of Section 29 of the General Convention, the plaintiff asserted that the UN had waived its immunity. *Id.* at *9. The court disagreed, holding:

> [S]ection 29(a) of the [General] Convention does not contain any language affecting an express waiver under any circumstances. Even assuming *arguendo* that the UN and the WFP have failed to provide an adequate settlement mechanism for Bisson's claims, such a failure does not constitute the equivalent of an express waiver of immunity. An express waiver may not be inferred from conduct.

Id. The court further noted that the fact that the plaintiff was an employee of the UN—and thus could avail herself of the staff compensation system—was not material to the question of waiver. *See id.* at *9 n.22 (concluding that the plaintiff's "relationship to the defendants is irrelevant. Even if she were not an employee of the WFP or the UN, both organizations would still be immune from suit by her, and [any failure to comply with] § 29(a) still would not constitute an express waiver.").

Indeed, every court to have evaluated the UN's immunity, including the Second Circuit, has based its determination on the unequivocal text of Article 2 of the General Convention, which grants immunity to the UN, and not on the existence or adequacy of an alternative redress mechanism. *See, e.g.*, *Brzak*, 597 F.3d at 112 ("Although plaintiff[] argue[s] that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention]."); ...Therefore, the existence or adequacy of an alternative remedy is irrelevant to the Court's immunity analysis.

Nor do allegations of wrongdoing or improper motivation alter the UN's absolute immunity under the General Convention. *See Brzak*, 597 F.3d at 110, 112 (UN immune under the General Convention notwithstanding allegations of sex discrimination); *Boimah*, 664 F. Supp. at 70-71 (UN immune under the General Convention notwithstanding allegations of race discrimination); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 373 (S.D.N.Y. 1996) ("plaintiff's allegations of malfeasance do not serve to strip the United Nations or [the individual defendant] of their immunities afforded under the U.N. Convention"); *see also De Luca*, 841 F. Supp. at 535 (defendant retained immunity under the International Organizations Immunities Act ("IOIA") notwithstanding allegations of malfeasance); *Tuck*, 668 F.2d at 550 n.7 (IOIA immunity applied notwithstanding allegations of race discrimination); *Donald v. Orfila*, 788 F.2d 36, 37 (D.C. Cir. 1986) (allegations of improper motive did not strip individual of immunity under IOIA).[11]

[11] Because the General Convention provides the UN with absolute immunity, and the individual defendants with diplomatic immunity, Plaintiffs' argument that defendants' alleged malfeasance strips them of immunity fails as a

Quite simply, the UN's immunity is "absolute," absent an "express" waiver. *Brzak*, 597 F.3d at 112. Because the UN has not expressly waived its immunity in this case, it is immune from this lawsuit.

3. The General Convention's Drafting History Confirms That the UN's Immunity Is Not Contingent on the Existence or Adequacy of a Dispute Resolution Mechanism

Although the UN's absolute immunity is established by the plain meaning of the treaty, the drafting history confirms that the UN's immunity is not contingent on whether or how it settles disputes. Before the drafting history of the General Convention is addressed, it is important to note that the United States representative to the UN understood, from the date that the UN Charter was signed, that "[t]he United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the Organization. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat." Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945), *reprinted in* 13 Digest of Int'l Law 37 (1963), attached hereto as Exhibit A. Thus, the work of building on the privileges and immunities provisions of the UN Charter, including the statement that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment [sic] of its purposes[,]" Charter § 105(1), was undertaken with the understanding—at least as far as the United States was concerned—that the UN would be absolutely immune from the jurisdiction of all of its members.

* * * *

The clear and consistent intent of the drafters that any waiver be express is reflected in the drafters' repeated statements that only the Secretary-General can waive the immunity of UN officials. Pl. Ex. 19, art. 8; *see also* Pl. Ex. 2, art. 7 ("While it will clearly be necessary that all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of their official duties, ... the Secretary-General both can waive immunity and will in fact do so in every case where such a course is consistent with the interests of the United Nations."). The drafting history, therefore, does not indicate that the UN can implicitly waive its absolute immunity, or that its immunity is contingent on the existence or adequacy of dispute resolution mechanisms.

* * * *

matter of law. In any event, plaintiffs are incorrect that the General Convention is *lex specialis* such that the IOIA has no application to this case. *See* Pl. Memo at 36 n.9. First, Plaintiffs' contention that the General Convention conflicts with the IOIA is without any support, and rests on the flawed premise that immunity under the General Convention is conditioned on providing dispute resolution mechanisms. Because there is no conflict, the courts have considered the immunities of the UN and its officials under both the General Convention and the IOIA. *See, e.g.*, *Brzak*, 597 F.3d at 112-13 (holding that the UN is immune under both the General Convention and the IOIA). Second, even if Plaintiffs' theory of the General Convention were correct, such that it did not provide defendants in this case with immunity, the IOIA would still provide them with immunity. *See id.* The IOIA simply provides an additional set of immunities for the UN and its officials.

The drafting history of the General Convention thus does not support Plaintiffs' position that the UN cannot enjoy immunity unless it provides for a dispute resolution mechanism. If anything, the drafting history reflects a bargain between the UN and its member states in which, in exchange for Section 2, which establishes the UN's absolute immunity, the UN, in Section 29, agreed to provide for dispute resolution mechanisms for third-party claims. But the drafting history does not reflect any intent to make the UN's immunity in any particular case legally contingent on the UN's providing a forum for, or satisfying the claims of, third parties in that case. In any event, however, the drafting history could not overcome the fact that the final text of the General Convention, as adopted by the General Assembly, and as ratified by the United States Senate, does not include any such condition.

4. The Foreign Authorities Cited by Plaintiffs Do Not Support Their Contention That a Breach of the General Convention Waives the UN's Immunity From Suit

Plaintiffs and the putative *Amici Curiae* fail to cite any case in which a foreign court determined that the UN waived its immunity by purportedly breaching the General Convention.

In interpreting a treaty, "opinions of our sister signatories . . . are entitled to considerable weight." *Abbott v. Abbott*, 560 U.S. 1, 16 (2010). However, the cases cited by Plaintiffs are either inapposite or otherwise unsupportive of Plaintiffs' position:

Drago v. International Plant Genetic Resources Institute (Sup. Ct. of Cassation, (Feb. 19, 2007),), *see* Pl. Memo at 23 & Ex. 16, does not involve the UN, but rather was a lawsuit against private corporation.

UNESCO v. Boulouis, Cour d'Appel, Paris (Fr.), Jun. 19, 1998, *see* Pl. Memo at 22 & Ex. 14, does not analyze the UN's immunities under the General Convention. There, the French Court of Appeals examined a contract between a UN agency and a private party that contained an arbitration clause, and evaluated the UN agency's immunity pursuant to Article 12 of the France-UNESCO Agreement of July 2, 1954.

Human Rights and the Immunities of Foreign States and International Organizations, in Hierarchy in International Law: The Place of Human Rights 71, Pl. Memo at 23 & Ex. 15 (in turn citing *Stavrinou v. United Nations* (1992) CLR 992, ILDC 929 (CU 1992) (Sup. Ct. Cyprus 17 July 1992), actually recognizes the UN's immunity. According to this article, the Cypriot court recognized the UN's immunity pursuant to the Convention and thereafter, apparently in dicta, "pointed out" that the UN's internal dispute resolution provided local personnel a remedy).

The Privileges and Immunities of International Organizations in Domestic Courts 332 (August Reinisch ed., 2013), which states that in *Maida v. Admin. for Int'l Assistance* (Italian Court of Cassation (United Chambers) May 27, 1955) , 23 ILR 510 (1955), the court found that the UN agency was not immune from suit because the personnel dispute process was "unlawful." Pl. Ex. 17 at 160. However, *Maida* was decided under an agreement between the International Refugee Organization (I.R.O.) and Italy, which referenced Italian law. 23 ILR 510 (attached hereto as Exhibit C). The reported decision makes no mention whatsoever of the General Convention (*see id.* at 510-15), which is not surprising, given that the I.R.O.—the precursor to the UN High Commission for Refugees—was a specialized agency of the UN, and thus its immunities were not governed by the General Convention. *See* Constitution of the International Refugee Organization art. 3 (providing for a future agreement between the I.R.O. and the UN to determine their relationship), *available at* *http://avalon.law.yale.edu/20th_century/decad053.asp#1*.

The putative *Amici Curiae* briefs likewise fail to cite any case in which a court has found that the UN's purported failure to provide alternative remedies acted as an "express[]" waiver of the UN's immunities under the General Convention. *See* Docket No. 31-1, Memorandum of Law of *Amici Curiae* International Law Scholars and Practitioners in Support of Plaintiffs' Opposition to the Government's Statement of Interest, dated May 15, 2014, at 4-5 (arguing that "the lack of an alternative and effective remedy for private law claims has been cited as grounds for courts to decline to recognize international organizations' immunity from suit," but acknowledging that such decisions "did not directly address the question of the UN's protections"); *see also* Docket No. 32-1, Memorandum of Law of *Amici Curiae* European Law Scholars and Practitioners in Support of Plaintiffs' Opposition to the Government's Statement of Interest, dated May 15, 2014("Eur. Amici Br."), at 2-5 (citing cases against a private corporation, Germany, the European Union, the African Development Bank, the Arab League, and the Permanent Court of Arbitration).

Instead, the European Scholars *Amici* point to a series of cases in which foreign courts invalidated local laws implementing UN sanctions resolutions; however, those courts also determined that they lacked jurisdiction to review the UN resolutions themselves. *See Kadi v. Council & Comm'n*, 2008 E.C.R. I-06351, ¶¶ 287, 312 (European Court of Justice invalidated a regulation passed by the Council of the European Union to give effect to a UN resolution, but also found that it had no power to review the lawfulness of resolution adopted by the UN Security Council); *Nada v. Switzerland*, 2012 Eur. Ct. H.R. 1691, ¶ 212 (European Court of Human Rights found that it had jurisdiction to review the Swiss regulation implementing a UN resolution, but did not have jurisdiction to review the UN resolution itself); *Al-Dulimi & Mont. Mgmt. Inc. v. Switzerland*, 2013 Eur. Ct. H.R. 1173, ¶¶ 114, 134 (European Court of Human Rights invalidated a Swiss regulation passed in response to a UN resolution but did not opine on the UN resolution itself, despite noting that the UN resolution failed to create an alternative dispute resolution for individuals added to sanctions list). In any event, none of these cases holds that the UN's alleged failure to provide for a dispute resolution mechanism deprives it of immunity under Section 2.

Therefore, while it is true, as the European Scholars *Amici* argue, that "encouraging respect for human rights is one of the purposes of the UN," Eur. Amici Br. at 11, the authorities cited by the *Amici Curiae* and Plaintiffs do not support their contention that the UN's immunity is conditional upon either upholding human rights or providing for a dispute resolution mechanism, nor does the text of the General Convention, the drafting history of the General Convention, or the decision of any United States court to have considered the issue support Plaintiffs' argument. The UN's immunity is simply not contingent upon any other section of the General Convention.

B. Plaintiffs May Not Assert Breach Claims Against the UN, Including MINUSTAH

Even assuming, *arguendo*, that the UN did breach the General Convention or the SOFA by failing to provide Plaintiffs with a method for resolving their tort claims, the obligations under the General Convention and the SOFA are owed by the UN to the other parties to those agreements, not to the Plaintiffs. It is those parties that have a right to invoke an alleged breach and to determine an appropriate remedy from among those legally available, not the Plaintiffs. No party to these treaties has alleged that the UN has breached either the General Convention or the SOFA, and Plaintiffs may not independently assert an alleged breach and determine their own preferred remedy.

Because "a treaty is an agreement between states forged in the diplomatic realm and similarly reliant on diplomacy (or coercion) for enforcement," courts have "recognize[d] that international treaties establish rights and obligations between States-parties and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty's existence." *Mora v. New York*, 524 F.3d 183, 200 (2d Cir. 2008). As the Supreme Court explained:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Edye v. Robertson, 112 U.S. 580, 598 (1884), *quoted in Mora*, 524 F.3d at 200. Because "the nation's powers over foreign affairs have been delegated by the Constitution to the Executive and Legislative branches of government," the Supreme Court "has specifically instructed courts to exercise 'great caution' when considering private remedies for international law violations because of the risk of 'impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.'" *Mora*, 524 F.3d at 200 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004)).

Plaintiffs' arguments in this action about the alleged lack of a dispute resolution mechanism are derivative of potential claims of the parties to the General Convention. "[E]ven where a treaty provides certain benefits for nationals of a particular state, . . . it is traditionally held that any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states." *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (finding the fact that no states party argued that the United States violated the United Nations Charter was "fatal" to appellant's claim of violation of the treaty; "the failure of Bolivia or Argentina to object to [the U.S. actions] would seem to preclude any violation of international law").

Here, both the General Convention and the SOFA provide methods by which the member states or Haiti, respectively, may dispute the UN's interpretation of the UN's obligations under these agreements. The General Convention and the SOFA provide that any dispute between a state party and the UN shall be submitted to the International Court of Justice, *see* General Convention, art. VIII, § 30; SOFA art. VIII, § 58; and the SOFA provides that any dispute between MINUTSAH and the Government of Haiti shall be submitted to arbitration, *see* SOFA art. VIII, § 57. Accordingly, the treaties provide that the Government of Haiti – not private parties – can seek redress for any purported breach of the General Convention or of the SOFA. But because Plaintiffs' claims are derivative of the Government of Haiti's, rather than arising out of Plaintiffs' own rights, Plaintiffs may not independently assert arguments based on the provisions of the General Convention or the SOFA. *See Lujan*, 510 F.2d at 67.

C. Plaintiffs' Constitutional Arguments Are Unavailing

Plaintiffs' argument that the UN's immunity from legal process and suit deprives United States citizens of their constitutional right of access to the courts has already been considered and rejected by the Second Circuit.

In *Brzak*, the plaintiffs, one of whom was a United States citizen, argued that granting the UN absolute immunity would violate their procedural due process right to litigate the merits of their case and their substantive due process right to access the courts. *See* 597 F.3d at 113. The

Second Circuit disagreed, noting: "The short—and conclusive—answer is that legislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law." *Id.* (citing Act for the Punishment of Certain Crimes Against the United States, 25, 1 Stat. 112, 117-18 (1790) (acknowledging diplomatic immunity); *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812) (acknowledging foreign sovereign immunity); *Tenney v. Brandhove*, 341 U.S. 367, 376-77 (1951) (acknowledging legislative immunity); *Barr v. Matteo*, 360 U.S. 564, 573 (1959) (acknowledging executive official immunity); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (acknowledging judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (acknowledging prosecutorial immunity) (further citations omitted)). The court concluded that "[i]f appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist," and accordingly upheld the UN immunity from suit. *Brazk*, 597 F.3d at 113. Even before the Second Circuit issued the *Brzak* decision, district courts routinely found that the UN was immune from suits brought by United States citizens. *See*, *e.g.*, *De Luca*, 841 F. Supp. at 533 (acknowledging UN's immunity where plaintiff was a United States citizen); *Bisson*, 2007 WL 2154181, at *2 (same). Plaintiffs' access to the courts argument is therefore refuted by the case law.

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Cross References

Visa determinations for proposed representatives to the UN, **Chapter 1.C.4.b.**
Alien Tort Claims Act and Torture Victim Protection Act, **Chapter 5.B.**
ILC's work on immunity, **Chapter 7.D.2.**
McKesson v. Iran, **Chapter 8.B.2.**
Diplomatic relations, **Chapter 9.A.**

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*.

* * * *

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. …

* * * *

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.

* * * *

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.

* * * *

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.

* * * *

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.

* * * *

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

* * * *

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.

* * * *

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. …

* * * *

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). …

* * * *

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.

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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."

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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).

* * * *

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.

* * * *

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.

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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)

* * * *

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*.

* * * *

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*.

* * * *

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.

* * * *

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.

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* * * *

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*.

* * * *

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.

* * * *

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*.

* * * *

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.

* * * *

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.

* * * *

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.

* * * *

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.

* * * *

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.

* * * *

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.

* * * *

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.

* * * *

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.

* * * *

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). …

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… 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.**

CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. Maritime Boundary Treaty with Micronesia

On August 1, 2014, the United States and the Federated States of Micronesia ("FSM") signed a treaty formally defining their maritime boundary, located between the Caroline Islands of the FSM and the U.S. territory of Guam. The treaty was signed in Palau during the Pacific Islands Forum leaders' meeting. This treaty applies principles of jurisdiction and limits under international law as reflected in the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"). The maritime boundary treaty, with appropriate technical adjustments, formalizes a boundary that had been informally adhered to by the two countries previously on the basis of the principle of equidistance, such that the line is equal in distance from each country. The boundary is 828 kilometers (447 nautical miles) in length. The treaty will enter into force upon the exchange of diplomatic notes indicating that each party has completed internal procedures necessary for entry into force, which for the United States requires ratification subject to the advice and consent of the U.S. Senate. The treaty is available at *www.state.gov/s/l/c8183.htm*.

2. Continental Shelf

In November 2014, the U.S. Mission to the UN delivered two separate notes to the UN Secretariat regarding earlier submissions made to the Commission on the Limits of the Continental Shelf ("CLCS") by Canada and the Bahamas in December 2013 and April 2014, respectively. Excerpts follow, first, from the U.S. note relating to Canada's submission, and second, from the U.S. note relating to the Bahamas' submission.

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The United Nations Convention on the Law of the Sea, including its Annex II, and the Rules of Procedure of the Commission, in particular Annex I thereto, provide that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.

The United States has taken note of the overlap between areas of continental shelf extending beyond 200 nautical miles (nm) from Canada and areas of continental shelf extending beyond 200 nm from United States territory in the Atlantic Ocean. The United States further takes note of the statement in Section 7 of the Executive Summary of the partial submission of Canada stating that "During the preparation of this submission, regular consultations between Canada and the United States of America revealed overlaps in their respective continental shelves . . ." and that "Canada has been advised by the United States that it does not object to the consideration of Canada's submission…."

With reference to the Executive Summary of the partial submission of Canada, particularly the aforementioned statement in its Section 7, the Government of the United States confirms that it does not object to Canada's request that the Commission consider the documentation in its partial submission regarding its continental shelf in the Atlantic Ocean and make its recommendation on the basis of this documentation, to the extent that such recommendations are without prejudice to the establishment of the outer limits of its continental shelf by the United States, or to any final delimitation of the continental shelf concluded subsequently in these areas between Canada and the United States.

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The United Nations Convention on the Law of the Sea, including its Annex II, and the Rules of Procedure of the Commission, in particular Annex I thereto, provide that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. In particular, Annex I to the Commission's Rules of Procedure recognizes, and the United States concurs, "that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States."

The United States takes note of paragraph 2.2 of the Executive Summary of the Submission, which states in part that "The Bahamas confirms that the area of continental shelf that forms the basis of the Submission is not the subject of any dispute with any other State." Contrary to this statement, the area described in the Submission is the subject of a maritime dispute with the United States.

The United States notes further that paragraph 2.3 of the Executive Summary "notes that the establishment of agreed maritime boundaries between The Bahamas and the United States of America is presently subject to negotiation and final delimitation" and that the "Submission is made without prejudice to the delimitation of outstanding maritime boundaries between The Bahamas and the United States of America." Notwithstanding the intention of The Bahamas, the United States considers that consideration of the Submission by the Commission would be

prejudicial with respect to the rights of the United States in the area in question and the delimitation of the maritime boundary between the United States and The Bahamas.

Accordingly, the United States requests the Commission not to consider the Submission of The Bahamas, in accordance with Article 5(a) of Annex I to its Rules of Procedure, which states the following: "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute." At this time, the United States is unable to consent to the consideration by the Commission of the Submission of the Commonwealth of The Bahamas. The United States intends to keep this matter under active consideration in connection with ongoing efforts to delimit the maritime boundary between the United States and The Bahamas.

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3. South China Sea and East China Sea

On February 5, 2014, Daniel R. Russel, Assistant Secretary of State for the Bureau of East Asian and Pacific Affairs, testified before the Subcommittee on Asia and the Pacific of the Committee on Foreign Affairs of the U.S. House of Representatives. Excerpts from Assistant Secretary Russel's testimony relating to the South China Sea appear below. His full testimony is available at *www.state.gov/p/eap/rls/rm/2014/02/221293.htm*.

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The Members of this Subcommittee know well the importance of the Asia-Pacific region to American interests. …

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Since the end of the Second World War, a maritime regime based on international law that promotes freedom of navigation and lawful uses of the sea has facilitated Asia's impressive economic growth. … As a maritime nation with global trading networks, the United States has a national interest in freedom of the seas and in unimpeded lawful commerce. From President Thomas Jefferson's actions against the Barbary pirates to President Reagan's decision that the United States will abide by the Law of the Sea Convention's provisions on navigation and other traditional uses of the ocean, American foreign policy has long defended the freedom of the seas. And as we consistently state, we have a national interest in the maintenance of peace and stability; respect for international law; unimpeded lawful commerce; and freedom of navigation and overflight in the East China and South China Seas.

For all these reasons, the tensions arising from maritime and territorial disputes in the Asia-Pacific are of deep concern to us and to our allies. Both the South China and East China

Seas are vital thoroughfares for global commerce and energy. … A simple miscalculation or incident could touch off an escalatory cycle. …

Accordingly, we have consistently emphasized in our diplomacy in the region as well as in our public messaging the importance of exercising restraint, maintaining open channels of dialogue, lowering rhetoric, behaving safely and responsibly in the sky and at sea, and peacefully resolving territorial and maritime disputes in accordance with international law. We are working to help put in place diplomatic and other structures to lower tensions and manage these disputes peacefully. We have sought to prevent provocative or unilateral actions that disrupt the status quo or jeopardize peace and security. When such actions have occurred, we have spoken out clearly and, where appropriate, taken action. In an effort to build consensus and capabilities in support of these principles, the administration has invested considerably in the development of regional institutions and bodies such as the ASEAN Regional Forum, the ASEAN Defense Ministers Meeting Plus, the East Asia Summit, and the Expanded ASEAN Maritime Forum. These forums, as they continue to develop, play an important role in reinforcing international law and practice and building practical cooperation among member states.

In the South China Sea, we continue to support efforts by ASEAN and China to develop an effective Code of Conduct. Agreement on a Code of Conduct is long overdue and the negotiating process should be accelerated. This is something that China and ASEAN committed to back in 2002 when they adopted their Declaration on the Conduct of Parties in the South China Sea. An effective Code of Conduct would promote a rules-based framework for managing and regulating the behavior of the relevant countries in the South China Sea. A key part of that framework, which we and many others believe should be adopted quickly, is inclusion of mechanisms such as hotlines and emergency procedures for preventing incidents in sensitive areas and managing them when they do occur in ways that prevent disputes from escalating.

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China's announcement of an Air Defense Identification Zone (ADIZ) over the East China Sea in November was a provocative act and a serious step in the wrong direction. The Senkakus are under the administration of Japan and unilateral attempts to change the status quo raise tensions and do nothing under international law to strengthen territorial claims. The United States neither recognizes nor accepts China's declared East China Sea ADIZ and has no intention of changing how we conduct operations in the region. China should not attempt to implement the ADIZ and should refrain from taking similar actions elsewhere in the region.

Mr. Chairman, we have a deep and long-standing stake in the maintenance of prosperity and stability in the Asia-Pacific and an equally deep and abiding long-term interest in the continuance of freedom of the seas based on the rule of law—one that guarantees, among other things, freedom of navigation and overflight and other internationally lawful uses of the sea related to those freedoms. International law makes clear the legal basis on which states can legitimately assert their rights in the maritime domain or exploit marine resources. By promoting order in the seas, international law is instrumental in safeguarding the rights and freedoms of all countries regardless of size or military strength.

I think it is imperative that we be clear about what we mean when the United States says that we take no position on competing claims to sovereignty over disputed land features in the East China and South China Seas. First of all, we do take a strong position with regard to behavior in connection with any claims: we firmly oppose the use of intimidation, coercion or force to assert a territorial claim. Second, we do take a strong position that maritime claims must accord with customary international law. This means that all maritime claims must be derived from land features and otherwise comport with the international law of the sea. So while we are not siding with one claimant against another, we certainly believe that claims in the South China Sea that are not derived from land features are fundamentally flawed. In support of these principles and in keeping with the longstanding U.S. Freedom of Navigation Program, the United States continues to oppose claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations.

As I just noted, we care deeply about the way countries behave in asserting their claims or managing their disputes. We seek to ensure that territorial and maritime disputes are dealt with peacefully, diplomatically and in accordance with international law. Of course this means making sure that shots aren't fired; but more broadly it means ensuring that these disputes are managed without intimidation, coercion, or force. We have repeatedly made clear that freedom of navigation is reflected in international law, not something to be granted by big states to others. President Obama and Secretary Kerry have made these points forcefully and clearly in their interactions with regional leaders, and I—along with my colleagues in the State Department, Defense Department, the National Security Council and other agencies—have done likewise.

We are also candid with all the claimants when we have concerns regarding their claims or the ways that they pursue them. Deputy Secretary Burns and I were in Beijing earlier this month to hold regular consultations with the Chinese government on Asia-Pacific issues, and we held extensive discussions regarding our concerns. These include continued restrictions on access to Scarborough Reef; pressure on the long-standing Philippine presence at the Second Thomas Shoal; putting hydrocarbon blocks up for bid in an area close to another country's mainland and far away even from the islands that China is claiming; announcing administrative and even military districts in contested areas in the South China Sea; an unprecedented spike in risky activity by China's maritime agencies near the Senkaku Islands; the sudden, uncoordinated and unilateral imposition of regulations over contested airspace in the case of the East China Sea Air Defense Identification Zone; and the recent updating of fishing regulations covering disputed areas in the South China Sea. These actions have raised tensions in the region and concerns about China's objectives in both the South China and the East China Seas.

There is a growing concern that this pattern of behavior in the South China Sea reflects an incremental effort by China to assert control over the area contained in the so-called "nine-dash line," despite the objections of its neighbors and despite the lack of any explanation or apparent basis under international law regarding the scope of the claim itself. China's lack of clarity with regard to its South China Sea claims has created uncertainty, insecurity and instability in the region. It limits the prospect for achieving a mutually agreeable resolution or equitable joint development arrangements among the claimants. I want to reinforce the point that under international law, maritime claims in the South China Sea must be derived from land features. Any use of the "nine dash line" by China to claim maritime rights not based on claimed land features would be inconsistent with international law. The international community would

welcome China to clarify or adjust its nine-dash line claim to bring it in accordance with the international law of the sea.

We support serious and sustained diplomacy between the claimants to address overlapping claims in a peaceful, non-coercive way. This can and should include bilateral as well as multilateral diplomatic dialogue among the claimants. But at the same time we fully support the right of claimants to exercise rights they may have to avail themselves of peaceful dispute settlement mechanisms. The Philippines chose to exercise such a right last year with the filing of an arbitration case under the Law of the Sea Convention.

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In the meantime, a strong diplomatic and military presence by the United States, including by strengthening and modernizing our alliances and continuing to build robust strategic partnerships, remains essential to maintain regional stability. This includes our efforts to promote best practices and good cooperation on all aspects of maritime security and bolster maritime domain awareness and our capacity building programs in Southeast Asia. The Administration has also consistently made clear our desire to build a strong and cooperative relationship with China to advance peace and prosperity in the Asia-Pacific, just as we consistently have encouraged all countries in the region to pursue positive relations with China. And this includes working with all countries in the region to strengthen regional institutions like ASEAN and the East Asia Summit as venues where countries can engage in clear dialogue with all involved about principles, values and interests at stake, while developing cooperative activities—like the Expanded ASEAN Seafarers Training initiative we recently launched—to build trust and mechanisms to reduce the chances of incidents.

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On February 14, 2014, Secretary Kerry summarized meetings he held in Beijing with Chinese leaders, including President Xi Jinping and the premier, the state councilor, and the foreign minister concerning multiple subject of concern between the United States and China. His summary included references to discussions about the South China Sea, excerpted below. Secretary Kerry's comments to the press in Beijing on February 14, 2014 are available in full at *www.state.gov/secretary/remarks/2014/02/221658.htm*.

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I also expressed our concern about the need to try to establish a calmer, more rule-of-law-based, less confrontational regime with respect to the South China Sea, and the issues with respect to both the South China Sea and the East China Sea. And this includes the question of how an ADIZ might or might not come about. We certainly expressed the view that it's important for us to cooperate on these kinds of things, to have notice, to work through these things, and to try to do them in a way that can achieve a common understanding of the direction that we're moving

in, and hopefully a common acceptance of the steps that are or are not being taken. Certainly, with respect to the South China Sea, it's important to resolve these differences in a peaceful, non-confrontational way that honors the law of the sea and honors the rule of law itself. And we encourage steps by everybody—not just China, by all parties—to avoid any kind of provocation or confrontation and to work through the legal tools available.

* * * *

…[W]e did discuss this specific road ahead with respect to resolving these claims in the South China Sea. And the Chinese have made clear that they believe they need to be resolved in a peaceful and legal manner, and that they need to be resolved according to international law and that process.

And I think they believe they have a strong claim, a claim based on history and based on fact. They're prepared to submit it, and—but I think they complained about some of the provocations that they feel others are engaged in. And that is why I've said all parties need to refrain from that. Particularly with respect to some of the islands and shoals, they feel there have been very specific actions taken in order to sort of push the issue of sovereignty on the sea itself or by creating some construction or other kinds of things.

So the bottom line is there was a very specific statement with respect to the importance of rule of law in resolving this and the importance of legal standards and precedent and history being taken into account to appropriately make judgments about it.

With respect to the ADIZ, we have, indeed, made clear our feelings about any sort of unilateral announcements. And I reiterated that again today. And I think hopefully that whatever falls in the future will be done in an open, transparent, accountable way that is inclusive of those who may or may not be concerned about that kind of action. But we've made it very clear that a unilateral, unannounced, unprocessed initiative like that can be very challenging to certain people in the region and therefore to regional stability. And we urge our friends in China to adhere to the highest standards of notice, engagement, involvement, information sharing, in order to reduce any possibilities of misinterpretation in those kinds of things.

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On February 17, 2014, Secretary Kerry touched on U.S. policy with respect to the South China Sea during remarks he made at the 4th Joint Ministerial Commission between Indonesia and the United States in Jakarta, Indonesia. Excerpts from the Secretary's remarks appear below. The remarks are available at *www.state.gov/secretary/remarks/2014/02/221711.htm*.

* * * *

…I was in Beijing just two days ago, where I discussed the United States growing concerns over a pattern of behavior in which maritime claims are being asserted in the East China and South China Sea, from restrictions on access to the Scarborough Shoals, the Scarborough Reef, to

China's establishment of an ADIZ in the East China Sea, to the issuance of revised regulations restricting fishing in disputed areas of the South China Sea.

We believe very strongly that international law applies to all countries, big countries, small countries. And …even though the United States has not ratified the Law of the Sea [Convention], we live by the Law of the Sea. We are pledged to stick with the rules of the Law of the Sea. And we think it's important for all countries to do that. It is imperative for all claimants to any location in these seas to base their maritime claims on the definitions of international law and to be able to resolve them peacefully within that framework.

The United States is very grateful for the leadership and the role that Indonesia has played in advancing China-ASEAN negotiations on a code of conduct in the South China Sea. It's not an exaggeration to say that the region's future stability will depend, in part, on the success and the timeliness of the effort to produce a code of conduct. The longer the process takes, the longer tensions will simmer, and the greater the chance of a miscalculation by somebody that could trigger a conflict. That is in nobody's interest. So I commend Foreign Minister Natalegawa for his focus on this issue. And I urge all of the parties to follow his lead and accelerate the negotiations.

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On March 30, 2014, the Republic of the Philippines submitted a memorial in its arbitration case concerning competing claims in the South China Sea. The U.S. Department of State issued a press statement on March 30, available at *www.state.gov/r/pa/prs/ps/2014/03/224150.htm*, in which it reaffirmed U.S. support for the use of peaceful means of resolving maritime disputes such as the one that is the subject of the arbitration initiated by the Philippines. The press statement also includes the following:

> All countries should respect the right of any States Party, including the Republic of the Philippines, to avail themselves of the dispute resolution mechanisms provided for under the Law of the Sea Convention. We hope that this case serves to provide greater legal certainty and compliance with the international law of the sea.

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The U.S. Department of State issued a press statement on May 7, 2014 regarding China's decision to introduce an oil rig and additional government vessels into waters disputed with Vietnam. The press statement is available at *www.state.gov/r/pa/prs/ps/2014/05/225750.htm* and includes the following:

> China's decision to introduce an oil rig accompanied by numerous government vessels for the first time in waters disputed with Vietnam is provocative and raises tensions. This unilateral action appears to be part of a broader pattern of

> Chinese behavior to advance its claims over disputed territory in a manner that undermines peace and stability in the region.
>
> We are also very concerned about dangerous conduct and intimidation by vessels operating in this area. We call on all parties to conduct themselves in a safe and professional manner, preserve freedom of navigation, exercise restraint, and address competing sovereignty claims peacefully and in accordance with international law.
>
> Sovereignty over the Paracel Islands is disputed; this incident is occurring in waters claimed by Vietnam and China near those islands. These events highlight the need for claimants to clarify their claims in accordance with international law, and to reach agreement on appropriate behavior and activities in disputed areas.

* * * *

On November 4, 2014, Secretary Kerry delivered a speech at the Johns Hopkins School of Advanced International Studies on U.S.-China Relations. His remarks are available at *www.state.gov/secretary/remarks/2014/11/233705.htm*. The following excerpt from Secretary Kerry's speech relates to the South and East China Seas:

> And when we talk about managing our differences, that is not code for agree to disagree. For example, we do not simply agree to disagree when it comes to maritime security, especially in the South and East China Seas. The United States is not a claimant, and we do not take a position on the various territorial claims of others. But we take a strong position on how those claims are pursued and how those disputes are going to be resolved. So we are deeply concerned about mounting tension in the South China Sea and we consistently urge all the parties to pursue claims in accordance with international law, to exercise self-restraint, to peacefully resolve disputes, and to make rapid, meaningful progress to complete a code of conduct that will help reduce the potential for conflict in the years to come. And the United States will work, without getting involved in the merits of the claim, on helping that process to be effectuated, because doing so brings greater stability, brings more opportunity for cooperation in other areas.

* * * *

On December 5, 2014, the U.S. Department of State published an analysis of China's maritime claims in the South China Sea, which is available at *www.state.gov/e/oes/ocns/opa/c16065.htm*. The report is one of a series issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State which examines coastal State's maritime claims and/or boundaries to provide the views of the United States

> Government regarding the consistency of such claims with international law. The excerpts from the report reproduced below (with footnotes omitted) explain more precisely the potential interpretations of China's claims analyzed in the study, and the legal basis for those interpretations.

* * * *

This study analyzes the maritime claims of the People's Republic of China in the South China Sea, specifically its "dashed-line" claim encircling islands and waters of the South China Sea.

In May 2009, the Chinese Government communicated two Notes Verbales to the UN Secretary General requesting that they be circulated to all UN Member States. The 2009 Notes, which contained China's objections to the submissions by Vietnam and Malaysia (jointly) and Vietnam (individually) to the Commission on the Limits of the Continental Shelf, stated the following:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.

The map referred to in China's Notes, which is reproduced as Map 1 to this study, depicted nine line segments (dashes) encircling waters, islands, and other features of the South China Sea. Vietnam, Indonesia, and the Philippines subsequently objected to the contents of China's 2009 Notes, including by asserting that China's claims reflected in the dashed-line map are without basis under the international law of the sea. In 2011, China requested that another Note Verbale be communicated to UN Member States, which reiterated the first sentence excerpted above, and added that "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence."

China has not clarified through legislation, proclamation, or other official statements the legal basis or nature of its claim associated with the dashed-line map. Accordingly, this *Limits in the Seas* study examines several possible interpretations of the dashed-line claim and the extent to which those interpretations are consistent with the international law of the sea.

* * * *

With respect to maritime claims, China's position is unclear. Therefore, this study examines below three possible interpretations of the dashed-line claim and the extent to which those interpretations are consistent with the international law of the sea. These alternative interpretations are identified with reference to primary sources, notably the official statements and acts of the People's Republic of China.

1. Dashed Line as a Claim to Islands

* * * *

Under this possible interpretation, the dashed line indicates only the islands over which China claims sovereignty. It is not unusual to draw lines at sea on a map as an efficient and practical means to identify a group of islands. If the map depicts only China's land claims, then China's maritime claims, under this interpretation, are those provided for in the LOS Convention.

* * * *

Setting aside issues related to competing sovereignty claims over land features and unresolved maritime boundaries in the South China Sea, if the above interpretation of China's dashed-line claim is accurate, then the maritime claims provided for in China's domestic laws could generally be interpreted to be consistent with the international law of the sea, as follows:

1. *China's mainland coast and Hainan Island* are entitled to a territorial sea, contiguous zone, EEZ, and continental shelf, including in areas that project into the South China Sea.
2. *Other islands*, as defined by Article 121(1) of the LOS Convention, claimed by China in the South China Sea would likewise be entitled to the above-mentioned maritime zones. Under Article 121(3) islands that constitute "rocks which cannot sustain human habitation or economic life of their own" would not be entitled to an EEZ and a continental shelf.
3. *Submerged features*, namely those that are not above water at high tide, are not subject to sovereignty claims and generate no maritime zones of their own. They are subject to the regime of the maritime zone in which they are found.
4. *Artificial islands, installations, and structures* likewise do not generate any territorial sea or other maritime zones.

This assessment is subject to several important caveats.

First, China's sovereignty claims over islands in the South China Sea are disputed. The Paracel Islands are also claimed by Vietnam and Taiwan; Scarborough Reef is also claimed by the Philippines and Taiwan; and some or all of the Spratly Islands are also claimed by Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. Because China's land claims are disputed, its maritime claims described above that are based on those land claims are likewise disputed.

Second, China has not yet clarified its maritime claims related to certain geographic features in the South China Sea. For instance, China has not clarified which features in the South China Sea it considers to be "islands" (or, alternatively, submerged features) and also which, if any, "islands" it considers to be "rocks" that are not entitled to an EEZ or a continental shelf under paragraph 3 of Article 121 of the LOS Convention. With respect to Scarborough Reef and certain features in the Spratly Islands, these issues are the subject of arbitration proceedings between the Philippines and China under Annex VII of the LOS Convention.

Third, Vietnam, the Philippines, Malaysia, Indonesia, and Brunei have maritime zones that extend from their mainland shores into the South China Sea. Assuming for the sake of argument that China has sovereignty over all the disputed islands in the South China Sea,

maritime zones generated by South China Sea islands would overlap with those generated by the opposing coastlines of the aforementioned States.

2. Dashed Line as a National Boundary

* * * *

Under this possible interpretation, the dashed line that appears on Chinese maps is intended to indicate a national boundary between China and neighboring States.

* * * *

Articles 74 and 83 of the LOS Convention provide with respect to the EEZ and continental shelf that boundary delimitation "shall be effected by agreement on the basis of international law …in order to achieve an equitable solution." Because maritime boundaries under international law are created by agreement (or judicial decision) between neighboring States, one country may not unilaterally establish a maritime boundary with another country. Assuming for the sake of argument that China has sovereignty over all the disputed islands, the maritime boundaries delimiting overlapping zones would need to be negotiated with the States with opposing coastlines—Vietnam, the Philippines, Malaysia, Indonesia, and Brunei. The dashes also lack other important hallmarks of a maritime boundary, such as a published list of geographic coordinates and a continuous, unbroken line that separates the maritime space of two countries.

To the extent the dashed line indicates China's unilateral position on the proper location of a maritime boundary with its neighbors, such a position would run counter to State practice and international jurisprudence on maritime boundary delimitation. In determining the position of maritime boundaries, States and international courts and tribunals typically accord very small islands far from a mainland coast like those in the South China Sea equal or less weight than opposing coastlines that are long and continuous. (Map 4 above shows selected locations where the dashes are considerably closer to the coasts of other States than to the South China Sea islands claimed by China.)

If the dashed line is intended to depict a unilateral maritime boundary claim, this interpretation also does not address the related question of what kind of rights or jurisdiction China is asserting for itself within the line. The dashed line, to be consistent with international law, cannot represent a limit on China's territorial sea (and, therefore, its sovereignty), as the dashes are located beyond the 12-nm maximum limit of the territorial sea of Chinese-claimed land features. Moreover, dashes 2, 3, and 8 are not only relatively close to the mainland shores of other States, all or part of those dashes are also beyond 200 nm from any Chinese-claimed land feature. The dashed line therefore cannot represent the seaward limit of China's EEZ consistent with Article 57 of the LOS Convention, which states that the breadth of the EEZ "shall not extend beyond 200 nautical miles" from coastal baselines.

3. Dashed Line as a Historic Claim

* * * *

Under this possible interpretation, the dashed line that appears on Chinese maps is intended to indicate a so-called "historic" claim. A historic claim might be one of sovereignty over the maritime space ("historic waters" or "historic title") or, alternatively, some lesser set of rights ("historic rights") to the maritime space.

* * * *

The assessment below examines whether there is a basis under international law for a Chinese claim to historic waters or historic rights to the waters within the dashed line.

Assessment Part 1 – Has China Made a Historic Claim?

As a threshold matter, as the preceding discussion suggests, China has not actually made a cognizable claim to either "historic waters" or "historic rights" to the waters of the South China Sea within the dashed line. A State making a historic claim must give international notoriety to such a claim. As stated in a recent comprehensive study on historic waters, "*formal notification* of such [a historic] claim would seem normally to be necessary for it to attain sufficient notoriety; so that, at the very least, other States may have the opportunity to deny any acquiescence with the claim by protest etc."

With respect to the South China Sea, there appears to be no Chinese law, declaration, proclamation, or other official statement describing and putting the international community on notice of a historic claim to the waters within the dashed line. The reference to "historic rights" in China's 1998 EEZ and continental shelf law is, as a legal matter, a "savings clause"; the statement makes no claim in itself, and the law contains no reference to the dashed-line map. Although certain Chinese laws and regulations refer to "other sea areas under the jurisdiction of the People's Republic of China," there is no indication of the nature, basis, or geographic location of such jurisdiction, nor do those laws refer to "historic" claims of any kind. While China's 2011 Note Verbale states that "historical and legal evidence" support China's "sovereignty and related rights and jurisdiction," that Note, like the 1998 EEZ and continental shelf law, is not a statement of a claim itself. Furthermore, the "historical ... evidence" could refer to China's sovereignty claim to the islands, and not the waters.

The mere publication by China of the dashed-line map in 1947 could not have constituted official notification of a maritime claim. China's "Map of South China Sea *Islands*" made no suggestion of a maritime claim, and its domestic publication in the Chinese language was not an act of sufficient international notoriety to have properly alerted the international community to such a claim, even if it had asserted one. The various maps published by China also lack the precision, clarity, and consistency that could convey the nature and scope of a maritime claim. The International Court of Justice's (ICJ) "statement of a principle" in the *Frontier Dispute* between Burkina Faso and Mali describes the legal force of maps as follows:

> Whether in frontier delimitations or international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.

China's 1958 Territorial Sea Declaration also contradicts the view that China has made a claim of either "historic waters" or "historic rights" within the dashed line. That declaration refers to the "high seas" separating China's mainland and coastal islands from "all other islands belonging to China." The notion of "high seas" as juridically distinct from any kind of national waters and not subject to national appropriation or exclusive use was an established rule of international law for centuries before China's 1958 Declaration. Further, to the extent the 1958 Declaration makes a historic claim, it is to a different body of water—Bo Hai (Pohai), a gulf in northeastern China. Had China considered in 1958 that the waters within the dashed line published on its maps constituted China's historic waters, it would presumably have referenced this in its 1958 Declaration along with its claim regarding Bo Hai. Instead, the contents of that Declaration, particularly the reference to "high seas," indicate that China did not consider the waters within the dashed line to have a historic character.

The international community has largely regarded China's dashed-line map in a manner consistent with this view. Indeed, a comprehensive study on historic waters published in 2008 did not even discuss China's dashed line, nor has the dashed line been identified in U.S. Government compendiums of historic waters claims in the public domain. Formal international protest of the dashed line began only after China's issuance in 2009 of its Notes Verbales described earlier in this study.

Assessment Part 2 – Would a Historic Claim have Validity?

China has not advanced a cognizable historic claim of either sovereignty over the maritime space within the dashed line ("historic waters" or "historic title") or a lesser set of rights ("historic rights") in that maritime space. If China nevertheless does consider that the dashed line appearing on its maps indicates a historic claim, such a claim would be contrary to international law.

Arguments in favor of China's historic claims often note that the LOS Convention recognizes such claims. A Chinese claim of historic waters or historic rights within the dashed-line would not be recognized by the Convention, however. The text and drafting history of the Convention make clear that, apart from a narrow category of near-shore "'historic' bays" (Article 10) and "historic title" in the context of territorial sea boundary delimitation (Article 15), the modern international law of the sea does not recognize history as the basis for maritime jurisdiction. A Chinese historic claim in the South China Sea would encompass areas distant from Chinese-claimed land features, and would therefore implicate the Convention's provisions relating to the EEZ, continental shelf, and possibly high seas. Unlike Articles 10 and 15, the

Convention's provisions relating to these maritime zones do not contain any exceptions for historic claims in derogation of the sovereign rights and jurisdiction of a coastal State or the freedoms of all States.

Because the Convention's provisions relating to the EEZ, continental shelf, and high seas do not contain exceptions for historic claims, the Convention's provisions prevail over any assertion of historic claims made in those areas. The 1962 study on historic waters commissioned by the Conference that adopted the 1958 Geneva Conventions reached this same conclusion with respect to interpretation of the 1958 Convention on the Territorial Sea and Contiguous Zone. The 1982 LOS Convention continued this approach by retaining provisions related to historic bays and titles that are substantively identical to those contained in the 1958 Convention. Had the drafters of the LOS Convention intended to permit historic claims of one State to override the expressly stated rights of other States, the Convention would have reflected this intention in its text. Instead, as with the 1958 Convention, the LOS Convention limits the relevance of historic claims to bays and territorial sea delimitation.

Accordingly, with regard to possible Chinese "historic rights" in the South China Sea, any such rights would therefore need to conform to the Convention's provisions that deal with the relevant activities. Rules of navigation are set out in the Convention, and these rules reflect traditional navigational uses of the sea. Rules related to oil and gas development are also set forth in the Convention, without exception for historic rights in any context. Also, rules for fishing are set out in the Convention, including limited rules pertaining to historic uses that do not provide a basis for sovereignty, sovereign rights, or jurisdiction. As the *Gulf of Maine* Chamber of the International Court of Justice noted in its 1984 judgment, the advent of exclusive jurisdiction of a coastal State over fisheries within 200 nm of its coast overrides the prior usage and rights of other States in that area.

It has also been argued that "historic title" and "historic rights" are "matters not regulated by this Convention [and thus] continue to be governed by the rules and principles of general international law" outside of the LOS Convention. This position is not supported by international law and misunderstands the comprehensive scope of the LOS Convention. The Convention sets forth the legal regimes for all parts of the ocean. As discussed above, matters such as navigation, hydrocarbon development, and fishing are in fact "regulated by th[e] Convention." Therefore, a State may not derogate from the Convention's provisions on such matters by claiming historic waters or historic rights under "general international law." Although one may need to refer to "general international law" to identify the meaning of particular terms in the Convention—such as references to historic bays and historic title in Articles 10 and 15, respectively—the Convention does not permit a State to resort to "general international law" as an alternative basis for maritime jurisdiction that conflicts with the Convention's express provisions related to maritime zones.

Even assuming that a Chinese historic claim in the South China Sea were governed by "general international law" rather than the Convention, the claim would still need to be justified under such law. In this regard, a Chinese historic waters claim in the South China Sea would not pass any element of the three-part legal test described above under the Basis of Analysis:

(1) *No open, notorious, and effective exercise of authority over the South China Sea.* China did not communicate the nature of its claim within the dashed line during the period when China might purport to have established a historic claim; indeed, the nature of Chinese authority claimed within the dashed line still has not been clarified. Likewise,

China has not established its claims with geographical consistency and precision. As such, it cannot satisfy the "open" or "notorious" requirements for a valid claim to historic waters.

(2) *No continuous exercise of authority in the South China Sea.* There has long been widespread usage of the South China Sea by other claimants in a manner that would not be consistent with Chinese sovereignty or exclusive jurisdiction. Many islands and other features in the South China Sea are occupied not just by China, but by Malaysia, the Philippines, Vietnam, and Taiwan, and the mainland maritime claims of Malaysia, the Philippines, Brunei, Indonesia, and Vietnam also project into the South China Sea. These countries have all undertaken activities, such as fishing and hydrocarbon exploration, in their claimed maritime space that are not consistent with "effective" or "continuous exercise" of Chinese sovereignty or exclusive rights over that space.

(3) *No acquiescence by foreign States in China's exercise of authority in the South China Sea.* No State has recognized the validity of a historic claim by China to the area within the dashed line. Any alleged tacit acquiescence by States can be refuted by the lack of meaningful notoriety of any historic claim by China, discussed above. A claimant State therefore cannot rely on nonpublic or materially ambiguous claims as the foundation for acquiescence, but must instead establish its claims openly and publicly, and with sufficient clarity, so that other States may have actual knowledge of the nature and scope of those claims. In the case of the dashed line, upon the first official communication of a dashed-line map to the international community in 2009, several immediately affected countries formally and publicly protested. The practice of the United States is also notable with respect to the lack of acquiescence. Although the U.S. Government is active in protesting historic claims around the world that it deems excessive, the United States has not protested the dashed line on these grounds because it does not believe that such a claim has been made by China. Rather, the United States has requested that the Government of China clarify its claims.

The fact that China's claims predate the LOS Convention does not provide a basis under the Convention or international law for derogating from the LOS Convention. The Convention's preamble states that it is intended to "settle … all issues relating to the law of the sea" and establish a legal order that promotes stability and peaceful uses of the seas. Its object and purpose is to set forth a comprehensive, predictable, and clear legal regime describing the rights and obligations of States with respect to the sea. Permitting States to derogate from the provisions of the Convention because their claims pre-date its adoption is contrary to and would undermine this object and purpose. Just as a State that claimed sovereignty over a 200 nm territorial sea in the 1950s cannot lawfully maintain such a claim today, neither China nor any other State could sustain a claim to historic waters or historic rights in areas distant from its shores. The Convention does not permit such claims, and unless the Convention textually recognizes historic claims—such as Article 10 concerning "bays"—the Convention's provisions prevail over any such historic claims. The advent of the LOS Convention, both as treaty law and as reflecting customary international law, requires States to conform their maritime claims to its provisions.

Conclusion

China has not clarified its maritime claims associated with the dashed-line maps in a manner consistent with international law. China's laws, declarations, official acts, and official statements present conflicting evidence regarding the nature and scope of China's claims. The available evidence suggests at least three different interpretations that China might intend, including that the dashes are (1) lines within which China claims sovereignty over the islands, along with the maritime zones those islands would generate under the LOS Convention; (2) national boundary lines; or (3) the limits of so-called historic maritime claims of varying types.

As to the first interpretation, if the dashes on Chinese maps are intended to indicate only the islands over which China claims sovereignty then, to be consistent with the law of the sea, China's maritime claims within the dashed line would be those set forth in the LOS Convention, namely a territorial sea, contiguous zone, EEZ, and continental shelf, drawn in accordance with the LOS Convention from China's mainland coast and land features that meet the definition of an "island" under Article 121 of the Convention.74 Because sovereignty over South China Sea islands is disputed, the maritime zones associated with these islands would also be disputed. In addition, even if China possessed sovereignty of the islands, any maritime zones generated by those islands in accordance with Article 121 would be subject to maritime boundary delimitation with neighboring States.

As to the second interpretation, if the dashes on Chinese maps are intended to indicate national boundary lines, then those lines would not have a proper legal basis under the law of the sea. Under international law, maritime boundaries are created by agreement between neighboring States; one country may not unilaterally establish a maritime boundary with another country. Further, such a boundary would not be consistent with State practice and international jurisprudence, which have not accorded very small isolated islands like those in the South China Sea more weight in determining the position of a maritime boundary than opposing coastlines that are long and continuous.75 Moreover, dashes 2, 3, and 8 that appear on China's 2009 map are not only relatively close to the mainland shores of other States, but all or part of them are also beyond 200 nm from any Chinese-claimed land feature.

Finally, if the dashes on Chinese maps are intended to indicate the area in which China claims so-called "historic waters" or "historic rights" to waters that are exclusive to China, such claims are not within the narrow category of historic claims recognized in Articles 10 and 15 of the LOS Convention. The South China Sea is a large semi-enclosed sea in which numerous coastal States have entitlements to EEZ and continental shelf, consistent with the LOS Convention; the law of the sea does not permit those entitlements to be overridden by another State's maritime claims that are based on "history." To the contrary, a major purpose and accomplishment of the Convention is to bring clarity and uniformity to the maritime zones to which coastal States are entitled. In addition, even if the legal test for historic waters were applicable, the dashed-line claim would fail each element of that test.

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4. Archipelagic States

Throughout 2014, the U.S. Department of State published 16 studies of maritime claims by States as part of its *Limits in the Seas* series. These reports are issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State to provide the views of the United States Government regarding the consistency of such claims with international law. One of these 2014 studies, concerning China's claims in the South China Sea, is excerpted *supra*. The other 15 assess the maritime claims of the following states claiming to be "archipelagic States" under the Law of the Sea Convention: Antigua and Barbuda, the Bahamas, Cabo Verde, Comoros, the Dominican Republic, Grenada, Indonesia, Mauritius, Papua New Guinea, the Philippines, Seychelles, the Solomon Islands, Trinidad and Tobago, Tuvalu, and Vanuatu. The reports are available at *www.state.gov/e/oes/ocns/opa/c16065.htm*. Excerpts are reproduced *infra*, with footnotes omitted. The "Basis for Analysis" in each of the 15 studies essentially repeats the excerpts immediately following, which are from the Philippines study.

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Basis for Analysis

The LOS Convention contains certain provisions related to archipelagic States. Article 46 provides that an "archipelagic State" means "a State constituted wholly by one or more archipelagos and may include other islands" (Article 46.a). An "archipelago" is defined as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such" (Article 46.b).

Only an "archipelagic State" may draw archipelagic baselines. Article 47 sets out criteria to which an archipelagic State must adhere when establishing its archipelagic baselines (Annex 3 to this study).

Under Article 47.1, an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago, provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1. In addition, the length of any baseline segment shall not exceed 100 nm except that up to 3 percent of the total number of baselines may have a length up to 125 nm (Article 47.2).

Additional provisions of Article 47 state that such baselines shall not depart to any appreciable extent from the general configuration of the archipelago; that such baselines shall not be drawn, with noted exceptions, using low-tide elevations; and that the system of such baselines shall not be applied in such a manner as to cut off from the high seas or exclusive economic zone (EEZ) the territorial sea of another State (Article 47.3 - 47.5).

Article 48 provides that the breadth of the territorial sea, contiguous zone, EEZ and continental shelf shall be measured from archipelagic baselines drawn in accordance with Article 47. Article 49 provides that the waters enclosed by archipelagic baselines drawn in accordance with Article 47 are "archipelagic waters," over which the sovereignty of an archipelagic State extends, subject to the provisions in Part IV of the LOS Convention.

The LOS Convention further reflects the specific rights and duties given to archipelagic States over their land and water territory. Article 53 allows the archipelagic State to "designate sea lanes…suitable for the continuous and expeditious passage of foreign ships…through…its archipelagic waters and the adjacent territorial sea." Also, Article 53.12 provides that "[i]f an archipelagic State does not designate sea lanes… the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation."

* * * *

a. Antigua and Barbuda

Antigua and Barbuda's archipelagic baseline system set forth in Act No. 18 of August 17, 1982 appears to be consistent with Article 47 of the LOS Convention.

* * * *

Pursuant to the Act, Antigua and Barbuda has claimed the waters within certain named bays and harbors as internal. However, no geographic coordinates are provided and it does not appear as though the bay closing lines are depicted on publicly available charts of a scale adequate for ascertaining their position.

* * * *

As of March 2014, the government of Antigua and Barbuda had not formally designated any archipelagic sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Consistent with Article 53.12 of the LOS Convention, Section 15B(4) of the Act provides that where no sea lanes or air routes have been designated, "the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation."

Act No. 18 limits certain navigational rights within the maritime zones of Antigua and Barbuda. Most notably, in Section 14(2) of Act No. 18, Antigua and Barbuda claims that a foreign warship must receive permission from the Government of Antigua and Barbuda prior to navigating in its archipelagic waters and territorial sea. This provision is not permitted by the LOS Convention and is not recognized by the United States. In 1987, the United States delivered a diplomatic note protesting this restriction as inconsistent with international law, as reflected in the LOS Convention.

* * * *

b. The Bahamas

…The Bahamas' archipelagic baseline system set forth in the Archipelagic Waters and Maritime Jurisdiction (Archipelagic Baselines) Order, 2008, appears to be consistent with Article 47 of the LOS Convention.

* * * *

As of January 2014, The Bahamas had not designated sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Consistent with Article 53.12 of the LOS Convention, section 11.5 of The Bahamas Act No. 37 states that, "Where there is no designation made pursuant to [section 11.1] the right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation."

* * * *

Although the United States and The Bahamas do not have an agreed maritime boundary, the United States published its fishery enforcement line in a 1977 Federal Register notice, pursuant to the provisions of the Fishery Conservation and Management Act of 1976. This line, now the U.S. EEZ limit, was reiterated, and published, as a notice to the 1995 Federal Register. As of January 2014, the governments of The Bahamas and the United States were engaged in maritime boundary negotiations. One provision of Act No. 37 addresses the situation of undelimited boundaries. Specifically, concerning the EEZ, Section 8 of the Act states that "[w]here the median line … is less than two hundred miles from the nearest baseline, and no other line is for the time being specified . . ., the outer limits of the exclusive economic zone of The Bahamas extend to the median line."

* * * *

c. Cabo Verde

[W]ith the exception of the matter of the specifying the relevant geodetic datum, Cabo Verde's archipelagic baseline system set forth in Law No. 60/IV/92 appears to be consistent with Article 47 of the LOS Convention.

* * * *

As of January 2014, the Cabo Verde government had not formally designated any archipelagic sea lanes. Since no archipelagic sea lanes have been designated in accordance with the LOS Convention, the "right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation" (Article 53.12).

* * * *

The declaration by Cabo Verde upon its signature of the LOS Convention in 1982 and reaffirmed upon ratification in 1987 states "In the exclusive economic zone, the enjoyment of the

freedoms of international communication, in conformity with its definition and with other relevant provisions of the LOS Convention, excludes any non-peaceful use without the consent of the coastal State, such as exercises with weapons or other activities which may affect the rights or interests of the said state ….” The United States has rejected this interpretation. The weapons/exercises declaration was not contained in the 1992 law.

* * * *

Article 13, pertaining to the EEZ, states that Cabo Verde “shall possess … (b) exclusive jurisdiction, with regard to (i) The establishment and use of artificial islands, installations and structures; (ii) Marine scientific research; (iii) The protection and preservation of the marine environment; and (iv) Any other rights not recognized to third States.” Subparagraphs (i), (ii), and (iii) of Article 13 mirror the permissible bases of jurisdiction set forth in Article 56 of the LOS Convention. However, whereas Cabo Verde claims “exclusive jurisdiction” with respect to these elements, the LOS Convention provides merely for “coastal State …jurisdiction as provided for in the relevant provisions of this Convention” (emphasis added). With respect to subparagraph (iv) referring to “any other rights not recognized to third States,” the LOS Convention does not provide for exclusive coastal state jurisdiction in this regard.

Article 14 of the law recognizes that high seas freedoms of navigation and overflight are available to all States within its EEZ. This is a partial recognition of the rights of other States in the EEZ. Article 58 of the LOS Convention states that, in addition to the freedoms of navigation and overflight, all States also enjoy, subject to the relevant provisions of the LOS Convention, “the freedoms …of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.”

* * * *

Article 21 of the law states that the “laying, maintenance or repair of submarine pipelines or cables by third States” in any of Cabo Verde’s maritime zones “may be carried out only with the prior authorization of the Republic of Cabo Verde.” Article 58.1 of the LOS Convention provides that, in the EEZ, the laying of submarine cables and pipelines is a high seas freedom that all States enjoy, subject to the relevant provisions of the LOS Convention.

* * * *

The law’s requirement for prior authorization with regard to the laying and maintenance of cables on Cabo Verde’s continental shelf is not found in the LOS Convention.

* * * *

Article 28 of the law provides, in part, that “…the location, exploration and recovery of any object of an archaeological and historical character, as well as treasures existing in the maritime areas of the Republic of Cape Verde …by any entity, whether national or foreign, shall require the express authorization of the competent national authorities.” Under Article 303.1 of

the LOS Convention, all nations share a duty to protect such objects and cooperate for this purpose. However, the LOS Convention limits a coastal State's jurisdiction over such objects to the seaward limit of the coastal State's 24-nm contiguous zone. Any enforcement of this provision against a foreign flagged vessel outside of the 24-nm contiguous zone would be inconsistent with the Convention, unless it is done with the consent of the flag State.

* * * *

d. Comoros

In conclusion, the archipelagic baseline system of Comoros does not appear to be consistent with the LOS Convention. Baseline point B on Banc Vailheu, a submerged feature, is not consistent with either Article 47.1 (specifying that the baselines join the outermost points of the outermost islands and drying reefs of the archipelago) or Article 47.3 (requiring that the baselines not depart from the general configuration of the archipelago).

Finally, as noted above, the sovereignty of Mayotte is disputed between Comoros and France. Mayotte is administered as a Department and region of France. Six of the 13 baseline points in Comoros' archipelagic baseline system are used to enclose Mayotte. France has protested this use of baseline points on Mayotte as "not compatible with the status of Mayotte and …without legal effect." In December 2013, by Decree No. 2013-1177, France promulgated baselines, including straight baselines and closing lines, from which the territorial sea of Mayotte is measured.

* * * *

e. The Dominican Republic

The Dominican Republic is located in the Caribbean Sea to the southeast of the Turks and Caicos Islands (U.K.), and to the west of Puerto Rico (U.S.) and to the east of Haiti on the island of Hispaniola. The Dominican Republic claims it is an archipelagic State, namely a State that is "constituted wholly by one or more archipelagos and [that] may include other islands" (LOS Convention, Article 46). The United States and some other countries have not accepted this claim.

* * * *

In conclusion, the archipelagic baseline system of the Dominican Republic does not appear to be consistent with the LOS Convention. Even assuming that the Dominican Republic qualifies as an archipelagic State under the LOS Convention, the archipelagic baseline system includes segments drawn from low-tide elevations that do not satisfy the conditions in Article 47.4 of the Convention. Further, the water-to-land area ratio set forth in Article 47.1 has been met only by utilizing such low-tide elevations.

* * * *

Article 14 of Law No. 66-07 defines the outer limit of the Dominican Republic's EEZ claim. … Portions of the claimed EEZ impinge on the claimed maritime limits of the United Kingdom (Turks and Caicos Islands), The Netherlands (Aruba and Curaçao), Haiti, and the United States (Puerto Rico). The Dominican Republic's claimed EEZ also disregards the Dominican Republic's maritime boundary with Venezuela….

* * * *

Article 53 of the LOS Convention provides that all ships and aircraft enjoy the right of archipelagic sea lanes passage, either through designated sea lanes and air routes or, where no such designations have been made, through the routes normally used for international navigation. Law No. 66-07 does not mention this right.

Articles 5 and 11 of Law No. 66-07 recognize the right of "innocent passage through [the Dominican Republic's] archipelagic waters and superjacent airspace." These articles also provide that this is "without prejudice to right of the Dominican State to designate passage routes …." Although this provision does not comport with the Convention, it may be an attempt by the Dominican Republic to refer to archipelagic sea lanes passage (which unlike "innocent passage" includes overflight) and the designation of "sea lanes" that traverse archipelagic waters (LOS Convention, Article 53). … As of January 2014, the Dominican Republic had not designated sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Since no archipelagic sea lanes have been designated in accordance with the LOS Convention, the "right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation" (Article 53.12).

Article 12 of Law No. 66-07 states that "ships and aircraft containing cargoes of radioactive substances or highly toxic chemicals" navigating through the archipelagic waters and territorial sea or its superjacent airspace shall not be considered innocent. This provision is inconsistent with the LOS Convention. Articles 17 and 52 of the LOS Convention state that "ships of all States … enjoy the right of innocent passage through …" the territorial sea and archipelagic waters, respectively. Article 23 of the LOS Convention states in part that "… ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements." This obligation applies to the flag State; the LOS Convention does not permit a coastal State to render passage non-innocent due to carriage of hazardous cargo.

* * * *

Article 6 of Law No. 66-07 claims certain bodies of waters as internal waters. Most of these claims were previously made in the Law No. 186, of September 13, 1967. The Dominican Republic's law refers to the headlands of the claimed juridical bays, but does not provide any geographic coordinates or show the bay closing lines on any charts. Article 16 of the LOS Convention states that "the baselines for measuring the breadth of the territorial sea determined in accordance with articles …9 [mouths of rivers] and 10 [bays]…shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical coordinates of points, specifying the geodetic datum, may be substituted." Further, Article 16

provides that the coastal State shall deposit a copy of each such chart or list with the Secretary-General of the United Nations. It does not appear that the Dominican Republic has deposited with the Secretary General such a chart or list, or otherwise given due publicity to the charts or lists of geographic coordinates that would be needed to support the claims contained in Article 6 of Law No. 66-07. Article 7 of Law No. 66-07 provides "[t]he following shall be considered historic bays: Santo Domingo, the area enclosed between Cabo Palenque and Punta Caucedo, and the Escocesa, the area between Cabo Francés Viejo and Cabo Cabrón. The waters that enclose them shall be considered internal waters." Santo Domingo and Escocesa Bays are not recognized by the United States as historic bays.

* * * *

Article 15 of Law No. 66-07 states that "[t]he Dominican Republic shall exercise jurisdiction over the exclusive economic zone as provided for in the 1982 United Nations Convention on the Law of the Sea . . ." The Additional Paragraph following Article 16 refers in part to "salvage operations with respect to treasures from ancient sunken vessels within the exclusive economic zone which constitute part of the national cultural heritage." Under Article 303.1 of the LOS Convention, all nations share a duty to protect such objects and cooperate for this purpose. Article 303.3 provides that "[n]othing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges." To the extent that the Dominican Republic is relying on coastal State jurisdiction to implement this provision, Article 303.2 limits coastal State jurisdiction over such objects to the seaward limit of the coastal State's 24-nm contiguous zone.

* * * *

f. Grenada

…Grenada's archipelagic baseline system set forth pursuant to Act No. 25 of 1989 appears to be consistent with Article 47 of the LOS Convention.

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Pursuant to Act No. 25, the Grenada Territorial Sea and Maritime Boundaries (Closing Lines—Internal Waters) Order of 1992 sets forth coordinates for closing lines defining the internal waters of Grenada. … The closing lines pertain to 28 named and unnamed bays and harbors. The coordinates set forth in Grenada's 1992 order properly enclose these bays, in accordance with Article 10 of the LOS Convention….

* * * *

As of March 2014, the government of Grenada had not formally designated any archipelagic sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Consistent with Article 53.12 of the LOS Convention, Section 19(5) of the Act provides that where no sea lanes or air routes have been designated, "the right of

archipelagic sea lanes passage may be exercised through or over the routes normally used for international navigation or overflight."

* * * *

Section 11 and 13 of the Act pertain to the continental shelf and EEZ, respectively, and provide for sovereign rights and jurisdiction similar to what is provided for in Parts V (Exclusive Economic Zone) and VI (Continental Shelf) of the LOS Convention. However, whereas Grenada claims "exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution," the LOS Convention provides merely for "coastal State …jurisdiction as provided for in the relevant provisions of this Convention" (emphasis added). Part XII of the Convention pertains to Protection and Preservation of the Marine Environment.

* * * *

Section 14 of the Act pertains to the laying or maintenance of submarine cables or pipelines on Grenada's continental shelf. Section 14(3) of the Act provides that the course for the laying of submarine cables on Grenada's continental shelf is subject to the consent of the Minister. Article 79(3) of the LOS Convention, however, limits the coastal State's authority in this regard to the course for the laying of pipelines only.

* * * *

g. Indonesia

Indonesia's archipelagic baseline system set forth in Regulation No. 37 of 2008 appears to be generally consistent with Article 47 of the LOS Convention. However, it appears as though Indonesia needs to address with Timor-Leste the effect that its archipelagic baselines have on Timor-Leste's maritime claims. Indonesia has proposed and the IMO has adopted three archipelagic sea lanes, which the government of Indonesia later formally designated in its Regulation No. 37 of 2002. This is a partial designation of archipelagic sea lanes; accordingly, the right of archipelagic sea lanes passage may be exercised within the three designated routes, and also within other routes normally used for international navigation. The Indonesian government has, on occasion, attempted to restrict the exercise of this right by U.S. military aircraft, attempts which are inconsistent with the navigational rights reflected in the LOS Convention.

* * * *

h. Mauritius

Both of Mauritius' archipelagic baseline systems set forth in the Maritime Zones (Baselines and Delineating Lines) Regulations 2005 appear to be consistent with Article 47 of the LOS Convention. However, because Mauritius' archipelagic baseline system for the Chagos Archipelago includes the islands of the British Indian Ocean Territory, the United States does not recognize this archipelagic baseline system. Mauritius' legislation does not recognize the right of archipelagic sea lanes passage, and Mauritius' requirement that ships carrying radioactive materials obtain authorization from the government of Mauritius prior to exercising the right of innocent passage or archipelagic sea lanes passage is not consistent with the LOS Convention. Mauritius' use of straight baselines for the island of Mauritius does not conform to the requirements of Article 7 of the LOS Convention. Mauritius' treatment of reefs, bays, and mouths of rivers generally conform to the Convention's requirements, with the exception of Mathurin Bay, which is not a juridical bay (Article 10 of the LOS Convention) and does not appear to meet the criteria for an historic bay.

* * * *

i. Papua New Guinea

The archipelagic baseline system for Papua New Guinea's Principal Archipelago does not meet the requirements of the LOS Convention. The baseline system does not join the outermost points of all the outermost islands of the archipelago (Article 47.1), and one baseline segment exceeds the maximum permissible length of 125 nm (Article 47.2). The government of Papua New Guinea has stated that it is preparing maritime zones legislation that will align all the maritime zones of Papua New Guinea with the relevant provisions of the LOS Convention.

* * * *

j. The Philippines

This study analyzes the maritime claims and maritime boundaries of the Republic of the Philippines, including its archipelagic baseline claim.

* * * *

The Philippines' archipelagic baseline system appears to be consistent with Article 47 of the LOS Convention. The legislation establishing the baselines, however, did not clarify whether the waters within the baselines are internal waters or archipelagic waters, nor did it specify the breadth of the territorial sea of the Philippines. In upholding the Philippine legislation that established its archipelagic baselines, the Philippine Supreme Court has recognized that Philippine sovereignty over the waters within the baselines is subject to the rights of innocent passage and archipelagic sea lanes passage, as provided for under international law. It appears

that the Government of the Philippines intends to enact additional legislation that will further clarify its maritime zones in a manner consistent with the LOS Convention.

* * * *

k. Seychelles

Because of its geography, Seychelles' Baselines Order establishes archipelagic baselines around four separate groups of islands.

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In summary, Group 1 does not appear to meet the water-to-land area ratio set forth in Article 47.1; because it is not enclosed or nearly enclosed by islands and drying reefs lying on the perimeter of Seychelles Bank, it cannot benefit from the use of Article 47.7. Further, all four Groups appear to contain baseline points in open water and thus do not conform to Article 47.4.

* * * *

Part III (sections 9-14) of Act No. 2, pertaining to the EEZ and continental shelf, contains a number of provisions that mirror those contained in the LOS Convention regarding coastal State jurisdiction. However, sections 10(d)-(e) and 12(b) provide that Seychelles has, in its EEZ and on its continental shelf "Exclusive jurisdiction over artificial islands, installations and structures... [and] [e]xclusive jurisdiction to regulate, authorize and control marine scientific research." Whereas Seychelles claims "exclusive jurisdiction" over these matters, Article 56 of the LOS Convention provides merely for "coastal State …jurisdiction as provided for in the relevant provisions of this Convention" (emphasis added).

* * * *

As of February 2014, Seychelles' government had not formally designated any archipelagic sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Consistent with Article 53.12 of the LOS Convention, section 18(5) of Act No. 2 states that "[w]here no sea lanes or air routes through or over archipelagic waters have been designated under section 19, the right of archipelagic sea lanes passage may be exercised through lanes or routes normally used for international navigation."

Act No. 2 limits certain navigational rights within the maritime zones of Seychelles. Sections 16(2) and (4) require foreign warships, nuclear-powered ships and ships carrying any nuclear substance or radioactive substance or materials to give notice to and obtain the prior authorization from the government of Seychelles before transiting the territorial sea or archipelagic waters. Section 17(3) further states that "passage of a foreign warship in the territorial sea or archipelagic waters is prejudicial to the peace, good order or security of Seychelles …without the prior notice and authorizations." Under Article 17 of the LOS Convention, "ships of all States, whether coastal or land-locked, enjoy the right of innocent

passage through the territorial sea." This right of innocent passage also applies in archipelagic waters (Article 52). Sections 16 and 17 of Act No. 2 impermissibly restrict the right of innocent passage and are not in conformity with the LOS Convention. In 2000, the United States delivered a diplomatic note protesting these, as well certain other, sections of Seychelles' legislation. The United States continues to not recognize such navigational restrictions that are not in conformity with international law, as reflected in the LOS Convention.

* * * *

l. The Solomon Islands

Four of the five archipelagic baseline systems of Solomon Islands meet the water-to-land area ratio set forth in Article 47.1: ….[W]ith the exception of Group 3, Solomon Islands' archipelagic baseline system set forth in the 1979 Declaration appears to be consistent with Article 47 of the LOS Convention.

* * * *

As of March 2014, the government of Solomon Islands had not formally designated any archipelagic sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO [International Maritime Organization]. Consistent with Article 53.12 of the LOS Convention, Section 10(4) of the Act provides: "Until such time as sealanes or air routes are designated …the [right of archipelagic sea lanes passage described in Section 10] may be exercised through and over all routes normally use for international navigation and overflight."

* * * *

m. Trinidad and Tobago

Trinidad and Tobago's archipelagic baseline system set forth in Act No. 24 of November 11, 1986 appears to be consistent with Article 47 of the LOS Convention.

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As of January 2014, the Trinidad and Tobago government had not formally designated any archipelagic sea lanes. Since no archipelagic sea lanes have been designated in accordance with the LOS Convention, the "right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation" (Article 53.12).

* * * *

n. Tuvalu

Tuvalu's archipelagic baseline system enclosing three of its islands appears to be consistent with the LOS Convention (Article 47), as does Tuvalu's approach to using the normal baseline for six of its islands (Articles 5 and 6). The provisions of Tuvalu's legislation pertaining to its maritime zones, including the navigation provisions, likewise appear to be consistent with international law as reflected in the LOS Convention.

* * * *

o. Vanuatu

...Vanuatu's archipelagic baseline system set forth in Order No. 81 of 2009 appears to be consistent with Article 47 of the LOS Convention.

* * * *

Section 5 of Act No. 6 recognizes the right of innocent passage of foreign ships through the archipelagic waters and territorial sea of Vanuatu. However, paragraph 10 of Section 5 provides that, for certain vessels such as foreign warships, the right of innocent passage is "subject to the prior written approval of the Minister [responsible for the Maritime Zones]." This provision is not permitted by the LOS Convention and is not recognized by the United States.

Vanuatu's law does not mention the right of archipelagic sea lanes passage for all ships and aircraft, which is provided for in Article 53 of the LOS Convention. As of March 2014, the Vanuatu government had not formally designated any archipelagic sea lanes. In accordance with Article 53.12 of the LOS Convention, since Vanuatu has not designated archipelagic sea lanes, the "right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation."

* * * *

Section 10(2) of the Act provides in part that "Vanuatu has jurisdiction and control in the exclusive economic zone, in respect of …the authorization, regulation and control of …the recovery of archaeological or historical objects." Under Article 303.1 of the LOS Convention, all nations share a duty to protect such objects and cooperate for this purpose. However, the LOS Convention limits a coastal State's jurisdiction over such objects to the seaward limit of the coastal State's 24-nm contiguous zone. Any enforcement of this provision of Vanuatu's law with respect to objects outside of the 24-nm contiguous zone against a foreign flagged vessel would be inconsistent with the LOS Convention, unless it is done with the consent of the flag State.

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5. Piracy

See Chapter 3.B.6.

6. Freedoms of Navigation and Overflight

a. Nicaragua

On March 7, 2014, the Embassy of the United States of America in Nicaragua delivered a diplomatic note to the Ministry of Foreign Affairs of the Republic of Nicaragua regarding Nicaragua's excessive straight baseline and exclusive economic zone ("EEZ") claims. The claims were made in the August 19, 2013 Decree No. 33-2013 issued by Nicaraguan President Ortega concerning "Baselines of the Marine Areas of the Republic of Nicaragua in the Caribbean Sea." Excerpts from the U.S. diplomatic note delivered on March 7, 2014 appear below.

* * * *

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Republic of Nicaragua and has the honor to refer to Decree No. 33-2013 concerning Baselines of the Marine Areas of the Republic of Nicaragua in the Caribbean Sea issued by the President of Nicaragua on August 19, 2013.

The United States recalls that, as recognized in customary international law and as reflected in Part II of the 1982 United Nations Convention on the Law of the Sea (LOS Convention), unless exceptional circumstances exist, baselines are to conform to the low-water line along the coast as marked on a State's official large-scale charts. As reflected in Article 7 of the LOS Convention, straight baselines may only be employed in localities where the coastline is deeply indented and cut into, or where there is a fringe of islands along the immediate vicinity of the coast. Additionally, baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

The Government of the United States notes that Decree No. 33-2013 lists nine baseline points that connect to create a straight baseline system extending the entire length of Nicaragua's approximately 500 kilometer-long coast facing the Caribbean Sea. The United States observes further that the coastline of Nicaragua is smooth and not indented, with only a few exceptions. Furthermore, although the Corn Islands and other islands lie off the mainland coast of Nicaragua, these islands do not constitute "a fringe of islands along the immediate vicinity of the coast." Rather, some of the islands that are used as baseline points in Nicaragua's straight baseline system are individual islands that are not close to other islands and are a significant distance from the coast. Edinburgh Cay and the Little and Great Corn Islands, for instance, are all more than 25 nautical miles from the closest point on Nicaragua's mainland coast. Additionally, some of the straight baseline segments are exceptionally long; for instance, the segments between

baseline points 4 and 5 and between baseline points 8 and 9 are 72 and 83 nautical miles, respectively. Finally, many of the baseline segments depart from the general direction of the coast. Taken in its entirety, Nicaragua's system of straight baselines purports to enclose significant areas of territorial sea and exclusive economic zone (EEZ) as internal waters. In the view of the United States, such waters are not sufficiently closely linked to the land domain to be subject to the regime of internal waters.

Accordingly, with regard to the Decree and baselines set forth therein, the United States is obliged to reserve its rights and those of its nationals. These baselines, as asserted, impinge on the rights, freedoms, and uses of the sea by all nations by expanding the seaward limit of maritime zones and enclosing as internal waters areas that were previously territorial sea and EEZ.

The United States requests that the Government of Nicaragua review its current practice on baselines and make appropriate modifications to its baselines to bring them into conformity with international law, as reflected in the LOS Convention. The United States would be pleased to discuss further this and other related issues with Nicaragua.

* * * *

The Ministry of Foreign Affairs of Nicaragua delivered a diplomatic note to the U.S. Embassy on February 27, 2014 regarding the U.S. vessel USNS Pathfinder, which Nicaragua claimed had been seen "in Nicaraguan waters" without permission of the competent authorities of Nicaragua. The United States Embassy was directed to address the Pathfinder issue in addition to the excessive baseline claims in its discussions with the Ministry of Foreign Affairs. U.S. Embassy officials explained that the Pathfinder was well outside of Nicaragua's territorial sea and that its activities were consistent with international law. The U.S. points included the explanation that the EEZ is a zone of limited coastal State jurisdiction that is legally distinct from territorial sea.

On March 7, 2014, the U.S. Embassy related that a Ministry of Foreign Affairs official acknowledged that the Pathfinder was in EEZ waters, and not territorial waters and that prior coastal state permission was not required. The Ministry also agreed to carefully review the U.S. objection to the Presidential degree regarding baselines, as detailed in the diplomatic note delivered March 7, 2014.[*]

b. Cuba

On June 12, 2014, the Department of State, through the Cuban Interests Section of the Embassy of Switzerland, responded to diplomatic notes from the Government of Cuba alleging U.S. violations of Cuban airspace in February and March of 2014. The U.S. response included the following:

[*] Editor's note: In September 2014, Nicaragua's Ministry of Foreign Affairs sent the United States an additional diplomatic note challenging U.S. surveys. The U.S. response to that note was delivered in January 2015 and will be discussed in *Digest 2015*.

On February 11, 2014, while on patrol in the Florida Straits, a United States Coast Guard (USCG) aircraft located two small vessels transiting near the Cuban territorial sea. As the Government of Cuba is aware, many of the small vessels that attempt to navigate the area where these vessels were located are of poor material condition and of interest to the USCG due to the risk they pose to safety of life at sea. When investigating both vessels, the closest the USCG aircraft came to the Cuban coast was 13 nautical miles. The USCG aircraft never entered within the internationally recognized sovereign airspace of Cuba. The USCG aircraft was eventually able to contact a Cuban patrol boat that arrived and rendered assistance to one of the vessels in question. The second vessel remained more than 15 nautical miles off Cuba's shore.

On March 27, 2014, the USCG conducted a search and rescue operation in the vicinity of Cay Lobos, Bahamas, after a "Good Samaritan" vessel reported a number of people stranded on the small island. The Government of the Bahamas granted the USCG permission to overfly the island for the purpose of dropping critical supplies to the survivors, who had been without food or water for several days. Other than operations to overfly the Bahamian island of Cay Lobos, USCG aircraft rescue operations were limited to international airspace and all operations were consistent with international conventions on maritime and aeronautical search and rescue, and with other internationally recognized uses of that airspace. The survivors were subsequently removed form Cay Lobos, Bahamas, by a USCG helicopter and transferred to Bahamian authorities for final disposition.

c. Peru

On November 12, 2014, the United States responded to a diplomatic note from the Peruvian Ministry of Foreign Affairs regarding a flight of U.S. Air Force C-17 aircraft Reach 282. Peruvian authorities asserted that the flight required clearance from Peru to enter its airspace. Excerpts follow from the U.S. reply note.

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[O]n August 7th, U.S. military aircraft Reach 282, following a flight plan from Panama to Chile, was flying in international airspace on a route of flight that at all times was outside Peruvian national airspace. During transit through the Lima Flight Information Region (FIR) this flight enjoyed freedom of navigation applicable to all nations provided for under international law.

International law permits a state to claim a territorial sea and corresponding national airspace up to twelve nautical miles in breadth, as measured from the state's base lines drawn in accordance with international law. Beyond this limit, all aircraft, including military or other state

aircraft, enjoy the freedoms of navigation and overflight and are not subject to the jurisdiction or control of air traffic control authorities of coastal states, as long as they do not intend to enter such national airspace. No notice to, clearance from, or approval of a coastal state is required to exercise such freedoms of navigation and overflight. The United States affirms its navigation and overflight rights in international airspace beyond twelve nautical miles from baselines drawn consistent with international law.

After reviewing the flight path of Reach 282, we have determined the aircraft was more than 12 nautical miles from the territory of Peru, and therefore outside Peruvian airspace at all times during its flight. The aircraft was operating in international airspace with due regard for the safety of civil aircraft. Military aircraft lawfully operating in international airspace with due regard for the safety of civil aircraft are under no obligation to check in with or obtain clearance from civil air traffic controllers. Regular overflights in the Lima FIR by U.S. military aircraft can be expected to continue.

The United States Government requests the Government of Peru to review this matter and ensure that the freedoms of navigation and overflight enjoyed by all nations under international law are not infringed in the future. The United States is willing to send experts from Washington to further explain its position if that would be helpful to your government.

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d. Maldives

In October 2014, the United States replied to a diplomatic note dated September 4, 2014 from the Ministry of Foreign Affairs of the Republic of Maldives expressing concern about reports of unauthorized aircraft operating in what Maldivian officials considered to be Maldivian airspace. The U.S. reply note affirmed that the aircraft were operating in international airspace.

7. Maritime Security and Law Enforcement

a. Agreement with Micronesia

On March 3, 2014, the Government of the United States of America and the Government of the Federated States of Micronesia signed an "Agreement concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity." The agreement entered into force upon signature and superseded the agreement between the two governments "to support ongoing regional maritime security efforts," that entered into force May 14, 2008. TIAS 08-514. See *Digest 2008* at 649-50 for discussion of the original agreement with Micronesia. The 2014 agreement is available at

www.state.gov/documents/organization/225158.pdf.

b. Agreement with Ghana

The temporary United States-Ghana maritime law enforcement agreement (concluded via an exchange of notes) entered into force on March 25, 2014 and U.S. Coast Guard and Navy maritime law enforcement operations commenced with Ghana in 2014.

c. Agreement with Honduras

After several years of negotiation, the United States-Honduras revised maritime law enforcement agreement was signed on March 26, 2014.

d. Agreement with Cabo Verde

A maritime security and law enforcement agreement between the United States and Cabo Verde was signed on March 24, 2014.

B. OUTER SPACE

1. UN Group of Governmental Experts

As discussed in *Digest 2013* at 377-78, the UN Group of Governmental Experts ("GGE") on transparency and confidence-building measures ("TCBMs") for outer space activities reached consensus in July 2013. The United States continued to support the work of the GGE in 2014. On February 27, 2014, Frank A. Rose, Deputy Assistant Secretary of State for the Bureau of Arms Control, Verification and Compliance, addressed the 3rd International Symposium on Sustainable Space Development and Utilization for Humankind in Tokyo, Japan. His remarks regarding the GGE and its work on the TCBMs for outer space are excerpted below. His remarks are available in full at www.state.gov/t/avc/rls/2014/222791.htm.

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As many of you know, the UN Group of Governmental Experts, or GGE, was established by the UN General Assembly to study the possible contributions of voluntary, non-legally binding TCBMs to strengthen stability and security in outer space. The Group included experts nominated by fifteen UN Member States, though we all served in our personal capacities.

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Furthermore, the Group endorsed efforts to pursue political commitments—including a multilateral code of conduct—to encourage responsible actions in, and the peaceful use of, outer space. In this regard, the Group noted the efforts of the European Union to develop an International Code of Conduct for Outer Space Activities through open-ended consultations with the international community.

Finally, the Group's study endorsed efforts to pursue bilateral transparency and confidence-building measures. This highlights the importance of efforts such as ongoing discussions on space security policy that the United States has been conducting with a number of spacefaring nations, including Russia, Italy, South Africa, and Japan. These discussions, along with U.S. efforts to develop mechanisms for improved warning of potential hazards to spaceflight safety, constitute significant measures to clarify intent and build confidence.

The GGE's endorsement of voluntary, non-legally binding transparency and confidence building measures to strengthen stability in space is an important development, and the consensus report was endorsed by UN General Assembly resolution last December.

I would like to close by noting that while all nations are increasingly reliant on space, our ability to continue to utilize space for these benefits is at serious risk. Accidents or irresponsible acts against space systems would not only harm the space environment, but would also disrupt services on which all governments and people depend. As a result, I would recommend that all governments review and consider implementing the recommendations of the GGE.

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2. UN Committee on the Peaceful Uses of Outer Space

Brian Israel, U.S. Representative to the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space ("COPOUS"), delivered a statement on non-legally binding UN instruments on outer space in April 2014. Mr. Israel's remarks are excerpted below and available at *www.state.gov/s/l/c8183.htm*.

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Among the most important roles for international lawyers in facilitating successful international cooperation is identifying the optimal cooperative mechanism in any given case—including when a legally non-binding mechanism may actually facilitate the cooperative objectives better than a treaty. The *Principles Relating to Remote Sensing of the Earth from Outer Space* serve as an excellent example of this Subcommittee advancing groundbreaking uses of outer space for the benefit of all countries through such a legally non-binding mechanism.

With the advent of remote sensing came a need to reconcile the great promise of this new capability with the concerns shared by many States about having access to data about their territory. Harnessing the full potential of remote sensing thus required a global consensus on how it was to be conducted.

As delegates are aware, this Subcommittee ultimately elected to develop a set of principles on remote sensing, which were adopted unanimously by the General Assembly. This mechanism offered the benefit of a *global* consensus on how this new activity would be conducted, rather than the piecemeal acceptance over time that generally attends international agreements.

The legally non-binding character of the Remote Sensing Principles certainly has not deprived them of influence—to the contrary, they are widely credited with fostering a successful international regime and enabling the robust remote sensing capabilities we enjoy today, whose myriad applications, such as in disaster mitigation and response, benefit all States.

At the heart of the Remote Sensing Principles is the principle of non-discriminatory access set forth in Principle XII. This principle of non-discriminatory access has been integrated into U.S. law, mandating that licenses to operate private remote sensing systems obligate the operator to "make available to the government of any country…unenhanced data collected by the system concerning the territory under the jurisdiction of such government as soon as such data are available and on reasonable terms and conditions."[12] It is worth noting that the United States did not incorporate this principle into law because it was legally required to do so—the Principles, after all, are not legally binding—but rather in furtherance of its investment in the success of the international regime for remote sensing the Principles embody.

Mr. Chairman, I will conclude with the reflection that the nature of the task faced by this Subcommittee as it took up the subject of remote sensing in the mid-1970s differed fundamentally from the task it faced in the mid-1960s. In contrast to the task of developing an international legal framework for outer space where none existed, this Subcommittee undertook its work on remote sensing with a functioning international legal framework already in place.

The same could be said of the efforts of space agencies, about a decade later, beginning at UNISPACE III, to cooperate to realize the potential of remote sensing systems for disaster management. These agencies were able to build upon not only the international legal framework that enables the use of outer space, but also the international regime enabled by the Remote Sensing Principles, and were thus able to structure their highly successful cooperation on disaster management around an even less formal cooperative mechanism—the International Charter on Space and Major Disasters.

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On October 17, 2014, Kenneth Hodgkins, Head of the U.S. delegation, delivered remarks on international cooperation in the peaceful uses of outer space at a session of COPOUS. Mr. Hodgkins' remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/233595.htm*.

[12] 51 U.S.C. § 60122(b)(2).

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… the U.S. was pleased to join Russia and China in co-sponsoring General Assembly resolution 68/50 on transparency and confidence building measures in outer space. It specifically highlights the contributions of COPUOS to the development and implementation of TCBMs that increase the security, safety and sustainability of outer space. The resolution also refers the report of a Group of Governmental Experts on space TCBMs, A/68/189, to COPUOS and several other UN bodies for further consideration. In the view of my delegation, the GGE report contains a wealth of valuable information and highly relevant recommendations on what states and the UN can do to ensure the safe and sustainable use of outer space. At this time, we would like to highlight several parts of the report.

The GGE report's discussion of "Coordination" suggests that a UN inter-agency mechanism could provide a useful platform for the promotion and effective implementation of TCBMs for space activities. It is also worth noting that the Secretary-General of the UN has stated his support for the Group's recommendation to establish coordination between various entities of the United Nations and other institutions involved in space activities. In this regard, the interagency meeting on space, known as UN Space, which is organized by OOSA, could fill this role.

Additionally, we note that the GGE recommends that as specific unilateral, bilateral, regional and multilateral TCBMs are agreed to, States should regularly review the implementation of such measures and discuss additional ones that may be necessary. Again, there could be a role for COPUOS in this regard.

Finally, in the report's discussion of "Information exchange and notifications related to space activities" and "risk reduction notifications," the Experts suggested measures that are directly relevant to the work we are doing on the long-term sustainability of space activities. We welcome COPUOS inviting member states to "submit their views on the modalities of making practical use of the recommendations contained in the report of the GGE as they related to and/or could prove instrumental in ensuring the safety of space operations. The results of this work in COPUOUS should be submitted to the General Assembly and discussed in a joint ad hoc meeting of the First and Fourth Committees during the 70th session of the General Assembly in 2015. And in this regard, my delegation strongly recommends that there be close coordination for this joint ad hoc meeting among the Secretariats of the First and Fourth Committee as well as with the Office of Outer Space Affairs.

We would like to note the progress made by the Scientific and Technical Subcommittee and its Working Group on the Long-Term Sustainability of Space Activities, under the Chairmanship of Peter Martinez of South Africa. We commend Mr. Martinez for his diligent efforts during the meeting of the Working Group and his efforts in between sessions, and we look forward to continuing to work with him. The U.S. believes that this topic is very timely due to the increasing number of space actors, spacecraft, and space debris. It is essential that we come together to agree on measures that can be employed to reduce the risks to space operations for all.

As we have in the past, we again take this opportunity to note that COPUOS and its Legal Subcommittee have a distinguished history of working through consensus to develop space law in a manner that promotes space exploration. The Legal Subcommittee played a key role in establishing the primary Outer Space Treaties – the Outer Space Treaty of 1967, the Rescue and Return of Astronauts Agreement, and the Liability and Registration Conventions. Under the legal framework of these treaties, space exploration by nations, international organizations and, now, private entities has flourished. As a result, space technology and services contribute to economic growth and improvements in the quality of life around the world.

At the last session of the Legal Subcommittee, work continued on the multi-year work plan entitled "Review of the international mechanisms for cooperation in the peaceful exploration and use of outer space." The United States is particularly pleased that the Subcommittee established a working group under the leadership of Professor Aoki of Japan. In accordance with the work plan, the Subcommittee conducted an exchange of information on the range of existing international space cooperation mechanisms. In the upcoming sessions, the Committee will continue to take stock of international cooperative mechanisms employed by Member States with a view to developing an understanding of the range of collaborative mechanisms employed by States. This information will be helpful to Member States as they consider relevant mechanisms to facilitate future cooperative endeavors in the peaceful uses of outer space. And in this regard, this item is particularly timely in that 2017, the final year of consideration of this agenda item, coincides with the fiftieth anniversary of the Outer Space Treaty.

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3. UN General Assembly First Committee Discussion on Outer Space

On October 27, 2014, Christopher L. Buck, Alternate Representative for the U.S. delegation, delivered remarks at the 69th UN General Assembly First Committee thematic discussion on outer space. Mr. Buck's remarks are excerpted below and available at *www.state.gov/t/avc/rls/2014/233445.htm*.

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… Outer space is becoming increasingly congested from orbital debris and contested from human threats that endanger the space environment. Therefore, it is essential that all nations work together to preserve this domain for use by future generations.

In this context, the United States is especially concerned about the continued development, testing, and, ultimately, deployment of destructive anti-satellite (ASAT) systems. Although some States have advocated for space arms control measures to prohibit the placement of weapons in outer space, their own development and testing of destructive ASAT capabilities is de-stabilizing, could trigger dangerous misinterpretations and miscalculations, and could be escalatory in a crisis or conflict.

ASAT weapons directly threaten satellites and the information that those satellites provide. They pose a direct threat to key infrastructure used in arms control verification monitoring; military command, control, and communications; and strategic and tactical warning of attack. Furthermore, a debris-generating ASAT test or attack may only be minutes in duration, but the consequences could last for decades and indiscriminately threaten space assets used by all nations. The United States believes that testing debris-generating ASAT systems threatens the national security, economic well-being, and civil endeavors of all nations.

In considering options for international cooperation to ensure space security and sustainability, we acknowledge that some States have proposed a new, legally binding agreement that would prohibit the placement of weapons in outer space. For its part, the United States is willing to consider space arms control proposals and concepts that are equitable, effectively verifiable, and enhance the security of all nations. However, the revised draft "Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects"—also known as the "PPWT"—submitted by Russia and China to the Conference on Disarmament (CD) earlier this year, does not satisfy these criteria.
As the United States has noted in our analysis submitted to the CD, which was published as CD/1998 dated September 3, 2014, the 2014 draft PPWT, like the earlier 2008 version, remains flawed. Above all, there is no integral verification regime to help monitor compliance with the ban on the placement of weapons in outer space. Moreover, Russia and China openly acknowledge that technologies do not currently exist to verify compliance with such a ban.

Furthermore, the updated draft PPWT distracts attention from terrestrially-based ASAT systems. Under the PPWT, there is no prohibition on the research, development, testing, production, storage or deployment of terrestrially-based anti-satellite weapons. Thus, the PPWT evades the fact that terrestrially based capabilities could be used to perform the same functions as space-based weapons. For example, according to our analysis, China's January 11, 2007, flight-test of a ground-based direct-ascent ASAT missile against its own weather satellite would have been permitted under both the 2008 as well as the updated 2014 draft PPWT. China's subsequent, non-destructive test of this same ASAT system on July 23, 2014, also would have been allowed.

In contrast to the flawed approach offered by the PPWT, there are numerous pragmatic ways where spacefaring nations could cooperate to preserve the security and sustainability of the space domain. Indeed, the United States is convinced that there are challenges that can, and should, be addressed through practical, near-term initiatives, such as non-legally binding transparency and confidence-building measures (TCBMs) to encourage responsible actions in, and the peaceful use of, outer space. Such pragmatic, non-legally binding measures either are already being implemented unilaterally, bilaterally, or multilaterally, or could be developed and implemented by spacefaring nations in the future.

In this regard, the United States fully participated in, and endorsed, the consensus study of outer space TCBMs by the UN Group of Governmental Experts (GGE), whose report was later endorsed on December 5, 2013, by the full General Assembly in Resolution 68/50. Moreover, the United States is co-sponsoring a follow-on resolution at this session on "Transparency and Confidence-Building Measures for Outer Space Activities," which supports further consideration of the GGE's recommendations at a joint ad hoc meeting of the First and Fourth Committees next year during the General Assembly's seventieth session.

The GGE report endorsed voluntary, non-legally binding transparency and confidence-building measures to strengthen stability in space. It also endorsed efforts to pursue political commitments—including a multilateral code of conduct—to encourage responsible actions in, and the peaceful use of, outer space.

The United States also welcomes proposals for the development of additional TCBMs if they satisfy the criteria established in the consensus report. Per the GGE consensus report, non-legally binding TCBMs for outer space activities should:

1) be clear, practical, and proven, meaning that both the application and the efficacy of the proposed measure must be demonstrated by one or more actors;
2) be able to be effectively confirmed by other parties in their application, either independently or collectively; and finally,
3) reduce or even eliminate the causes of mistrust, misunderstanding, and miscalculation with regard to the activities and intentions of States.

In this regard, we would note that some ideas for TCBMs that have been mentioned in the First Committee fail to meet the GGE's criteria for a valid TCBM. For example, in assessing the Russian initiative for States to make declarations of "No First Placement" (NFP) of weapons in outer space, we conclude that the NFP initiative has three basic flaws:

First, the NFP Pledge does not adequately define what constitutes a "weapon in outer space."

Second, other parties would not be able to confirm effectively a State's political commitment "not to be the first to place weapons in outer space."

Third, the NFP Pledge focuses exclusively on space-based weapons—such as the co-orbital ASAT weapon once flight-tested and deployed by the former-Soviet Union. It is silent in regard to terrestrially-based ASAT weapons, which, as previously noted, constitute a significant threat to spacecraft.

Fortunately, there are constructive proposals for outer space TCBMs that satisfy the criteria established in the consensus GGE report. For example, the U.S. Strategic Command provides to both government and commercial sector satellite operators timely notifications of satellite close approaches. In this regard, the United States welcomes China's recent commitment to provide contact information necessary for Chinese entities responsible for spacecraft operations and conjunction assessment to receive urgent satellite collision warnings directly from the U.S. Strategic Command's Joint Space Operations Center.

Also, the United States believes that European Union efforts to develop an International Code of Conduct for Outer Space Activities can serve as the best near-term mechanism for States to implement many of the GGE's recommendations. Over the past two years, the United States has actively participated in the European Union-sponsored Open-Ended Consultations in Kyiv, Bangkok, and Luxembourg. We now look forward to working next year with the European Union and the international community in an inclusive process to finalize a Code of Conduct that enhances the long-term sustainability, safety, stability and security of the space environment. In addition to continued informal exchanges at the CD in Geneva, the United States supports consideration of the GGE recommendations by the UN Disarmament Commission during its 2015-2017 cycle.

These "top-down" measures to enhance stability can be complemented by "bottom-up" efforts to ensure the long-term sustainability of outer space activities. The United States

welcomes the decision by the Committee on the Peaceful Uses of Outer Space (COPUOS) to consider the GGE report during its 58th session in June 2015. This review can reinforce the importance of ongoing efforts of COPUOS to mitigate space debris and develop new guidelines for improved spaceflight safety and collaborative space situational awareness.

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4. Multilateral Efforts to Ensure a Safe and Sustainable Space Environment

On November 21, 2014, Deputy Assistant Secretary of State Rose addressed a conference in London on promoting space security and sustainability. His remarks are available at *www.state.gov/t/avc/rls/2014/234392.htm*. Excerpted below are his comments regarding multilateral efforts to ensure a stable and safe environment in space.

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Given these threats and the current era where many States and nongovernmental organizations are harnessing the benefits of outer space, we have no choice but to work with our allies and partners around the world to ensure the long-term sustainability of the space environment. We also must speak clearly and publicly about what behavior the international community should find both acceptable and unacceptable. Over the past few years, the United States has worked to support a number of multilateral initiatives that seek to establish consensus guidelines for space activities that are both in the national security interests of the United States, and will further the long-term stability and sustainability of the space environment.

Just last year, I served as the United States expert on a United Nations Group of Governmental Experts (GGE) study of outer space transparency and confidence-building measures (TCBMs). The consensus GGE report which was published in July of last year endorsed voluntary, non-legally binding TCBMs to strengthen sustainability and security in space. The GGE benefited immensely from the contributions of Professor Richard Crowther of the U.K. Space Agency, who worked with several other experts to define a rigorous set of criteria for considering space TCBMs. This work contributed to the GGE's recommendation that States implement measures to promote coordination to enhance safety and predictability in the uses of outer space. The report also endorsed "efforts to pursue political commitments, for example, a multilateral code of conduct, to encourage responsible actions in, and the peaceful use of, outer space."

This International Code of Conduct for Outer Space Activities is another important multilateral initiative. Among the Code's commitments for signatories is to refrain from any action which brings about, directly or indirectly, damage, or destruction, of space objects and to minimize, to the greatest extent possible, the creation of space debris, in particular, the creation of long-lived space debris. The Code could also help solidify safe operational practices, reduce the chance of collisions or other harmful interference with nations' activities, contribute to our

awareness of the space environment through notifications, and strengthen stability in space by helping establish norms for responsible behavior in space.

Lastly, the UN Committee on the Peaceful Uses of Outer Space (COPUOS) is also doing important work to move forward in the development of new international long-term sustainability guidelines. U.S. and U.K. experts from the private sector as well the federal government have played a leading role in the COPUOS Working Group on the Long-term Sustainability of Outer Space Activities. These efforts contribute to the development of multilateral and bilateral space TCBMs. Exchanges of information between space operations centers also can serve as useful confidence building measures.

Multilateral diplomatic initiatives contribute greatly to defining acceptable and unacceptable behaviors in space and therefore are key components of the United States deterrence strategy. In addition, if we are serious about maintaining the space environment for future generations, we must support such measures that promote positive activities in space and further the creation of norms which dissuade countries from taking destabilizing actions such as the testing of debris-generating ASAT systems. By working with the international community, we can, and must, advance the long-term sustainability and security of the outer space environment for all nations and future generations.

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5. Applicability of International Legal Framework for Space to Commercial Space Activities

In September 2014, Kenneth Hodgkins, Director of the Office of Space and Advanced Technology, U.S. Department of State, addressed the Commercial Space Transportation Advisory Committee. His remarks are excerpted below.

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A number of U.S. companies have recently announced plans for unprecedented activities in outer space, including on-orbit satellite servicing and exploitation of lunar and asteroid resources. Such activities implicate the international legal framework for space in novel ways, and have inspired extensive academic commentary on the manner in which international law shapes (or even precludes) these activities. Accordingly, a number of companies have approached the Administration—through formal and informal channels—seeking guidance as to whether and how their planned activities are constrained by the international obligations or foreign policy interests of the United States. Although some of these activities remain years if not decades in the future, we understand the desire for greater legal clarity in the near term to attract investment.

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Of central importance to commercial space activities is Article VI of the Outer Space Treaty, which provides in relevant part:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions of the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.

Article VI was among the more contentious provisions during the negotiation of the Outer Space Treaty. The Soviet Union strongly favored a formulation that would have limited space activities to governmental entities. The United States, which had plans at that point for privately operated telecom satellites, fought for a formulation preserving the possibility of non-governmental space activities. The compromise is what we have in Article VI: non-governmental activities are permitted, but require authorization and continuing supervision by the appropriate State Party to ensure they are carried out in conformity with the Treaty.

The United States implements this Article VI obligation through licensing programs administered by three agencies: the FAA licenses launch and reentry; the FCC licenses broadcast from space; and NOAA licenses remote sensing of the Earth. This national regulatory framework is adequate for existing commercial space activities—launch services, communications and remote sensing satellites—but it is not clear that it is adequate for all newly contemplated commercial activities on the horizon.

As the entity responsible for ensuring compliance with the United States' international obligations, the State Department is actively working with the interagency to determine how best to align the Government's regulatory authority in space with our international obligation to regulate non-governmental space activities. …

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Cross References

Piracy, **Chapter 3.B.6.**
Proliferation Security Initiative, **Chapter 19.E.**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

a. UN Framework Convention on Climate Change

On December 11, 2014, Secretary of State John Kerry addressed the 20th Conference of the Parties ("COP-20") of the UN Framework Convention on Climate Change ("FCCC") in Lima, Peru. Secretary Kerry's remarks are excerpted below and available at *www.state.gov/secretary/remarks/2014/12/234969.htm*.

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I'm … delighted to say that because of all that hard work, I understand we now have enough pledges from the international community to meet and exceed the initial Climate Green Fund target of 10 billion. And the United States is very proud to be contributing 3 billion, and we are grateful for the announcement of countries like Australia, Belgium, Colombia, and Peru that they have made in recent days to help get us over the hurdle. All of this will help to ensure that this fund can succeed in helping the most overburdened nations of the world to do more to be able to respond to climate change. And finally, I want to thank Peru for hosting the COP-20, a critical stepping stone to the agreement that we must reach in Paris next year.

Now for Peru, climate change is personal. It will determine whether future generations will know Peru as we know it today, as we have known it, or whether today's treasures are confined to history. Think about it: Peru is home to 70 percent of the world's tropical glaciers, to nearly all of the world's major ecosystems, and to more fish species than any other country on earth. But already, almost half the volume of many glaciers has melted away just in the last 30

years or so. Ecosystems are visibly being destroyed before our eyes. And fisheries are threatened. So this is not just a fight by Peru; it is a fight for Peru.

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…[W]hether we're able to promptly and effectively address climate change is as big a test of global leadership, of the international order … that you'll find. Every nation—and I repeat this as we hear the debates going back and forth here—every nation has a responsibility to do its part if we're going to pass this test. And only those nations who step up and respond to this threat can legitimately lay claim to any mantle of leadership and global responsibility. And yes, if you're a big, developed nation and you're not helping to lead, then you are part of the problem.

Rest assured, if we fail, future generations will not and should not forgive those who ignore this moment, no matter their reasoning. Future generations will judge our effort not just as a policy failure, but as a massive, collective moral failure of historic consequence, particularly if we're just bogged down in abstract debates. They will want to know how we together could possibly have been so blind, so ideological, so dysfunctional, and frankly, so stubborn that we failed to act on knowledge that was confirmed by so many scientists in so many studies over such a long period of time and documented by so much evidence.

The truth is we will have no excuse worth using. The science of climate change is science, and it is screaming at us, warning us, compelling us—hopefully—to act. Ninety-seven percent of peer- reviewed climate studies have confirmed that climate change is happening and that human activity is responsible. …

Now you only have to look at the most recent reports to see in all too vivid detail the stark reality that we are faced with. Scientists agree that the emission of climate pollutants like carbon dioxide, methane, soot, hydrofluorocarbons all contribute to climate change. In fact, basic science tells us that life on earth wouldn't exist at the heretofore 57 degrees average temperature Fahrenheit which allows life to exist. Without a greenhouse effect, life wouldn't exist, and if the greenhouse effect is good enough to provide you with life itself, obviously, logic suggests that it's also going to act like a greenhouse if you add more gases and they're trapped and you heat up the earth. This is pretty logical stuff, and it's astounding to me that even in the United States Senate and elsewhere, we have people who doubt it.

People agree that energy sources that we've relied on for decades to fuel our cars and power our homes—things like oil and coal—are largely responsible for sending these warming gasses up into the atmosphere. And they agree that emissions coming from deforestation and from agriculture also send enormous quantities of carbon pollution into our atmosphere. And they agree that if we continue down the same path that we are on today, the world as we know it will change profoundly and it will change dramatically for the worse.

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Mankind is creating the problem, and mankind can solve the problem. And unlike some problems that we face, this one already has a ready-made solution provided by mankind that is staring us in the face: The solution to climate change is energy policy.

And there is still time for us to come together as a global community and make the right energy choices. We can significantly cut emissions and prevent the worst consequences of climate change from happening. And anyone who tells you otherwise is just plain wrong, period. The science shows that at this moment there still is a window. It's shutting. It's smaller. It's not as big an opening. And indeed, mitigation is here with us as a result, but there is time for us to change course and avoid the worst consequences—but the window is closing quickly.

So we have to approach this global threat with the urgency that it warrants. Leaders need to lead. Countries need to step up. And that means we have to come together around an ambitious climate agreement between now and the end of next year. Let me be clear: We're not going to solve everything at this meeting or even in Paris—I understand that. But we must take giant, measurable, clear steps forward that will set us on a new path. And that means concrete actions and ambitious commitments.

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Now certainly, the biggest emitters, including the United States—and I'm proud that President Obama has accepted that responsibility—have to contribute more to the solution. But ultimately, every nation on Earth has to apply current science and make state-of-the-art energy choices if we're going to have any hope of leaving our future to the next generation to the safe and healthy planet that they deserve.

Now I want to be very clear: President Obama and I understand the way countries feel, particularly about the major emitters. We get it. The United States and other industrial nations have contributed significantly to this problem—before, I might add, we fully understood the consequences. And we recognize the responsibility we have now to lead the global response.

But that is exactly what the United States is doing. It's a challenge that President Obama has taken on. And today, thanks to the President's Climate Action Plan, the United States is well on its way to meeting our international commitments to seriously cut our greenhouse gas emissions by 2020. And that's because we're going straight to the largest source of pollution. We're targeting emissions from transportation and power sources, which account for roughly 60 percent of the dangerous greenhouse gases that we release. And we're also taking—tackling smaller opportunities in every sector of the economy in order to address every greenhouse gas.

The President has put in place standards to double the fuel efficiency of cars and trucks in the American roads. We've also proposed regulations that will curb carbon pollution coming from new power plants, and similar regulations to limit the carbon pollution coming from power plants that are already up and running, and we're going to take a bunch of them out of commission.

At the same time, since President Obama took office, the United States has upped our wind energy production more than threefold, and we've upped our solar energy production more than tenfold. We've also become smarter about the way we use energy in our homes and businesses. And as a result, we're emitting less overall than we have at any time in the last 20 years.

This is by far the most ambitious set of climate change actions that the United States has ever undertaken. And it's the reason we were able to recently announce our post-2020 goal of reducing emissions from 26 to 28 percent, from 2005 levels, by 2025. That will put us squarely on the road to a more sustainable and prosperous economy. And the upper end of this target would also enable us to cut our emissions by 83 percent by 2050—which is what science says we need to do to meet the goal of preventing over 2 degrees of Celsius warming.

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Now, of course industrialized countries have to play a major role in reducing emissions, but that doesn't mean that other nations are just free to go off and repeat the mistakes of the past and that they somehow have a free pass to go to the levels that we've been at where we understand the danger.

Now, I know this is difficult for developing nations. We understand that. But we have to remember that today more than half of global emissions—more than half—are coming from developing nations. So it is imperative that they act, too.

And at the end of the day, if nations do choose the energy sources of the past over the energy sources of the future, they'll actually be missing out on the opportunity to build the kind of economy that will be the economy of the future and that will thrive and be sustainable.

Coal and oil may be cheap ways to power an economy today in the near term, but I urge nations around the world—the vast majority of whom are represented here, at this conference—look further down the road. I urge you to consider the real, actual, far-reaching costs that come along with what some think is the cheaper alternative. It's not cheaper.

I urge you to think about the economic impacts related to agriculture and food security – and how scientists estimate that the changing climate is going to yield – is going to reduce the capacity of crops to produce the yields they do today in rice or maize or wheat, and they could fall by 2 percent every single decade. Think about what that means for millions of farmers around the world and the impact it will have on food prices on almost every corner of the world, and particularly as each decade we see the world's population rise towards that 9 billion mark. Then factor in how that would also exacerbate the human challenges like hunger and malnutrition.

Add to that the other long-term-related problems that come from relying on 20th century energy sources and the fact that air pollution caused by the use of fossil fuel contributes to the deaths of at least 4.5 million people every year and all the attendant healthcare costs that go with it.

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The bottom line is that we can't only factor in the cost of immediate energy need or energy transition. We have to factor in the long-term cost of carbon pollution. And we have to factor in the cost of survival itself. And if we do, we will find that the cost of pursuing clean energy now is far cheaper than paying for the consequences of climate change later. Nicolas Stern showed us that in a study any number of years ago. And we still need to get all of our countries more serious about doing that accounting.

In economic terms—bottom line, in economic terms, this is not a choice between bad and worse, not at all. This is a choice between growing or shrinking your economy. And what we don't hear enough of is the most important news of all, that climate change presents one of the greatest economic opportunities of all time on earth.

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So today I call on all of you here in Lima—negotiators, diplomats, scientists, economists, and concerned citizens in Peru and around the world—to demand resolve from your leaders. Speak out. Make climate change an issue that no public official can ignore for even one more day, let alone for one more election. Make a transition towards clean energy the only policy that you'll accept. And make it clear that an ambitious agreement in Paris is not an option, it's an urgent necessity.

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b. Joint Action with China

The United States and China committed to work together within the U.S.-China Climate Change Working Group ("CCWG"), launched in 2013, to address the issues of climate change and air pollution from burning fossil fuels. See February 15, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/02/221686.htm*. Specifically, the two sides decided to work together on "implementation plans on the five initiatives launched under the CCWG, including Emission Reductions from Heavy Duty and Other Vehicles, Smart Grids, Carbon Capture Utilization and Storage, Collecting and Managing Greenhouse Gas Emissions Data, and Energy Efficiency in Buildings and Industry," and further committed to achieve "concrete results by the Sixth U.S.-China Strategic and Economic Dialogue in 2014."

On June 15, 2014, the State Department released a media note containing the latest report of the CCWG to U.S. and China's leaders. The report, summarizing progress on the five initiatives agreed in February, as well as other areas of cooperation, is available at *www.state.gov/r/pa/prs/ps/2014/07/229308.htm*.

On November 12, 2014, the U.S. and China announced new actions to reduce carbon pollution. President Obama and Chinese President Xi Jinping jointly announced targets set by the United States and China for reducing greenhouse gas emissions post-2020. The announcement is available on the White House website at *www.whitehouse.gov/blog/2014/11/12/us-and-china-just-announced-important-new-actions-reduce-carbon-pollution*. Excerpts follow from the White House announcement.

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This announcement is a unique development in the U.S.-China relationship. The world's two largest economies, energy consumers, and carbon emitters are reaching across traditional divides and working together to demonstrate leadership on an issue that affects the entire world.

By making this announcement well in advance of the deadline set out in the UNFCCC negotiations, the two leaders demonstrated their commitment to reducing the harmful emissions warming our planet, and urged other world leaders to follow suit in offering strong national targets ahead of next year's final negotiations in Paris.

President Obama believes we have a moral obligation to take action on climate change, and that we cannot leave our children a planet beyond their capacity to repair. Over the last year, a spate of scientific studies have laid out the scope and scale of the challenge we face in the starkest of terms. "Climate change, once considered an issue for a distant future, has moved firmly into the present," says the U.S. National Climate Assessment. "Without additional mitigation efforts…warming by the end of the 21st century will lead to high to very high risk of severe, widespread, and irreversible impacts globally," the Intergovernmental Panel on Climate Change concludes.

In Copenhagen in 2009, President Obama pledged that the United States would reduce its greenhouse gas emissions in the range of 17 percent below 2005 levels by 2020. We're on track to meet that goal while growing the economy and creating jobs, thanks to the historic fuel economy standards enacted during the President's first term; the measures to reduce carbon pollution, deploy more clean energy, and boost energy efficiency through the President's Climate Action Plan; and the leadership demonstrated by a growing number of U.S. businesses, who have increased their investment in clean technologies and pledged to phase down the potent greenhouse gases known as HFCs.

After 2020, the United States will reduce its net greenhouse gas emissions to 26-28% below 2005 levels by 2025. This goal is both ambitious and achievable, grounded in an intensive analysis of what actions can be taken under existing law, and will double the pace of carbon pollution reduction in the United States from the pre-2020 period. It also means the United States is doing its part to contain warming to 2 degrees Celsius, though achieving that global outcome will require global ambition and commitments from all economies.

Chinese President Xi announced for the first time his intention to peak Chinese CO2 emissions around 2030, and further committed to make best efforts to peak early. China also announced a target of expanding the share of zero-emission sources in primary energy, namely renewables and nuclear, to 20% by 2030. To achieve that goal, China will have to deploy an additional 800-1,000 gigawatts of zero-emission generation capacity by 2030, about the same as all their current coal-fired capacity and nearly as much as the total installed capacity in the U.S. energy sector today.

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2. UNEP

As discussed in *Digest 2013* at 392-93, the UN Environment Programme ("UNEP") underwent significant reforms, including the transition to universal membership. The statement of Dr. Daniel A. Reifsnyder, Deputy Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs, at the inaugural meeting of the UN Environmental Assembly in Nairobi, Kenya, June 26, 2014 is excerpted below and available at *www.state.gov/s/l/c8183.htm*.

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My delegation is proud to be in Nairobi at this historic first meeting of the United Nations Environmental Assembly. …

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For decades, UNEP has provided a forum in which to consider such problems and a platform from which nations have acted to address them. UNEP's recent achievements in this regard include the new Minamata Convention on Mercury and the Intergovernmental Platform on Biological Diversity and Ecosystem Services. But these are only the most recent—the list is too long to repeat in the short time available here but includes such things as the Vienna Convention and Montreal Protocol on protecting ozone layer, launching—with the World Meteorological Organization—of the Intergovernmental Panel on Climate Change, the Regional Seas Program, the Stockholm Convention on Persistent Organic Pollutants, and the Partnership for Clean Fuels and Vehicles.

In the outcome document from Rio+20, we agreed to strengthen the role of UNEP. That is being accomplished now with such changes as this first meeting of the United Nations Environmental Assembly, now including universal membership, the empowerment of the Committee of Permanent Representatives, and the additional funding for UNEP from the United Nations regular budget.

We believe that UNEP has been and continues to be vital in helping nations to address the broad range of environmental problems each of us faces. But UNEP operates in a complex international structure in which there are many players each with specific mandates. We think it important that UNEP continually define and redefine its comparative advantage and promote excellence within its mandate, working closely with others to achieve our common objectives with respect to the environment.

In particular, we believe that UNEP's role in scientific assessment of environmental problems is key—scientific assessment which can be as simple as seeking advice from an expert on how to approach a specific problem to something as complex as a periodic assessment of

global climate change by the IPCC. UNEP cannot itself undertake these assessments, but UNEP can serve as a critical repository of information and advice on how to bring science and scientific assessment to bear in addressing environmental problems.

Another key area in which UNEP has a clear comparative advantage is in monitoring the global environment and making policy makers aware of continuing and emerging environmental problems. This is why we believe that such things as UNEP Live and the Global Environmental Outlook are so vital, and why we have sought to bring to the GEO the same kind of rigor that we bring to the IPCC's periodic scientific assessment reports.

Before concluding, chair, let me say that we are encouraged that member states have reached agreement on a new decision regarding air pollution. We believe this decision will prove instrumental in bringing a global focus to a burgeoning problem and will help build capacity in countries to address it—with significant benefits for their citizens today and tomorrow. We think it will be important for UNEP to align its program of work to take into account this and other decisions we have made at this session.

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3. Ozone Depletion

At the Twenty-sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer in Paris in November 2014, the Parties again considered an amendment to the Protocol proposed by the United States, Canada, and Mexico to phase down the production and consumption of hydrofluorcarbons (HFCs). HFCs are potent greenhouse gases used as alternatives to chlorofluorocarbons and hydrochlorofluorocarbons, which are being phased out under the Montreal Protocol. The HFC phase-down as proposed in 2014 would take place between 2018 and 2035 for developed countries, and between 2020 and 2045 for developing countries. Proponents of the amendment sought the establishment of a contact group, the mechanism typically used by the Parties to negotiate significant issues. Despite high-level diplomatic efforts by the United States and its partners, strong opposition by Pakistan, Iran, India, and others prevented the attainment of consensus on the formation of a contact group. In the end, the Parties agreed instead to hold a special Open-Ended Working Group meeting on issues related to HFC management and a technical workshop focused on HFC alternatives in high ambient temperature conditions, both in April 2015. The Parties also approved the critical use exemption requested by the United States for methyl bromide, an ozone-depleting substance that is used as an agricultural fumigant.

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. General

On February 25, 2014, Secretary Kerry addressed the World Ocean Summit sponsored by The Economist and National Geographic. His remarks are available at *www.state.gov/secretary/remarks/2014/02/222532.htm*. Excerpts below identify ways to improve the health of the world's oceans.

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First, the U.S. Government and domestic industries have made real progress in sustainably managing our fisheries. More and more, we are learning how to do that. We're also trying to stop ports from importing illegally harvested fish. There's more that we can do on both of these fronts. One step all nations should take is to end government subsidies to fisheries, because that just encourages overfishing and undermines the effort to have a management regulatory process that is sustainable.

Another is to implement more systematic checks on seafood delivered to ports all over the world. In the United States, we are also exploring policies that would, for example, only allow seafood into American markets if there's proof that the seafood was captured legally and in a way that is traceable. All of these steps can actually help us to level the playing field for honest fishermen and better protect the entire seafood supply chain.

Second, …more sustainable agricultural processes will go a long way toward cutting down on nutrient pollution. And we could also do a better job of protecting coastal and marine areas. Today, less than 3 percent of the world's oceans are part of a marine protected area or a marine reserve. I'm proud that I introduced, with Gerry Studds years ago, the Stellwagen Marine Preserve off of Massachusetts. But we need many more of these around the world. Think about the progress we could make if just 10 percent of coastal and marine areas were protected. And I think that's a goal that we could accomplish and it's one we ought to set for ourselves.

Third, if we want to slow down the rate of acidification on our oceans, protect our coral reefs, and save species from extinction, we have to cut down on greenhouse gas emissions and pursue cleaner sources of energy. It's as simple as that.

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2. Ratification of Fisheries Treaties

As discussed in *Digest 2013* at 414-15, President Obama transmitted several fisheries-related international conventions and agreements to the U.S. Senate in 2013 for advice and consent to ratification. On April 3, 2014, the Senate gave its advice and consent to ratification of the following conventions and agreements: (1) The Convention on the Conservation and Management of High Seas Fisheries Resources of the North Pacific Ocean; (2) The Convention on the Conservation and Management of High Seas Fishery

resources of the South Pacific Ocean; (3) Amendments to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries; and (4) The FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the "Port State Measures Agreement"). Individually and collectively, these four agreements represent significant progress in protecting U.S. interests, advancing U.S. international policies and priorities to conserve and manage shared living marine resources, to protect the broader marine environment from the effects of destructive fishing practices, and to prevent illegal fishing activities from undermining global and regional efforts toward these ends. Congress is considering proposed implementing legislation for the four agreements.

3. Whaling

a. U.S. Response to Icelandic Whaling

On April 1, 2014, President Obama issued a memorandum directing executive branch departments, agencies, and officials to take steps to respond to Icelandic whaling activities. Daily Comp. Pres. Docs. 2014 DCPD No. 00226 (Apr. 1, 2014). President Obama based his action on a January 31, 2014 determination by Secretary of the Interior Sally Jewell under section 8 of the Fisherman's Protective Act of 1967 (the "Pelly Amendment") (22 U.S.C. § 1978), that nationals of Iceland are conducting trade in whale meat and products that diminish the effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The President directed the following:

> (1) relevant departments and agencies to raise concerns with Iceland's trade in whale parts and products in appropriate CITES fora and processes and, in consultation with other international actors, to seek additional measures to reduce such trade and enhance the effectiveness of CITES; (2) relevant senior Administration officials and U.S. delegations meeting with Icelandic officials to raise U.S. objections to commercial whaling and Iceland's ongoing trade in fin whale parts and products and to urge a halt to such action, including immediate notification of this position to the Government of Iceland; (3) the Department of State and other relevant departments and agencies to encourage Iceland to develop and expand measures that increase economic opportunities for the nonlethal uses of whales in Iceland, such as responsible whale watching activities and educational and scientific research activities that contribute to the conservation of whales; (4) the Department of State to re-examine bilateral cooperation projects and, where appropriate, to base U.S. cooperation with Iceland on the Icelandic government changing its whaling policy, abiding by the International Whaling Commission moratorium on commercial whaling, and not

> engaging in trade in whale parts and products in a manner that diminishes the effectiveness of CITES; (5) the Department of State to inform the Government of Iceland that the United States will continue to monitor the activities of Icelandic companies that engage in commercial whaling and international trade in whale parts and products; (6) Cabinet secretaries and other senior Administration officials to evaluate the appropriateness of visits to Iceland in light of Iceland's resumption of fin whaling and ongoing trade in fin whale parts and products; and (7) relevant departments and agencies to examine other options for responding to continued whaling by Iceland.

The 2014 determination was the second such determination under the Pelly Amendment regarding Iceland. On September 15, 2011, the President directed departments and agencies to take similar actions in response to the certification of Iceland by the Secretary of Commerce under the Pelly Amendment that nationals of Iceland are conducting whaling activities that diminish the effectiveness of the International Whaling Commission's conservation program.

President Obama also notified Congress of Secretary Jewell's determination regarding Icelandic whaling under the Pelly Amendment and his direction to executive branch agencies and departments in response. Daily Comp. Pres. Docs. 2014 DCPD No. 00227 (Apr. 1, 2014). Excerpts follow from the President's message to Congress.

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Iceland's actions jeopardize the survival of the fin whale, which is listed in CITES among the species most threatened with extinction, and they undermine multilateral efforts to ensure greater worldwide protection for whales. Specifically, Iceland's continued commercial whaling and recent trade in whale products diminish the effectiveness of CITES because: (1) Iceland's commercial harvest of fin whales undermines the goal of CITES to ensure that international trade in species of animals and plants does not threaten their survival in the wild; and (2) Iceland's current fin whale harvest and quota exceeds catch levels that the IWC's scientific body advised were sustainable.

In her letter of January 31, 2014, Secretary Jewell expressed her concern for Iceland's actions, and I share these concerns. Just as the United States made the transition from a commercial whaling nation to a whale watching nation, we must enhance our engagement to facilitate this change by Iceland.

…. In addition, previous Pelly certifications of Iceland, and the direction to take actions pursuant to those certifications, remain in effect. I concur with the recommendation, as presented by the Secretary of the Interior, to pursue the use of non-trade measures and that the actions outlined above are the appropriate course of action to address this issue. Accordingly, I am not directing the Secretary of the Treasury to impose trade measures on Icelandic products for the whaling activities that led to the certification by the Secretary of the Interior.

The Departments of State, Commerce, and the Interior will continue to monitor and encourage Iceland to revise its policies regarding commercial whaling. Further, within 6 months,

I have directed relevant departments and agencies to report to me through the Departments of State, Commerce, and the Interior on their actions. I believe that continuing focus on Icelandic whaling activities is needed to encourage Iceland to halt commercial whaling and support international conservation efforts.

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b. International Whaling Commission

The International Whaling Commission ("IWC") convened for its 65th session September 15-18, 2014 in Slovenia. The Chair's report of the meeting (including links to opening statements) is available at *https://iwc.int/chairs-reports*. The U.S. opening statement at the IWC's 65th session appears below and touches on the decision of the International Court of Justice in the whaling case, *Australia v. Japan*, among other topics.

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The United States is pleased to be in Portorož, Slovenia, to participate in the 65th meeting of the International Whaling Commission (IWC). We are very grateful to the Government of Slovenia for its hospitality and for all of its work, along with the Secretariat, in arranging these wonderful facilities. The United States looks forward to a successful and productive IWC65.

For the United States, the IWC is, and must continue to be, the preeminent organization for the conservation and management of whales. Our participation at IWC65 will be guided by this objective. As part of our effort we will continue to promote the role of the IWC in leading scientific research on cetaceans and on addressing major causes of mortality for cetaceans including ship strikes and entanglement. We will also continue to support the management of aboriginal subsistence whaling by the Commission as well as the moratorium on commercial whaling.

There are several important topics before the Commission this year, including the proposed South Atlantic Whale Sanctuary, Aboriginal Subsistence Whaling catch limits for the Greenland hunt, and lethal scientific research whaling. The Commission will also consider important ongoing conservation work.

The United States is a global leader in promoting cetacean conservation, spanning the full range of current threats to whales. The United States has hosted multiple IWC workshops since 2012, including two workshops on marine debris and the workshop on "Impacts of Increased Marine Activities on Cetaceans in the Arctic". The United States also provided financial and staff support for two disentanglement workshops, the ship strike workshop hosted by Panama, the global soundscape modeling workshop hosted by the Netherlands, and the whale watch operators workshop hosted by Australia. We look forward to discussing results of intersessional work on whale watching, ocean noise, ship strikes, marine debris, entanglement prevention and disentanglement, and anthropogenic impacts on whales in the Arctic.

The United States continues to support the moratorium on commercial whaling. The commercial whaling moratorium is an effective conservation and management measure enabling

the recovery of whale stocks from the long, devastating history of overexploitation. In this regard, the United States believes that the commercial whaling conducted by nationals of Iceland and Norway diminish the effectiveness of the International Convention for the Regulation of Whaling and, in the case of Iceland, the Convention on International Trade in Endangered Species of Wild Fauna and Flora as well. We strongly urge Iceland and Norway to cease immediately all commercial whaling and international trade in whale products.

The United States also continues to support the establishment of a South Atlantic Whale Sanctuary, and urges other IWC members to support the proposed Sanctuary. In our view, the Sanctuary will provide range states with important new opportunities to advance whale conservation. In addition, the Sanctuary will also provide a means for international cooperation necessary for effective conservation and management of cetaceans.

On behalf of Greenland, Denmark has submitted an aboriginal subsistence whaling catch limit request. We are hopeful that the Commission will quickly adopt catch limits for Greenland. With regard to outstanding issues related to aboriginal subsistence whaling, over the past two years the United States has participated in the Aboriginal Subsistence Whaling Working Group, with the goal of improving the management of aboriginal subsistence whaling. We appreciate the efforts of all the Working Group members.

The United States continues to oppose lethal scientific research whaling. We recognize the significance of the 2014 International Court of Justice (ICJ) decision in the *Whaling in the Antarctic: Australia vs. Japan (New Zealand intervening)* case. While the decision applies only to those parties involved, the Commission has a role to play. In light of the ICJ decision, the Commission should consider providing guidance to the Scientific Committee on how to review and make recommendations on the appropriateness and scientific merit of new proposed special permits. We look forward to hearing the views of the three parties involved in the case on this matter.

The IWC is the premiere international forum to solve current and emerging whale conservation issues and coordinate critical research. While the passage of the commercial whaling moratorium drastically reduced the number of whales being killed, obstacles to whale conservation remain, and three member countries hunt whales outside of IWC control. A cooperative atmosphere is essential to achieve our shared overall goal of preserving the world's whales for future generations and to make meaningful progress on addressing threats to whales. The United States believes observers can also contribute significantly to the cooperative work of the Commission, and we look forward to working with other member states to utilize this important resource in productive ways.

One important sign of progress at the IWC is that conservation issues are an increasingly important part of the IWC's agenda. We remain most concerned about the status of many populations of whales and small cetaceans, including, but not limited to, western gray whales, Arabian Sea humpbacks, Peru-Chile right whales, eastern North Pacific right whales, J-stock minke whales, the vaquita, and the Yangtze finless porpoise. It is imperative that the Commission focus more of its attention on growing conservation problems such as climate change, bycatch, marine debris, disentanglement, pollution and ocean noise, which are increasingly detrimental to cetacean populations and their habitat. The United States looks forward to addressing these and other issues as we move forward at IWC65.

Lastly, the United States is pleased to offer to host the Scientific Committee's 2015 meeting May 20-June 4, 2015, in San Diego, California. The U.S. Pacific Coast has a long tradition of marine research institutions. We believe the Scientific Committee will find the working environment inspiring.

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4. Sea Turtle Conservation and Shrimp Imports

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On May 14, 2014, the Department of State made its annual certifications related to conservation of sea turtles, certifying that 14 nations have adopted programs to reduce the incidental capture of sea turtles in their shrimp fisheries comparable to the program in effect in the United States. The Department also certified that the fishing environments in 26 other countries and one economy do not pose a threat of the incidental taking of sea turtles protected under Section 609. As excerpted below, the Federal Register notice announcing the State Department's May 14 certifications explained the Department's determinations and the applicable legal framework. 79 Fed. Reg. 36,572 (June 27, 2014).

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On May 14, 2014, the Department certified 14 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Colombia, Costa Rica, Ecuador, El Salvador, Gabon, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Nigeria, Pakistan, Panama, and Suriname. The Department also certified 26 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Ten nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The 10 nations and one economy are: the Bahamas, Belize, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru, Sri Lanka, and Venezuela. …

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Shrimp harvested with turtle excluder devices (TEDs) in an uncertified nation may, under specific circumstances, be eligible for importation into the United States under the DS–2031 section 7(A)(2) provision for "shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States." Use of this provision requires that the Department of State determine in advance that the government of the harvesting nation has put in place adequate procedures to monitor the use of TEDS in the specific fishery in question and to ensure the accurate completion of the DS–2031 forms. At this time, the Department has made such a determination only with respect to specific and limited fisheries in Australia and France.…

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C. OTHER CONSERVATION ISSUES

Wildlife Trafficking

On February 17, 2014, the United States and Indonesia signed a Memorandum of Understanding ("MoU") on conserving wildlife and combating wildlife trafficking. See State Department media note, February 17, 2014, available at *www.state.gov/r/pa/prs/ps/2014/02/221713.htm*. Excerpts follow from the February 17, 2014 media note announcing the MoU.

> …The MoU will allow the United States and Indonesia to strengthen capacity for wildlife conservation and management, including efforts to protect critical habitat, strengthen scientific information in support of conservation programs, build public awareness, stabilize and increase populations of threatened and endangered species, strengthen law enforcement capacity, and combat illicit harvesting and trade in wildlife species in Indonesia.

The United States also announced its National Strategy for Combating Wildlife Trafficking on February 11, 2014. See the White House Fact Sheet, available at *www.whitehouse.gov/the-press-office/2014/02/11/fact-sheet-national-strategy-combating-wildlife-trafficking-commercial-b*. At the same time, the United States announced a ban on commercial trade of elephant ivory. Excerpts follow from the White House Fact Sheet.

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THE STRATEGY

The National Strategy for Combating Wildlife Trafficking establishes guiding principles for U.S. efforts to stem illegal trade in wildlife. It sets three strategic priorities: strengthening domestic and global enforcement; reducing demand for illegally traded wildlife at home and abroad; and strengthening partnerships with international partners, local communities, NGOs, private industry, and others to combat illegal wildlife poaching and trade.

THE IVORY BAN

Today we are also announcing a ban on the commercial trade of elephant ivory, which will enhance our ability to protect elephants by prohibiting commercial imports, exports and domestic sale of ivory, with a very limited number of exceptions. This ban is the best way to help ensure that U.S. markets do not contribute to the further decline of African elephants in the wild.

To begin implementing these new controls, federal Departments and Agencies will immediately undertake administrative actions to:

- Prohibit Commercial Import of African Elephant Ivory: All commercial imports of African elephant ivory, including antiques, will be prohibited.
- Prohibit Commercial Export of Elephant Ivory: All commercial exports will be prohibited, except for bona fide antiques, certain noncommercial items, and in exceptional circumstances permitted under the Endangered Species Act.
- Significantly Restrict Domestic Resale of Elephant Ivory: We will finalize a proposed rule that will reaffirm and clarify that sales across state lines are prohibited, except for bona fide antiques, and will prohibit sales within a state unless the seller can demonstrate an item was lawfully imported prior to 1990 for African elephants and 1975 for Asian elephants, or under an exemption document.
- Clarify the Definition of "Antique": To qualify as an antique, an item must be more than 100 years old and meet other requirements under the Endangered Species Act. The onus will now fall on the importer, exporter, or seller to demonstrate that an item meets these criteria.
- Restore Endangered Species Act Protection for African Elephants: We will revoke a previous Fish and Wildlife Service special rule that had relaxed Endangered Species Act restrictions on African elephant ivory trade.
- Support Limited Sport-hunting of African Elephants: We will limit the number of African elephant sport-hunted trophies that an individual can import to two per hunter per year.

The United States will continue to lead global efforts to protect the world's iconic animals and preserve our planet's natural beauty for future generations. Combating wildlife trafficking will require the shared understanding, commitment, and efforts of the world's governments, intergovernmental organizations, NGOs, corporations, civil society, and individuals. At this week's London Conference on the Illegal Wildlife Trade, we hope other countries will join us in taking ambitious action to combat wildlife trafficking. In the coming months, we will take further steps to implement the National Strategy, and will work with the Congress to strengthen existing laws and adopt new ones to enhance our ability to address this global challenge.

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President Obama's statement on the release of the National Strategy for Combating Wildlife Trafficking, Daily Comp. Pres. Docs. 2014 DCPD No. 00084 (Feb. 11, 2014) follows.

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Like other forms of illicit trade, wildlife trafficking undermines security across nations. Well-armed, well-equipped, and well-organized networks of criminals and corrupt officials exploit porous borders and weak institutions to profit from trading in poached wildlife. Record high demand for wildlife products, coupled with inadequate preventative measures and weak institutions has resulted in an explosion of illicit trade in wildlife in recent years.

That trade is decimating iconic animal populations. Today, because of the actions of poachers, species like elephants and rhinoceroses face the risk of significant decline or even extinction. But it does not have to be that way. We can take action to stop these illicit networks and ensure that our children have the chance to grow up in a world with and experience for themselves the wildlife we know and love.

Addressing these challenges requires a U.S. strategy that is proactive, recognizes immediate imperatives, and balances our strengths and expertise to address challenges comprehensively over the long term. This is a global challenge requiring global solutions. So we will work with foreign governments, international organizations, nongovernmental organizations, and the private sector to maximize our impacts together. Our efforts will aim to strengthen enforcement, reduce demand, and increase cooperation to address these challenges.

The entire world has a stake in protecting the world's iconic animals, and the United States is strongly committed to meeting its obligation to help preserve the Earth's natural beauty for future generations.

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Cross references

Wildlife trafficking, **Chapter 3.B.5.**
Constitutionality of MARPOL amendment, **Chapter 4.B.2.**
Human rights and the environment, **Chapter 6.E.**
ILC's work protection of the atmosphere, **Chapter 7.D.1.**
ILC's work on protection of the environment in relation to armed conflict, **Chapter 7.D.3.**
Addressing aviation impacts on climate change, **Chapter 11.A.3.**
Environmental cooperation agreement with Colombia, **Chapter 11.D.1.c.**

CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2014, the United States took steps to protect the cultural property of China, Bulgaria, and Honduras by imposing or extending import restrictions on certain archaeological and/or ecclesiastical ethnological material from those countries. These actions were based on determinations by the Department of State's Bureau of Educational and Cultural Affairs that the statutory threshold factors permitting entry into an agreement were met, or that the factors permitting entry into the initial agreement still pertained. 19 U.S.C. §§ 2602 (a)(1) and (e), respectively. In 2014, the United States entered into one agreement and extended two pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), to which the United States became a State Party in 1983, and pursuant to the Convention on Cultural Property Implementation Act, which implements parts of the Convention. See Pub. L. No. 97-446, 96 Stat. 2351, 19 U.S.C. § 2601 *et seq*. If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation which has requested such protections and which has ratified, accepted, or acceded to the Convention.

1. China

Effective January 14, 2014, the United States and China amended and extended for five years the Memorandum of Understanding ("MOU") Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period Through the Tang Dynasty and Monumental

Sculpture and Wall Art at least 250 Years Old. Cooperation to protect the cultural property of China began in 2009 when the United States implemented import restrictions to address illicit trafficking in pillaged cultural property from China's archeological heritage. See *Digest 2009* at 525-27 regarding the original MOU. The text of the 2014 amended and extended MOU is available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*. See also the January 13, 2014 Department of State media note, available at *www.state.gov/r/pa/prs/ps/2014/01/219636.htm*. U.S. Customs and Border Protection ("CBP") of the Department of Homeland Security and the Department of the Treasury further extended the import restrictions imposed previously with respect to certain archaeological materials from China. 79 Fed. Reg. 2088 (Jan. 13, 2014).

2. Bulgaria

On January 14, 2014, the Government of the United States of America and the Government of the Republic of Bulgaria entered into an MOU, effective for five years, to protect categories of archaeological and ecclesiastical ethnological material representing the cultural heritage of Bulgaria. The State Department media note issued on January 15, 2014 announcing the agreement is available at *www.state.gov/r/pa/prs/ps/2014/01/219830.htm*. As the media note explains, the MOU also provides for the exchange of cultural property for cultural, educational, and scientific purposes. The Federal Register notice including the designated list of the types of restricted material, which range in date from 7,500 B.C. to approximately 1,750 A.D. for archaeological material and from 681 A.D. to approximately 1,750 A.D. for ethnological material, was published on January 16, 2014. 79 Fed. Reg. 2781 (Jan. 16, 2014). Both countries are parties to the 1970 UNESCO Convention. The text of the MOU is available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*.

3. Honduras

Effective March 12, 2014, the United States and Honduras extended for five years, and amended, their MOU "Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures of Honduras." See State Department media note, March 13, 2014, available at *www.state.gov/r/pa/prs/ps/2014/03/223401.htm*. The Federal Register notice announcing that CBP of the Department of Homeland Security and the Department of the Treasury were extending the import restrictions relating to archaeological material from Honduras appeared on March 12. 79 Fed. Reg. 13,873 (Mar. 12, 2014). Import restrictions were also extended to include certain categories of ecclesiastical ethnological material. The title of the MOU was also amended to reflect the extended scope of the agreement, "Concerning the Imposition of Import Restrictions on the Archaeological Materials from the Pre-Columbian Cultures and Ecclesiastical

Ethnological Material from the Colonial Period of Honduras." The United States and Honduras began cooperating to protect cultural heritage in 2004 when they originally signed the MOU. It was previously amended and extended in 2009. See *Digest 2009* at 527-28. The media note includes the following description of the updated MOU:

> Under the terms of the updated Memorandum of Understanding, objects may enter the United States under certain restrictions, as long as no other applicable U.S. laws are violated. The restrictions only allow importation of an object accompanied by an export permit issued by Honduras, or when accompanied by either: (1) documentation verifying that a pre-Columbian archaeological object left Honduras prior to 2004; or (2) documentation verifying that ecclesiastical ethnological material left Honduras prior to 2014.

The original 2004 MOU as well as the amendments and extensions in 2009 and 2014 are available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*.

B. RENEWAL OF THE CHARTER OF THE CULTURAL PROPERTY ADVISORY COMMITTEE

On April 25, 2014, the charter of the Cultural Property Advisory Committee was renewed for two years. 79 Fed. Reg. 25,639 (May 5, 2014). The following background on the Committee appeared in the Federal Register notice of the renewal:

> The Committee was established by the Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. 2601 *et seq*. It reviews requests from other countries seeking U.S. import restrictions on archaeological or ethnological material the pillage of which places a country's cultural heritage in jeopardy. The Committee makes findings and recommendations to the President's designee who, on behalf of the President, determines whether to impose the import restrictions. The membership of the Committee consists of private sector experts in archaeology, anthropology, or ethnology; experts in the international sale of cultural property; and representatives of museums and of the general public.

C. PRESERVATION OF AMERICA'S HERITAGE ABROAD

The Commission for the Preservation of America's Heritage Abroad ("the Commission") is an independent agency of the U.S. government established in 1985 by § 1303 of Public Law 99-83, 99 Stat. 190, 16 U.S.C. § 469j (1985). Among other things, the Commission negotiates bilateral agreements with foreign governments in Central and Eastern Europe and the former Soviet Union to protect and preserve cultural heritage. The agreements focus on protection of communal properties that represent the cultural heritage of groups that were victims of genocide during World War II. The website of

the Commission describes these bilateral agreements, and refers to efforts to negotiate additional agreements, at *www.heritageabroad.gov/Agreements.aspx*. For additional background, see II Cumulative Digest 1991–1999 at 1793–94.

D. EXCHANGE VISITOR PROGRAM

On August 12, 2014, a United States district court granted the U.S. Department of State's motion to dismiss claims brought by ASSE International, a program sponsor in the U.S. Exchange Visitor Program ("EVP"). *ASSE Int'l Inc. v. Kerry*, No. SACV 14-00534-CJC (C.D. Cal 2014). ASSE was sanctioned by the State Department after a review of its compliance with EVP regulations. Sanctions included a letter of reprimand, a 15 percent reduction in the number of exchange visitors permitted in ASSE's program, and the requirement that ASSE submit a corrective action plan. ASSE's complaint claimed violations of the Administrative Procedures Act ("APA"); violations of due process; and illegal retroactive application of Department rules. Excerpts follow (with footnotes omitted) from the court's order dismissing all claims.*

* * * *

The Exchange Visitor Program ("EVP" or "Program") was created by Congress to allow foreign nationals to temporarily come to the United States and participate in educational and cultural exchanges, including obtaining occupational training. The purpose of the EVP is to "assist in the development of friendly, sympathetic, and peaceful relations between the United States and other countries of the world." 22 U.S.C § 2451; *see* 22 C.F.R. § 62.1. The Program is administered by the United States Department of State, and operates through third-party organizations—program sponsors—often from within the private sector. *See* 22 U.S.C. § 1461. Program sponsors assist qualifying visitors in finding appropriate study, teaching, or training opportunities within the United States, and oversee the visitors' stay. *See* 22 C.F.R § 62.9. ASSE is one such program sponsor.

* * * *

The State Department argues that because the decision whether and how much to sanction a program sponsor are committed to its discretion by law, its decision to sanction ASSE here is not reviewable by the Court. *See* 5 U.S.C. § 701(a)(2) (exempting from judicial review "agency action committed to agency discretion by law"). That is, the State Department argues that the Court lacks subject matter jurisdiction to review the claim. The Court agrees.

* * * *

* Editor's note: ASSE International's appeal from the district court's dismissal was pending as of May 2015. *ASSE Int'l Inc. v. Kerry,* No. 14-56402 (9th Cir. 2014).

As an initial matter, there is no doubt that the statute authorizing the Program fully vests in the State Department the discretion to implement the EVP to the extent that the Department "considers that it would strengthen international cooperative relations." 22 U.S.C. § 2452(a). Moreover, the statute does not limit the manner in which the Department should exercise its discretion. *See, e.g.*, 22 U.S.C. §§ 2451, 2455(f).

Pursuant to its discretion, the State Department has implemented regulations creating and governing the operation of the EVP. …

The regulatory scheme does not limit the broad grant of discretionary authority provided to the State Department by the Congress. The regulation is clear that that the Department need only issue sanctions "in its discretion" and depending on its determination of the "nature and seriousness of the violation." 22 C.F.R. § 62.50(b)(1). Whether sanctions are issued, and which of the sanctions are issued, is wholly committed to the Department's judgment. *Id.* Depending on the Department's judgment as to the seriousness of the program sponsor's violations or acts endangering the exchange visitor, the Department can elect to issue "lesser sanctions," or the more serious sanctions of suspension or revocation of the program sponsor's designation as a program sponsor. *See* 22 C.F.R. §§ 62.50(b)–(d). Various levels of process are provided before sanctions are imposed, based on the seriousness of the sanction. When "lesser sanctions" are imposed, the Department must provide written notice and an opportunity to respond to the program sponsor. *See* 22 C.F.R. § 62.50(b)(2). The Department may then "in its discretion modify, withdraw, or confirm" the issued sanctions. *Id.*

Such a scheme, combined with the broad grant of Congressional authority, as well as the fact that the issues involved here squarely implicate foreign relations, which the Court has no standards or expertise to judge, make clear that the Department's ultimate decision of whether and in what amount to sanction a program sponsor like ASSE is not subject to judicial review, so long as the Department does not exceed the enumerated factors in arriving at its decision. The Court is simply not equipped to determine how serious a violation must be to warrant certain sanctions, or to decide how serious a sanction is necessary to promote the EVP's purpose of "furthering the foreign policy objectives of the United States." *See* 22 C.F.R. § 62.1(a); *see also Chong v. Director, United States Info. Agency*, 821 F.2d 171, 177 (3rd Cir. 1987) ("[C]ases involving the Exchange Visitor Program necessarily implicate foreign policy concerns and involve an agency exercising its discretionary powers in that respect.").

Moreover, it is important to note here that ASSE is not alleging that the State Department did not make the required findings before deciding to issue sanctions, or relied on a factor not available for consideration under the regulations, which the Court would have the power to review. …. Indeed, as evidenced by the multiple letters sent by the Department to ASSE outlining its reasons for issuing sanctions, the Department did make such findings. (*See* Notice of Intent; Imposition of Sanctions.) Rather, ASSE is alleging that the State Department reached the wrong conclusion in making these findings, and gave weight to the wrong evidence. (*See generally* Compl.) But whether the exchange visitor in question here spoke sufficient English to participate in the Program, or whether the third-parties employed by ASSE to provide services "[we]re adequately qualified, appropriately trained, and comply with the Exchange Visitor Program regulations," are questions well beyond the scope of any meaningful review the Court could provide. They are areas of executive action, reserved to agency discretion, because they involve "nice issues of judgment and choice …which require exercise of informed discretion," *see Helgeson*, 153 F.3d at 1004, and are rightly reserved given the serious foreign policy consequences that could result from judicial review.

* * * *

Here, ASSE's Complaint lacks any allegations that publication of ASSE's name as a sanctioned sponsor would be false or misleading. ASSE has, in fact been sanctioned by the State Department, and notifying the public of that fact would be neither false nor misleading. The public, and the international exchange visitors whom the EVP is intended to serve, have a right to know whether a program sponsor through whom they are considering participating in the Program has been previously sanctioned.

* * * *

ASSE's allegation that the State Department lacked authority to require it to "admit allegations of wrongdoing, whether true or accurate, when submitting a corrective action plan" because such a sanction was not first promulgated in accordance with 5 U.S.C. § 553 is nonsensical. The State Department has clear regulatory authority pursuant to 22 C.F.R. § 62.50(b)(iii) to require a program sponsor found to have engaged in any sanctionable act or omission, as outlined in 22 C.F.R. § 62.50(a), to submit a corrective action plan. There is simply no doubt that that regulation, which was properly approved through notice-and-comment, contemplates, and indeed is predicated upon, a finding that the program sponsor engaged in wrongdoing. ASSE's claim in this regard is dismissed.

* * * *

A procedural due process challenge of the sort brought by ASSE "hinges on proof of two elements: (1) a protect[ed] liberty or property interest . . . and (2) a denial of adequate procedural protections." *Pinnacle Armor*, 648 F.3d at 716 (quoting *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998)). Here, the parties disagree whether ASSE has a property interest in maintaining its full allocation of the number of exchange visitors it can sponsor each year. The Court need not reach that question, however, because even if ASSE possesses a protected property interest, the process by which ASSE was sanctioned was fundamentally fair. ASSE therefore fails to state a valid procedural due process claim.

Under the Due Process Clause, "[a]ll that is required before a deprivation of a protected interest is 'notice and opportunity for hearing appropriate to the nature of the case.' " *Pinnacle Armor*, 648 F.3d at 717 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). "Due process is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather a "flexible" one, with "fundamental fairness" as its touchstone. *United States v. Harrington*, 749 F.3d 825, 828 (9th Cir. 2014) (citations omitted). …

Assuming ASSE has a protected property interest, the process afforded to it by the State Department prior to the imposition of "lesser sanctions" was fundamentally fair. The regulations provide that after the State Department notifies a program sponsor of an intent to sanction a program sponsor, "the sponsor may submit to the Office a statement in opposition to or mitigation of the sanction." 22 C.F.R. § 62.50(b)(2). The sponsor may include any "additional documentary material" that it believes may support its position. *Id.* Only after reviewing and considering the program sponsor's materials may the Department, "in its discretion, modify, withdraw, or confirm such sanction." *Id.*

Thus, the regulations provide sanctioned program sponsors notice of the sanctions, the basis of the sanctions, and an opportunity to rebut the Department's basis for sanctions prior to their confirmation.

Here, ASSE was afforded the process available to it under the regulations. ASSE was notified of the specific grounds on which the State Department had decided to sanction it, as well as the nature of the allegations upon which such sanctions were based. (*See* Notice of Intent.) It then gave ASSE an opportunity to respond, of which ASSE availed itself. (*See* Notice of Sanctions.) Only after addressing ASSE's opposition did the Department determine that sanctions against ASSE were warranted. (*Id.*)

Under the circumstances, more process is not warranted. ASSE was given clear notice of the claims against it, given a full and fair opportunity to respond, including submitting its own evidence in opposition, and had that evidence considered by the State Department before sanctions were levied. More trial-type procedures like those ASSE argues for were not warranted or required. ...The sanctions imposed against ASSE are "lesser sanctions" that do not deprive it of its ability to meaningfully participate in the program. In juxtaposition to ASSE's interest in its own participation in the EVP, the State Department maintains a much more important interest in achieving Congress's mandate that the Program should only operate such that it can "strengthen international cooperative relations." 22 U.S.C. § 2452(a). Clearly, swiftly regulating and sanctioning program sponsors, where warranted, is necessary to ensure that program sponsors take quick and appropriate action to resolve any wrongdoing and to further Congress's objective in providing for the EVP. Moreover, subjecting exchange visitors to adversarial proceedings, whereby they must endure cross-examination by their program sponsor, as ASSE apparently believes warranted, would certainly not serve the mandate of the EVP as a positive contributor to the United States' foreign policy efforts. While the State Department may implement such procedures, it need not do so to satisfy the Due Process Clause.

* * * *

Cross References

Chabad v. Russian Federation, **Chapter 10.A.4.d.**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. General

On October 13, 2014, Carol Hamilton, Senior Adviser for the U.S. Mission to the UN, addressed the UN General Assembly's Sixth (Legal) Committee during its debate on the report of the UN Commission on International Trade Law ("UNCITRAL") on the work of its 47th session. Ms. Hamilton's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/233407.htm*.

* * * *

Mr. Chairman, the United States welcomes the Report of the 47th session of UNCITRAL and commends the efforts of UNCITRAL's member states, observers, and Secretariat in continuing to promote the harmonization of international commercial law.

Most notably, UNCITRAL's work in this past year included the development of a Convention on Transparency in Treaty-Based Investor-State Arbitration, to be known as the Mauritius Convention on Transparency. This effort built upon the previous development of a set of procedural rules designed to make arbitrations under investment treaties accessible to the public through publication of information regarding the commencement of the arbitration, key arbitration documents, open hearings, and participation by third parties. The new Convention will be a convenient tool for applying these transparency measures to arbitrations occurring under the thousands of existing investment treaties, without having to amend each treaty separately. We thus encourage all states to consider becoming parties to the Convention. We also wish to highlight the efficiency with which UNCITRAL completed this instrument, which was completed in approximately 12 days of negotiations—a pace that we hope can be replicated for other instruments in the future

Also of note, UNCITRAL commenced its efforts to develop legal instruments that will help states encourage the growth of micro, small, and medium enterprises. These efforts, underway in Working Group I, are starting with the topics of simplified incorporation and business registration. In Working Group II, which completed the Convention on Transparency, efforts are now underway to update the Notes on Organizing Arbitral Proceedings. That Working Group will also consider a U.S. proposal, submitted in A/CN.9/822, to develop a new treaty on the enforcement of mediated settlement agreements, with the aim of promoting the use of mediation to settle commercial disputes in the same way that the New York Convention promoted the use of international arbitration. Working Group III will continue to draft generic procedural rules for online dispute resolution in electronic commerce. Working Group IV will continue to draft an instrument that will facilitate the use of electronic transferable records. Working Group V will continue to work on enterprise group insolvency issues and will begin work on the recognition and enforcement of insolvency-related judgments. Working Group VI will continue its work on a model law on secured transactions.

The United States is pleased that the Commission continued its consideration of whether changes are needed to the processes by which UNCITRAL develops its work program. The Report highlights several aspects of this issue that merit further discussion: how to avoid the creation of permanent or semi-permanent working groups that continue to propose extensions of their own mandates; whether UNCITRAL should reduce the number of its working groups to five, rather than six; how to balance legislative activity with other uses of resources; and how best to pursue partnerships with other organizations. We would like to encourage states to continue considering these issues over the coming year, as well as at the next Commission session.

The upcoming year promises to be a productive one for UNCITRAL, with several of the working groups hopefully poised to complete their current work and submit projects for review by the Commission. The United States looks forward to continued collaboration with not only other member states but also all of the non-governmental organizations and other observers that provide so much valuable input into UNCITRAL's work by contributing their expertise regarding the practice of international commercial law.

* * * *

2. Transparency in Treaty-based Investor-State Arbitration

As mentioned in Ms. Hamilton's statement, above, UNCITRAL finished negotiating a new treaty on Transparency in Treaty-Based Investor-State Arbitration. The treaty will open for signature in March 2015. The text of the treaty is included in the July 2014 report on UNCITRAL's 47th session. U.N. Doc. A/69/17.

3. Proposed Convention on Enforcing Results of Conciliation

At the UNCITRAL session in July 2014, the United States submitted a proposal that UNCITRAL consider as a future project the development of a convention on the enforcement of settlement agreements resulting from international commercial

conciliation, a counterpart to the New York Convention on enforcement of arbitral awards. U.N. Doc. A/CN.9/822. The U.S. proposal is excerpted below.

* * * *

Background: The United Nations General Assembly has recognized that the use of conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States."[13] Because promoting the use of conciliation may help achieve these benefits, UNCITRAL has previously developed two important instruments aimed at increasing its usage: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002). (In this paper, as in the Model Law, the term "conciliation" is used to refer to "a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."[14] Thus, this paper does not intend to differentiate conciliation from mediation.)

When UNCITRAL completed this earlier work, it was already recognized that "[c]onciliation is being increasingly used in dispute settlement practice in various parts of the world," and that it is "becoming a dispute resolution option preferred and promoted by courts and government agencies," in part because of its high success rate.[15] Since then, conciliation's acceptance and use have continued to grow. For example, in 2008, the European Union issued a directive on mediation, requiring that its member states implement a set of rules designed to encourage the use of mediation in cross-border disputes within the EU.[16] Increased use of conciliation can be expected as parties continue to seek options that reduce costs and provide faster resolutions.

One obstacle to greater use of conciliation, however, is that settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards, if a party that agrees to a settlement later fails to comply. In general, settlement agreements reached through conciliation are already enforceable as contracts between the parties.[17] However, enforcement under contract law may be burdensome and time-consuming. Thus, if even a successful conciliation simply results in a second contract that is as difficult to enforce as the underlying contract that gave rise to the dispute, engaging in conciliation to address a contractual dispute may be less attractive. Moreover, unlike arbitration, which generally provides a definitive resolution to a dispute, conciliation does not guarantee that the parties will reach an agreement,

[13] A/Res/57/18 (2003).
[14] Model Law on International Commercial Conciliation, art. 1.3.
[15] Guide to Enactment of the Model Law on International Commercial Conciliation ("Guide to Enactment"), para. 8.
[16] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3.
[17] Guide to Enactment, supra note 4, at para. 89.

and even a party that agrees to a resolution may later fail to comply. Thus, in deciding whether to invest their time and resources in the process of conciliation, parties may want greater certainty that, if they do reach a settlement, enforcement will be effective and not costly. "Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award."[18] Thus, the Commission has supported "the general policy that easy and fast enforcement of settlement agreements should be promoted."[19] Bolstering enforceability across borders also helps promote finality in settlement of cross-border disputes, as it reduces the possibility of parties pursuing duplicative litigation in other jurisdictions. For these reasons, initial consultations with the private sector have indicated strong support for further efforts by UNCITRAL to facilitate the enforceability of conciliated settlement agreements.

Proposed Convention: To further these goals, the United States proposes that Working Group II develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration. Just as the New York Convention has been successful in part due to its relative brevity and simplicity, an analogous convention on conciliation should also avoid unnecessary complexity.

With respect to the scope of a convention, the United States proposes that the Working Group address the following issues, among others:

• Providing that the convention applies to "international" settlement agreements, such as when the parties have their principal places of business in different states;

• Ensuring that the convention applies to settlement agreements resolving "commercial" disputes, not other types of disputes (such as employment law or family law matters);

• Excluding agreements involving consumers from the scope of the convention;

• Providing certainty regarding the form of covered settlement agreements, for example, agreements in writing, signed by the parties and the conciliator; and

• Providing flexibility for each party to the convention to declare to what extent the convention would apply to settlement agreements involving a government.

The convention could then provide that settlement agreements falling within its scope are binding and enforceable (similar to Article III of the New York Convention), subject to certain limited exceptions (similar to Article V of the New York Convention).

Such an approach would build on existing law. To encourage use of conciliation, many legislative frameworks and sets of rules make some conciliated settlement agreements easier to enforce by treating them in the same manner as arbitral awards. For example, the UNCITRAL Model Law on International Commercial Arbitration (adopted in many jurisdictions around the world) provides in Article 30 that if parties settle a dispute during arbitral proceedings, the tribunal can make an award on agreed terms, with the same status and effect as any other award on the merits of a case. The result relies on a legal fiction: although the parties resolve the dispute themselves, rather than waiting for a neutral third-party decision maker to impose a resolution, the settlement is still categorized as an award. This fiction gives the parties the same benefits in terms of finality and ease of enforcement that a normal award would have provided.

[18] *Id*. para. 87.
[19] *Id*. para. 88.

Other jurisdictions have gone further by treating conciliated settlement agreements equivalently to arbitral awards even if arbitral proceedings have not yet commenced. These jurisdictions thus provide parties with an incentive to settle disputes at earlier stages. For example, UNCITRAL has noted that India and Bermuda provide for settlement agreements reached through conciliation to be treated as arbitral awards.[20] A number of U.S. states, including California and Texas, have statutes on international commercial conciliation that provide for settlement agreements to have the same legal effect as arbitral awards.[21] Various sets of arbitration rules around the world take a similar approach. The Korean Commercial Arbitration Board's Domestic Arbitration Rules provide that, if conciliation succeeds in settling a dispute before arbitration commences, "the conciliator shall be deemed to be the arbitrator appointed under the agreement of the parties, and the result of the conciliation shall … have the same effect" as an award on agreed terms.[22] The Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce similarly provide that the parties can appoint the mediator as an arbitrator for the purpose of confirming a settlement agreement as an arbitral award.[23]

A convention for conciliation modelled on the New York Convention would draw upon the approach taken by these jurisdictions, but would address the enforceability of settlement agreements directly, rather than relying on the legal fiction of deeming them to be arbitral awards. This approach would also eliminate the need to initiate an arbitration process (with the attendant time and costs) simply to incorporate a settlement agreement into an award.

Any convention along these lines would, of course, need to include a limited set of exceptions similar, but not identical, to those provided in Article V of the New York Convention. For example, an analog to Article V(1)(d) (regarding the composition of the arbitral authority or the arbitral procedure) may not be necessary. By contrast, the Working Group could consider whether to allow a party to a settlement agreement to prevent enforcement if it can demonstrate that it was coerced into signing that settlement agreement. The Working Group could also consider several possible structural limitations on enforcement under the convention:

• Whether to provide that other courts could give effect to an originating jurisdiction's determination that a settlement agreement is not enforceable (similar to the New York Convention's treatment of set-aside proceedings);

• How to avoid duplicative litigation caused by simultaneous attempts to enforce a settlement under the convention as well as under contract (or other) law; and

• How to ensure respect for restrictions on enforcement chosen by the parties to a settlement (*e.g.*, settlements containing forum selection clauses or other limitations on remedies).

Moreover, settlement agreements can contain long-term obligations regarding the parties' conduct years into the future, and might address such issues more commonly than arbitral awards would. The Working Group should consider whether limits on enforcement under the convention would be appropriate in such cases. For example, enforcement under the convention could be made available only for a limited period of time, after which other mechanisms — such as domestic contract law — might be more appropriate (*e.g.*, to deal with issues such as changed circumstances). Other methods of limiting the convention's application to non-monetary

[20] *Id*. para. 91 (citing Bermuda, Arbitration Act 1986; and India, Arbitration and Conciliation Ordinance, 1996, arts. 73-74).

[21] *E.g.*, Cal. Civ. Pro. § 1297.401; Tex. Civ. Prac. & Rem. Code Ann. § 172.211.

[22] Korean Commercial Arbitration Board, Domestic Arbitration Rules 18.3 (2011).

[23] Arbitration Institute of the Stockholm Chamber of Commerce, Mediation Rules 14 (2014).

elements of settlements could also be considered. During the development of the Model Law on International Commercial Conciliation, it was noted that drafting uniform legislation regarding enforcement would be difficult because the methods for achieving expedited enforcement of settlement agreements varied greatly between legal systems and depended on domestic procedural law.[24] However, the Working Group could minimize these difficulties by addressing enforcement via a convention that, like the New York Convention, sets forth the result that states would need to provide through their domestic legal systems (in this case, enforcement of conciliated settlement agreements) without trying to harmonize the specific procedure for reaching that goal.[25]

Similarly, efforts to develop a convention should not seek to develop harmonized rules for the conciliation process itself, just as the New York Convention does not set forth mandatory rules for conducting arbitral proceedings. However, the Working Group could consider whether additional topics, such as the confidential nature of conciliation discussions, could be addressed through further projects after completion of an initial convention.

Next Steps: In view of the potential benefits of such a convention, as well as the background work already done by the Secretariat in the context of the development of the Model Law, the United States urges the Commission to assign this project the highest priority within the Working Group, including at its next session in September 2014. While other efforts under consideration by the Working Group (such as updating the Notes on Organizing Arbitral Proceedings) should continue, they should not delay work on this project.

* * * *

At its session in July 2014, the Commission decided that Working Group II should consider the U.S. proposal to develop a convention on conciliation at its February 2015 session and report to the Commission on the feasibility of work on the topic. On December 23, 2014, the United States submitted a paper to provide further explanation of its proposal and respond to questions raised at the July session. U.N. Doc. A/CN.9/WG.II/WP.188. Excerpts follow (with footnotes omitted) from the December submission by the United States.

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I. The Need for a New Convention

One question that has been raised in response to the proposal is whether commercial parties' willingness to enter into conciliation is affected by the legal regime that would apply to the enforcement of any resulting settlement. UNCITRAL's previous work on conciliation suggests that enforceability does matter…A recently-conducted international survey also supports the

[24] Guide to Enactment, *supra* note 4, at para. 88.

[25] Similarly, although this convention would provide for enforcement of settlement agreements, it would not address matters related to the attachment or execution of assets, just as the New York Convention did not do so.

view that a convention that facilitated enforcement would encourage conciliation. …Similarly, a survey of in-house counsel, senior corporate managers, and others by the International Mediation Institute found that over 93% of respondents would be more likely (either "much more likely" or "probably") to mediate a dispute with a party from another country if that country had ratified a convention on the enforcement of mediated settlement agreements. …Additionally, the U.S. Council for International Business— *i.e.*, the U.S. branch of the International Chamber of Commerce (ICC)—sought input on the subject from its membership, which expressed the view that a convention would be useful.

Thus, the United States believes that a convention as outlined in the proposal would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement could be relied on and easily enforced. (In particular, when a commercial dispute arises from a contractual relationship, conciliation may not be an attractive option if even a successful conciliation would result in a settlement that would merely have the same legal status as the original contract and would have to be the subject of litigation under contract law.)

Some who have questioned why a convention is needed have noted that many sets of arbitration rules permit parties who settle during an arbitration to have the settlement turned into a "consent award" (or an "award on agreed terms"). The settlement is treated as if it were an award, even though the parties themselves (rather than an arbitral panel) determine the outcome. However, adapting this feature of international arbitration to the enforcement of conciliated settlements would be difficult. First of all, if a dispute is settled through conciliation and subsequently submitted to arbitration solely in order to obtain a consent award, questions persist as to whether such award would be enforceable under the New York Convention, as it might not arise from "differences between the parties." Furthermore, even if arbitrators could be persuaded to serve in an arbitration whose only function is to rubberstamp an agreement that has already been reached between the parties, parties should not have to initiate arbitration—with the attendant costs and delays—merely in order to bless a settlement. Many parties would likely not be willing to do so at the end of a successful conciliation, at a time when the parties presumably expect compliance and thus would see extra formalities as an unnecessary cost. (Even if they were willing to initiate arbitration merely to have the settlement blessed, it may not be appropriate in all situations, such as if court proceedings have already commenced.)

Moreover, the problems identified in the survey responses noted above persist even to the extent it is possible to convert conciliated settlements into consent awards. Assuming parties are able to enforce settlements under contract law or transform them into consent awards, enforcement of conciliated settlements is still seen as too difficult in the cross-border context. Solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.

II. Status of Settlements under a Convention

At the Commission session in July 2014, several questions about the operation and effect of a convention were raised with respect to the proposal, including whether a convention would merely convert conciliated settlements into arbitral awards, and "whether the new regime of enforcement envisaged would be optional in nature."

The proposal does not envision that a convention would transform conciliated settlements into arbitral awards. Rather, although the convention would give conciliated settlements an enforcement regime similar to that provided under the New York Convention, conciliated settlements would remain a separate legal concept, entirely distinct from (though coequal to) arbitral awards. The basis for a conciliated settlement would still be the voluntary agreement by the parties, rather than a decision of an arbitral panel. The settlement would simply be more easily enforceable internationally than it would be if it remained merely a contractual agreement. Given that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration (in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them).

At the same time, because the conciliated settlement has its basis in the parties' voluntary agreement, any enforcement regime should respect the contours of that agreement, including any limitations that the parties establish. For example, if the parties include a forum selection clause specifying that enforcement could only occur in a particular jurisdiction, the convention should not override that clause. Similarly, if the parties include in the settlement other limitations on remedies, such as requiring any disputes to be brought back to the conciliator before enforcement is sought, enforcement under the convention should only be available to the degree specified. By extension, parties could opt out of the convention's framework entirely by specifying in the settlement that enforcement under the convention is unavailable. By including limitations of this nature, the convention would respect the voluntary nature of conciliated settlements and would not diminish the ability of the conciliation process to bring disputing parties to mutually-agreeable resolutions.

III. Complex Settlements and Other Possible Exceptions

Another question raised in response to the proposal is whether complex conciliated settlements (*e.g.*, those containing complicated non-monetary elements, such as long-term obligations) would be suitable for enforcement under the convention. However, in general, arbitral awards also have the potential to include similarly complex elements, depending on the issues the arbitrators are asked to resolve. Thus, courts enforcing arbitral awards under the New York Convention could already be confronted by a need to enforce such complex elements and order various forms of non-monetary relief. A new convention providing a similar enforcement mechanism for conciliated settlements thus should not present courts with a qualitatively different set of problems. At the same time, conciliated settlements may include complex obligations more frequently than arbitral awards do; the proposed convention could thus require courts to enforce such complex obligations more often. Providing for the possibility of limiting the convention's application when a conciliated settlement includes non-monetary obligations may therefore be prudent. The simplest approach may be to permit states to make a reservation limiting the extent to which the convention applies to non-monetary elements of conciliated settlements. Under this approach, the default rule would be full coverage of both monetary and non-monetary elements of conciliated settlements, but if a state believes that its courts would struggle to enforce certain types of non-monetary elements of settlements, it could limit its obligations in those respects.

A related question is which other exceptions should apply to a state's obligation to enforce conciliated settlement agreements. Some of the exceptions in Article V of the New York Convention would likely need to be retained, while others could be modified or replaced by other exceptions more appropriate for the context of conciliation, as discussed below.

IV. Technical Feasibility

An additional question that has been raised about the proposal is whether the New York Convention is the appropriate model on which to base a new convention. Using the New York Convention as the model for work on enforcement of conciliated settlements—a model that sets forth a broad obligation to recognize and enforce, and provides a set of exceptions to that obligation—would have the benefit of simplicity, focusing on the result (*i.e.*, recognition and enforcement) rather than dictating particular procedures to reach that goal. Thus, a new convention would not need to be long and complex.

Only a few articles would be needed to set forth the central content of a convention. The main obligation, to recognize and enforce conciliated settlements, could be based on Article III of the New York Convention. This article could also require that Parties to the convention not impose substantially more onerous conditions on the recognition and enforcement of international conciliated settlements than are imposed on either domestic conciliated settlements or on arbitral awards. Next, a set of definitions would be needed. A definition of "conciliation" could be based on Article 1.3 of the Model Law. Similarly, a definition of "international" could be based on Article 1.4(a) of the Model Law, which addresses parties that have their places of business in different states. The definition of "commercial" in the Model Law may not be as well suited for a convention, as it only provides a non-exhaustive list of examples. Instead, this definition could be drawn from other instruments, such as the draft Hague Principles of Choice of Law in International Commercial Contracts, which in Article 1 state that they apply to contracts "where each party is acting in the exercise of its trade or profession" but not to consumer or employment disputes. Similarly, a definition would be needed for a conciliated settlement agreement, specifying that the agreement should be in writing, that it should be signed by the parties to an international commercial dispute, and that the parties should have used conciliation.

The other key provisions of a convention, in addition to the definitions and the obligation to recognize and enforce conciliated settlements, would be the exceptions to that obligation. Some of these issues could be addressed as exceptions similar to those in Article V of the New York Convention, while for other issues a reservation mechanism might be more appropriate. Generally-available exceptions might include the following:

• Conciliated settlements invoked against parties that were, under the law applicable to them, under some incapacity or that were coerced into signing the conciliated settlements;

• Conciliated settlements that are not valid under the law to which the parties have subjected them or, failing any indication thereon, under the law of the country in which they were made;

• Conciliated settlements the subject matter of which is not capable of settlement through conciliation under the law of the country where recognition and enforcement is sought;

• Conciliated settlements that would be contrary to public policy to recognize or enforce; and

• Conciliated settlements whose own terms would preclude enforcement as requested.

Other issues may be more properly addressed by permitting Parties to the convention to take a reservation limiting the convention's application when needed in order to allow implementation in a particular legal system:

• Applying the convention to conciliated settlements to which a government is a party only to the extent specified in the declaration;

• Providing that a party to a conciliated settlement shall not be eligible to seek recognition and enforcement under the convention if that party has its place of business in a state that is not a Party to the convention;

• Applying the convention to non-monetary elements of conciliated settlements only to the extent specified in the reservation; or

• Applying the convention only to conciliated settlements in which the parties to the conciliated settlement have explicitly agreed that the convention would apply.

Beyond provisions such as these, not many additional substantive rules would be needed in a new convention. Analogues to Articles IV (procedures for enforcement) and VI (suspension of proceedings) of the New York Convention could be included, as could a provision limiting application of the convention to conciliated settlements signed after the convention's entry into force. Otherwise, only a standard set of final provisions would be needed.

Thus, the United States continues to believe that developing a new convention along the lines set out in the earlier proposal would be not only a useful project, but a feasible one that the Working Group could accomplish in a relatively short period of time. We look forward to discussing these issues with other delegations.

* * * *

B. FAMILY LAW

1. Hague Convention on the Civil Aspects of International Child Abduction

a. Lozano

As discussed in *Digest 2013* at 435-42, the United States filed *amicus* briefs in 2013 in the U.S. Supreme Court in *Lozano v. Alvarez*, No. 12-820, on whether the one-year period for automatic return of a child in Article 12 of the Hague Convention is subject to extension based on principles of "equitable tolling" applied to U.S. statutes of limitations. On March 5, 2014, the Supreme Court decided the case, agreeing with the U.S. arguments in its briefs that the one-year period is not subject to such extension. Excerpts follow from the Supreme Court's opinion (with footnotes omitted).

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* * * *

We conclude that the parties to the Hague Convention did not intend equitable tolling to apply to the 1-year period in Article 12. Unlike federal statutes of limitations, the Convention was not adopted against a shared background of equitable tolling. Even if the Convention were subject to a presumption that statutes of limitations may be tolled, the 1-year period in Article 12 is not a statute of limitations. And absent a presumption in favor of equitable tolling, nothing in the Convention warrants tolling the 1-year period.

A

First, there is no general presumption that equitable tolling applies to treaties. Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law. *Rotella v. Wood*, 528 U. S. 549, 560 (2000) ("[F]ederal statutes of limitations are generally subject to equitable principles of tolling"). It does not follow, however, that we can export such background principles of United States law to contexts outside their jurisprudential home.

It is particularly inappropriate to deploy this background principle of American law automatically when interpreting a treaty. "A treaty is in its nature a contract between . . . nations, not a legislative act." *Foster v. Neilson*, 2 Pet. 253, 314 (1829) (Marshall, C. J., for the Court); see also 2 Debates on the Federal Constitution 506 (J. Elliot 2d ed. 1863) (James Wilson) ("[I]n their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make . . ."). That distinction has been reflected in the way we interpret treaties. It is our "responsibility to read the treaty in a manner 'consistent with the *shared* expectations of the contracting parties.'" *Olympic Airways v. Husain*, 540 U. S. 644, 650 (2004) (quoting *Air France v. Saks*, 470 U. S. 392, 399 (1985); emphasis added). Even if a background principle is relevant to the interpretation of federal statutes, it has no proper role in the interpretation of treaties unless that principle is shared by the parties to "an agreement among sovereign powers," *Zicherman v. Korean Air Lines Co.*, 516 U. S. 217, 226 (1996).

Lozano has not identified a background principle of equitable tolling that is shared by the signatories to the Hague Convention. To the contrary, Lozano concedes that in the context of the Convention, "foreign courts have failed to adopt equitable tolling . . . because they lac[k] the presumption that we [have]." Tr. of Oral Arg. 19–20. While no signatory state's court of last resort has resolved the question, intermediate courts of appeals in several states have rejected equitable tolling. See *Cannon v. Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W. L. R. 32, ¶51 (Eng.), (rejecting the "tolling rule" as "too crude an approach" for the Convention); *Kubera v. Kubera*, 3 B. C. L. R. (5th) 121, ¶64, 317 D. L. R. (4th) 307, ¶64 (2010) (Can.) (equitable tolling "has not been adopted in other jurisdictions, including Canada"); see also *HJ v. Secretary for Justice*, [2006] NZFLR 1005, ¶53 (CA), appeal dism'd on other grounds, [2007] 2 NZLR 289; A. C. v. P. C., [2005] HKEC 839, 2005 WL 836263, ¶55, (Hong Kong Ct. 1st Instance). The American presumption that federal statutes of limitations can be equitably tolled therefore does not apply to this multilateral treaty. Cf. *Eastern Airlines, Inc. v. Floyd*, 499 U. S. 530, 544–545, and n. 10 (1991) (declining to adopt liability for psychic injury under the Warsaw Convention because "the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the Convention" (footnote omitted)).

It does not matter to this conclusion that Congress enacted a statute to implement the Hague Convention. See ICARA, 42 U. S. C. §§11601–11610. ICARA does not address the availability of equitable tolling. Nor does it purport to alter the Convention. See §11601(b)(2) ("The provisions of [ICARA] are in addition to and not in lieu of the provisions of the Convention"). In fact, Congress explicitly recognized "the need for uniform international interpretation of the Convention." §11601(b)(3)(B). Congress' mere enactment of implementing legislation did not somehow import background principles of American law into the treaty interpretation process, thereby altering our understanding of the treaty itself.

B

Even if the presumption in favor of equitable tolling had force outside of domestic law, we have only applied that presumption to statutes of limitations. See *Hallstrom v. Tillamook County*, 493 U. S. 20, 27 (1989) (no equitable tolling of a 60-day presuit notice requirement that does not operate as a statute of limitations). The 1-year period in Article 12 is not a statute of limitations.

As a general matter, "[s]tatutes of limitations establish the period of time within which a claimant must bring an action." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U. S. ___, ___ (2013) (slip op., at 4). They characteristically embody a "policy of repose, designed to protect defendants." *Burnett v. New York Central R. Co.*, 380 U. S. 424, 428 (1965). And they foster the "elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, *supra*, at 555.

In *Young*, 535 U. S. 43, we evaluated whether those characteristics of statutes of limitations were present in the "three-year lookback period" for tax liabilities in bankruptcy proceedings. The Bankruptcy Code favors tax claims less than three years old in two respects: Such claims cannot be discharged, and they have priority over certain others in bankruptcy proceedings. See 11 U. S. C. §§507(a)(8)(A)(i), 523(a)(1)(A). If the Internal Revenue Service "sleeps on its rights" by failing to prosecute those claims within three years, however, then those mechanisms for enforcing claims against bankrupt taxpayers are eliminated. *Young*, 535 U. S., at 47. We concluded that the lookback period "serves the same 'basic policies [furthered by] all limitations provisions,'" *ibid*. (quoting *Rotella*, 528 U. S., at 555), *i.e.*, certainty and repose. We accordingly held that it was a limitations period presumptively subject to equitable tolling. 535 U. S., at 47.

Unlike the 3-year lookback period in *Young*, expiration of the 1-year period in Article 12 does not eliminate the remedy the Convention affords the left-behind parent—namely, the return of the child. Before one year has elapsed, Article 12 provides that the court "shall order the return of the child forthwith." Treaty Doc., at 9. But even after that period has expired, the court "shall also order the return of the child, unless it is demonstrated that the child is now settled." *Ibid*. The continued availability of the return remedy after one year preserves the possibility of relief for the left-behind parent and prevents repose for the abducting parent. Rather than establishing any certainty about the respective rights of the parties, the expiration of the 1-year period opens the door to consideration of a third party's interests, *i.e.*, the child's interest in settlement. Because that is not the sort of interest addressed by a statute of limitations, we decline to treat the 1-year period as a statute of limitations.

C

Without a presumption of equitable tolling, the Convention does not support extending the 1-year period during concealment. Article 12 explicitly provides that the 1-year period commences on "the date of the wrongful removal or retention," and makes no provision for an extension of that period. *Id*., at 9. Further, the practical effect of the tolling that Lozano requests would be to delay the commencement of the 1-year period until the left-behind parent discovers the child's location. Commencing the 1-year period upon discovery is the obvious alternative to the commencement date the drafters actually adopted because the subject of the Hague Convention, child abduction, is naturally associated with the sort of concealment that might justify equitable tolling under other circumstances. See 697 F. 3d, at 51, n. 8 ("It would have been a simple matter, if the state parties to the Convention wished to take account of the possibility that an abducting parent might make it difficult for the petitioning parent to discover

the child's whereabouts, to run the period 'from the date that the petitioning parent learned [or, could reasonably have learned] of the child's whereabouts'" (alterations in original)). Given that the drafters did not adopt that alternative, the natural implication is that they did not intend the 1-year period to commence on that later date. Cf. *Sebelius v. Auburn Regional Medical Center*, 568 U. S.___, ___ (2013) (slip op., at 10–11). We cannot revisit that choice.

Lozano contends that equitable tolling is nevertheless consistent with the purpose of the Hague Convention because it is necessary to deter child abductions. In his view, "absent equitable tolling, concealment 'probably will' result in non-return," which will in turn encourage abduction. Reply Brief 14–15; see also *Duarte*, 526 F. 3d, at 570.

We agree, of course, that the Convention reflects a design to discourage child abduction. But the Convention does not pursue that goal at any cost. The child's interest in choosing to remain, Art. 13, or in avoiding physical or psychological harm, Art. 13(b), may overcome the return remedy. The same is true of the child's interest in settlement. …We are unwilling to apply equitable tolling principles that would, in practice, rewrite the treaty. …

Nor is it true that an abducting parent who conceals a child's whereabouts will necessarily profit by running out the clock on the 1-year period. American courts have found as a factual matter that steps taken to promote concealment can also prevent the stable attachments that make a child "settled." See, *e.g.*, *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363–1364 (MD Fla. 2002) (children not settled when they "lived in seven different locations" in 18 months); *Wigley v. Hares*, 82 So. 3d 932, 942 (Fla. App. 2011) ("The mother purposely kept him out of all community activities, sports, and even church to avoid detection by the father"); *In re Coffield*, 96 Ohio App. 3d 52, 58, 644 N. E. 2d 662, 666 (1994) (child not settled when the abducting parent "was attempting to hide [child's] identity" by withholding child from school and other organized activities). Other signatories to the Hague Convention have likewise recognized that concealment may be taken into account in the factual determination whether the child is settled. See, *e.g.*, *Cannon*, [2005] 1 W. L. R., ¶¶52–61. See also *Kubera*, 3 B. C. L. R. (5th), ¶47, 317 D. L. R. (4th), ¶47; A. C. v. P. C., [2005] HKEC 839, ¶39, 2005 WL 836263, ¶39. Equitable tolling is therefore neither required by the Convention nor the only available means to advance its objectives.

D

Finally, Lozano contends that the Hague Convention leaves room for United States courts to apply their own "common law doctrine of equitable tolling" to the 1-year period in Article 12 without regard to whether the drafters of the Convention intended equitable tolling to apply. Brief for Petitioner 25. Specifically, Lozano contends that the Convention recognizes additional sources of law that permit signatory states to return abducted children even when return is not available or required pursuant to the Convention. Article 34 of the Convention provides that "for the purpos[e] of obtaining the return of a child," the Convention "shall not restrict the application of an international instrument in force between the State of origin and the State addressed" or the application of "other law of the State addressed." Treaty Doc., at 13; see also Art. 18, *id.*, at 11 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time"). In Lozano's view, equitable tolling principles constitute "other law" that should apply here.

That contention mistakes the nature of equitable tolling as this Court has applied it. We do not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose. See *supra*, at 7–8. To the contrary, we may apply equitable tolling to the Hague Convention only if we determine that

the treaty drafters so intended. See *Choctaw Nation*, 179 U. S., at 535. For the foregoing reasons, we conclude that they did not.

* * * *

b. Lopez Sanchez

In 2014, the Court of Appeals for the Fifth Circuit considered the question of what impact a grant of asylum to the children has on a petition for their return brought pursuant to the Hague Convention and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"). *Angelica Lopez Sanchez v. R.G.L. et al.*, 761 F.3d 495 (5th Cir. 2014). The three minor children had been brought into the United States by their aunt and uncle and were subsequently placed in foster care after expressing fear of returning to Mexico because of their mother's boyfriend, with whom they and their mother had lived, because they claimed he was involved in drug gang activity and abusive behavior. The children appealed from the district court's order that they be returned to their mother in Mexico. During the pendency of the appeal, U.S. Citizenship and Immigration Services ("USCIS") granted the children asylum pursuant to 8 U.S.C. § 1158. The Court of Appeals held that the children had standing to appeal the district court's order that they be returned to Mexico and remanded the case for further consideration. Excerpted below (with footnotes omitted) is the portion of the opinion of the Court of Appeals relating to the relevance of the asylum proceedings to consideration of a Hague Convention petition.[*] The Court also held that the district court had jurisdiction although the mother had not served the children's actual custodian; that joinder of the United States was required; and that the children were entitled to appointment of a guardian ad litem.

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III. Effect of asylum grant on the district court's order

The final issue we address is whether the children's asylum grant should be considered by the district court. The children first argue that an asylum grant directly conflicts with the district court order, and the more recent asylum grant should take precedence over Convention relief under the last-in-time rule. *See Ntakirutimana v. Reno*, 184 F.3d 419, 426–27 (5th Cir.1999).

[*] Editor's Note: Excerpts herein come from the Court's August 1, 2014 opinion. The Court initially issued its decision vacating and remanding to the district court on February 21, 2014. *Sanchez v. R.G.L.*, 743 F.3d 945 (5th Cir. 2014) (withdrawn on rehearing). The Court issued a second opinion on June 5, 2014, in response to the children's first petition for rehearing, in which it ordered the Government's joinder on remand. *Sanchez v. R.G.L.*, 2014 WL 2532434 (5th Cir. 2014) (withdrawn on rehearing). The final opinion restates the conclusions that the district court had jurisdiction, that the Government should be joined, and corrects the erroneous conclusion that joinder would moot the jurisdictional challenge raised by the children. On remand, the district court dismissed the case after considering all submissions of the parties.

This argument focuses on the effect of the asylum grant vis-a-vis the district court order and views Sanchez's attempt to secure the return of her children under ICARA as an impermissible collateral attack on the grant of asylum. Alternatively, the children argue that we should remand to the district court for reconsideration of whether the Article 13(b) or 20 exception applies in light of the recent grant of asylum, which is new evidence not considered by the district court.

Sanchez responds that, if Convention relief is found to be in conflict with the asylum grant, the return order should take precedence over the asylum grant because the Convention proceedings were more thorough. She also disputes the argument that it is necessary for the district court to consider the asylum grant because evidence related to that grant was already considered by the district court. In its amicus brief, the Government advances the position that a grant of asylum is not dispositive of but is relevant to whether either the Article 13(b) or 20 exception applies.

The children were granted asylum pursuant to the Immigration and Nationality Act ("INA"), as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), 8 U.S.C. §§ 1158, 1229a, 1232. To qualify for asylum, an applicant must either have suffered past persecution or have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A), *incorporated by* 8 U.S.C. § 1158(b)(1)(B)(i). The children's grant of asylum was discretionary, 8 U.S.C. § 1158(b)(1)(A), and provides that "the Attorney General shall not remove or return the alien to the alien's country of nationality...." 8 U.S.C. § 1158(c)(1)(A).

We disagree with the children's argument that the asylum grant must be revoked before they can be returned to Mexico pursuant to the Hague Convention. The language of the INA indicates that the discretionary grant of asylum is binding on the Attorney General or Secretary of Homeland Security. *See id.* No authority has been offered to support the argument that the discretionary grant of asylum confers a right to remain in the country despite judicial orders under this Convention. The asylum grant does not supercede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security under the INA. *See Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 173, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993).

The children's asylum grant, though, is relevant to whether the Hague Convention exceptions to return should apply. We agree with the Government that there is a significant overlap between the asylum inquiry and Article 13(b) of the Hague Convention. Both focus on the level of harm to which the children would be exposed if returned to their home country. An asylee has been found to face persecution upon return to his or her country of nationality. 8 U.S.C. § 1101(a)(42)(A). Persecution has been defined as an "extreme concept" and turns on whether suffering or harm is likely to be inflicted on the asylum applicant. *Eduard v. Ashcroft,* 379 F.3d 182, 187 & n. 4 (5th Cir.2004). Similarly, Article 13(b) of the Hague Convention requires a respondent to show that "there is a grave risk that his or her return would expose the child to physical or psychological harm." Hague Convention, art. 13(b). The level of harm necessary to trigger the Article 13(b) exception must be "a great deal more than minimal." *Walsh,* 221 F.3d at 218.

Despite similarities, the asylum finding that the children have a well-founded fear of persecution does not substitute for or control a finding under Article 13(b) of the Convention about whether return "would expose the child to physical or psychological harm or otherwise

place the child in an intolerable situation." Hague Convention, art. 13(b). The judicial procedures under the Convention do not give to others, even a governmental agency, authority to determine these risks. The district court makes an independent finding of potential harm to the children, considering all offered relevant evidence. The prior consideration of similar concerns in a different forum are relevant, but we determine that an asylum grant does not remove from the district court the authority to make controlling findings on the potential harm to the child.

We note also that the evidentiary burdens in the asylum proceedings and those under ICARA's framework are different. To be granted asylum, the children were required to show their eligibility by a preponderance of the evidence. *See* 8 C.F.R. § 1208.13(a),(b)(1)(i). In order for a Convention exception to apply, a respondent must establish the exception by clear and convincing evidence. 42 U.S.C. § 11603(e). The level of participation by interested parties in the two proceedings may also be different, a point Sanchez makes when arguing she did not have an opportunity to make a meaningful presentation prior to the asylum grant.

As the district court recognized, the USCIS grants of asylum are relevant to any analysis of whether the Article 13(b) or 20 exception applies. When faced with a motion to stay the proceedings while the children's asylum application was pending, the district court determined that the interests of a prompt answer under the Convention outweighed the merits of a stay. Now that the children have been granted asylum, though, all available evidence from the asylum proceedings should be considered by the district court before determining whether to enforce the return order.

CONCLUSION

The district court's return order is VACATED. The case is REMANDED to the district court with instructions to determine the current physical and legal custodian; to join the Government, if it still retains temporary legal custody, as a party respondent; to appoint the children a guardian *ad litem;* and to consider the asylum grants, assessments, and any related evidence not previously considered that relates to whether Article 13(b) or 20 applies. Any remaining issues such as whether the oldest child is no longer subject to these proceedings can be addressed. Finally, we repeat our previous statement, which was echoed in the previous dissent, that the United States Government should take "all appropriate measures" to fulfill its Convention-imposed duties, including an obligation to "facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child." Hague Convention, art. 7.

* * * *

2. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

On September 29, 2014, the President signed the Preventing Sex Trafficking and Strengthening Families Act. Pub. L. No. 113-183. Title III of that Act implements the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Among other things, the Act mandates that U.S. states have in effect the 2008 amendments to the Uniform Interstate Family Support Act in order to qualify for continued federal funding under Title IV-D of the Social Security Act. On September 30, 2014, Secretary Kerry issued a press statement welcoming passage of the

Act. Secretary Kerry's press statement, available at *www.state.gov/secretary/remarks/2014/09/232337.htm*, includes the following:

> … I am grateful to Congress for passing this important implementing legislation. …
>
> The United States was the first country to sign the Convention in 2007. Protection of our most vulnerable citizens, our children, is fundamental to who we are. …We know that recovering child support when the child and one parent are in one country and the other parent is in another is difficult and too often impossible. The United States has a comprehensive system to establish, recognize and enforce domestic and international child support obligations. The Convention just requires that all treaty partners have similar systems in place and, as a result, more children in the United States and abroad will be receiving more support, more expeditiously than ever before.

C. INTERNATIONAL CIVIL LITIGATION

1. Arbitration

a. BG Group v. Argentina

As discussed in *Digest 2013* at 443-52, the United States filed two *amicus* briefs in the Supreme Court of the United States in a case challenging an award issued in an arbitration conducted under a bilateral investment treaty. On March 5, 2014, the Supreme Court decided the case. *BG Group PLC v. Argentina*, 134 S.Ct. 1198 (2014). The Supreme Court did not remand the case, as recommended in the U.S. brief. Seven justices voted to reverse the decision of the U.S. Court of Appeals for the District of Columbia Circuit, which had reversed the district court's decision confirming the award. Two justices dissented, with the dissenting opinion by Chief Justice Roberts taking a position similar to that articulated in the U.S. brief. The opinion of the Supreme Court includes the following introduction, summarizing the majority view:

> This case concerns the Treaty's arbitration clause, and specifically the local court litigation requirement set forth in Article 8(2)(a). The question before us is whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions. That is to say, who—court or arbitrator—bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy? In our view, the matter is for the arbitrators, and courts must review their determinations with deference.

A majority of the Supreme Court found that the treaty did not make the litigation requirement a condition of consent to arbitration, and therefore deferred to the arbitrators' jurisdictional determination as a reasonable interpretation and application of the treaty.

b. Commissions Import Export SA v. Republic of the Congo

On April 7, 2014, the United States submitted a brief as *amicus* in the U.S. Court of Appeals for the District of Columbia Circuit in in *Commissions Import Export SA v. Republic of the Congo*, No. 13-7004. Commissions Import Export S.A. ("Commisimpex") obtained an arbitral award in France in 2000, which it confirmed in an English court in 2009, resulting in a money judgment which it then sought to enforce in the United States under the District of Columbia Uniform Foreign-Country Money Judgments Recognition Act, D.C. Code § 15-361 *et seq*. The district court held that the Federal Arbitration Act, with its requirement that an action to confirm an arbitral award be brought within three years, preempted the action. The U.S. brief argues that the action is not preempted. Excerpts follow from the U.S. brief, which is available in full at *www.state.gov/s/l/c8183.htm*. The Court of Appeals issued its decision on July 11, 2014, agreeing with the U.S. view that enforcement of the "foreign court judgment by a lawful, parallel enforcement scheme does not stand as an obstacle to accomplishment of the purposes of FAA Chapter 2," and reversing the district court's dismissal of the case. 757 F.3d 321 (D.C. Cir. 2014).

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* * * *

The New York Convention does not establish a ceiling for enforcement of foreign arbitral awards in U.S. court, and the Foreign Arbitral Awards Convention Act does not preclude a Court from applying state law to recognize a foreign judgment arising out of an award.

1. The New York Convention does not contain any time limitations for recognizing or enforcing foreign arbitral awards. Enforcing the English judgment would thus not conflict with any provision of the Convention.

Nor do other provisions of the Convention have the effect of barring a Contracting Party from enforcing awards under different, more liberal criteria than would apply under the Convention itself. The Convention is properly understood to facilitate the enforcement of arbitration awards by requiring a Contracting Party to enforce awards that satisfy the criteria set out in the Convention. See *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366-367 (5th Cir. 2003) (recognizing that the Convention was intended "to facilitate the enforcement of arbitration awards"). The Convention thus sets a "floor," but not a "ceiling," for enforcement of arbitral awards.

Article III of the Convention provides for application of the procedural law of the forum—including the relevant limitations period—in an action to enforce an arbitral award, while requiring that those procedural rules may not be more onerous than the rules applied to the recognition and enforcement of domestic arbitral awards. Articles V(1) and V(2) of the New

York Convention establish exceptions to the affirmative obligation imposed by Article III, beginning with the prefatory statement that "[r]ecognition and enforcement of the award *may* be refused" in the specified circumstances. New York Convention, Art. V(1), (2) (emphasis added). This language is properly understood to allow, *but not to require*, a Contracting Party to deny enforcement of an arbitral award that meets one of the grounds for refusal set out in Article V. See Department of State Memorandum, Discussion of the Provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 21 (attached to President's Transmittal Letter, Apr. 24, 1968) (explaining that Article V(2) "*permits* the competent authority" to refuse recognition and enforcement of an arbitral award in its "discretion") (Addendum A-21); *Karaha Bodas*, 335 F.3d at 368 (Art. V "enumerates specific grounds on which the court *may* refuse enforcement if the party contesting enforcement provides proof sufficient to meet one of the bases for refusal" (emphasis in original)).

Furthermore, the exceptions set out in Article V(1) of the Convention are affirmative defenses that must be invoked and proven by an arbitral party, *not* limitations on a Contracting Party's enforcement authority. They do not reflect an intent to require Contracting Parties to deny enforcement in any case in which an exception applies. See Restatement (Third) of U.S. Law of International Commercial Arbitration, § 4-32 Tentative Draft No. 3, Comment e (Apr. 16, 2013) ("denial of enforcement under the [New York and Panama] Conventions is permissive rather than mandatory").

This construction of the New York Convention is also supported by Article VII, which provides that the Convention "shall not * * * deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon" or under existing bilateral or multilateral treaties. As the State Department explained, the "basic purpose" of Article VII "is to safeguard existing agreements which stipulate more liberal provisions than the conventions." Department of State Memorandum 22, Addendum 22. The rationale underlying this provision is that "the Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon." Albert Jan van den Berg, *The New York Convention of 1958: An Overview* 20 (June 6, 2008).

Analyzing this text and structure, courts and commentators have concluded that "[n]othing in Article V, nor the basic structure and purpose of the Convention, imposes" an obligation on a Contracting Party to deny recognition to an arbitral agreement or arbitral award that is not required to be enforced under the Convention. Gary B. Born, II *International Commercial Arbitration* 2722 (2009); accord Roy Goode, *The Role of the* Lex Loci Arbitri *in International Commercial Arbitration*, 17 Arb. Int'l 19, 22 (2001) ("It is clear that Article V is mandatory only in precluding refusal of enforcement on grounds other than those set out in it. Proof of the existence of one of those grounds entitles the courts of a Convention state to refuse recognition and enforcement but does not oblige them to do so."); *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Achille Lauro*, 712 F.2d 50, 54 (3d Cir. 1983); *Termorio SA ESP v. Electrificadora del Atlantico SA ESP*, 421 F. Supp.2d 87, 93 (D.D.C. 2006); see also Gary B. Born, II *International Commercial Arbitration* 2724 n.97 (collecting citations).

It would thus be inconsistent with the terms and structure of the Convention to conclude that its minimum requirements for recognition and enforcement of a foreign arbitral award have the effect of preempting state laws that provide more lenient standards for award recognition and enforcement.

2. Like the Convention itself, the implementing federal legislation in Title 9, Chapter 2 reflects Congress' intent to require enforcement of arbitral agreements and arbitral awards that satisfy certain requirements. "Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award," and "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the" Convention. 9 U.S.C. § 207. In the view of the United States, however, the district court erred in concluding that application of state law to enforce the English judgment would undermine the goals and policies of the Foreign Arbitral Awards Convention Act. See *id.* at 477-478.

The Foreign Arbitral Awards Convention Act was intended to "set[] up the legal structure that [was] required to implement the [New York] Convention." Statement of Amb. Kearney at Senate Committee on Foreign Relations, Feb. 9, 1970, reprinted as appendix to S. Rep. No. 91-702 (1970); see also H. Rep. No. 91-1181, at 1, reprinted in 1970 U.S.C.C.A.N. 3601, 3601. The legislative history explains that the Act "will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts." *Id.*; see also 116 Cong. Rec. 22,731-22,732 (Jul. 6, 1970) (Sen. Jacobs, explaining that the New York Convention and implementing legislation are intended to permit enforcement of arbitration awards in summary proceedings).

The district court reasoned that the limitations period in 9 U.S.C. § 207 reflects a congressional intent to "protect[] potential defendants' interest in finality." JA 363. Although, at some level of generality, any limitations period can be viewed as promoting finality, there is no evidence in the statute or its legislative history that § 207 was intended to preclude enforcement of a money judgment like the English judgment here. The provision merely implements the New York Convention's provision allowing parties to the Convention to apply domestic procedural rules in arbitration actions to recognize or enforce arbitral awards, including "the limitations period applicable to such actions, provided it is not unreasonably short." George A. Bermann, *'Domesticating' the New York Convention: the Impact of the Federal Arbitration Act*, 2 J. Int'l Disp. Settlement 317, 325 & n.29 (2011).

The district court also reasoned that Congress intended for arbitration actions governed by the New York Convention to be decided under "uniform federal procedures." JA 362. The district court construed Article XI of the Convention to give Contracting Parties the option to implement the Convention either "at the federal or at the sub-national (*i.e.* state or province) level." JA 8-9. The court then deduced from the fact that the United States implemented the New York Convention through federal legislation that Congress must have intended to adopt uniform federal procedures and that enforcement of the English judgment would be inconsistent with that intent. JA 360-361. That reasoning was erroneous.

Article XI is not intended to give Contracting Parties a choice of how to implement the Convention, but to reflect that in some countries, the competence to enforce arbitral awards rests at the sub-federal rather than the federal level. See Dirk Otto, *Article XI*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*

494 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port, eds., 2010) (explaining that Australia insisted on such a provision because its federal government had no power to require its states to enforce arbitral awards). Article XI(a) provides that if the Contracting Party is a federal government that has the power to comply with some or all of the Convention, it must implement those obligations as would a unitary state. Article XI(b) provides that a federal government need only make a recommendation to the constituent states or provinces if parts of the Convention fall outside of its jurisdiction. In the case of the United States, Congress enacted federal legislation implementing the Convention because it had the power to do so, and therefore was required to do so under Article XI(a).

B. Enforcement Of A Foreign Judgment Arising Out Of An Arbitral Award Is Distinct From Enforcement Of An Arbitral Award, And Is Not Governed By The New York Convention Or Its Implementing Legislation.

Neither the New York Convention nor its implementing legislation was intended to preempt a state-law action enforcing a money judgment that is in turn based on an arbitral award governed by the Convention that is brought beyond the three-year limitations period in 9 U.S.C. § 207. There is a critical difference between such an action and an action to enforce a foreign money judgment. Any preemptive force attributed to § 207 should not be extended to this latter context.

It is essential to recognize that a foreign court judgment confirming an arbitral award is not governed by the New York Convention or the Foreign Arbitral Awards Convention Act. As a matter of U.S. law, the mechanism for obtaining recognition and enforcement of a foreign money judgment arising out of an arbitral award has been understood to be distinct from an action seeking recognition and enforcement of an arbitral award. See, *e.g.*, *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 582-583 (2d Cir. 1993). Enforcement of a foreign court money judgment has traditionally been governed by state law. See Restatement (Third) of Foreign Relations Law of the United States § 481 comment a (1987); see also Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Foreign Country Money Judgments Recognition Acts (1962 & 2005).

U.S. law reflects international law and practice, which also distinguishes between the two types of actions, and has traditionally provided for a party to have a "parallel entitlement" to pursue both forms of relief. As the draft Restatement (Third) of the U.S. Law of International Commercial Arbitration explains,

> If a foreign award has been reduced to judgment by a court in the arbitral seat, a party may seek either: (1) recognition or enforcement of the award in accordance with the provisions of this Chapter; or (2) recognition or enforcement of the judgment in accordance with the foreign judgment recognition and enforcement standards of the forum in which such relief is sought.

Restatement (Third) of U.S. Law of International Commercial Arbitration, § 4- 3(d), Tentative Draft No. 2 (Apr. 16, 2012). "Once an award has been confirmed by a foreign court at the arbitral seat, the prevailing party may seek to have it recognized or enforced either as an award or as a foreign judgment, or both." *Id*., comment g. If the party seeks to enforce the award as a foreign money judgment, "the forum applies its own standards on the recognition or enforcement of foreign judgments." *Id*.

As a practical matter, furthermore, seeking enforcement of a foreign money judgment arising out of an arbitral award may lead to a substantively different outcome than seeking to enforce a foreign arbitral award. Here, the English judgment sought to be enforced by the

plaintiffs includes not only the amount due under the original arbitral award, but also interest, costs, and fees awarded by the English court. Those amounts would not have been encompassed by a timely effort by Commisimpex to have the arbitral award recognized under the Foreign Arbitral Awards Convention Act.

Admittedly, the "parallel entitlement" approach to enforcement of arbitration awards and judgments can give rise to what may seem to be anomalies, such as by permitting a party to enforce a judgment recognizing or enforcing an arbitral award when an action to recognize or enforce the underlying arbitral award itself would be barred by a limitations period. See Restatement (Third) of U.S. Law of International Commercial Arbitration, § 4-3(d), Reporter's Notes g, Tentative Draft No. 2 (Apr. 16, 2012). This result, however, is "consistent with the language of the [New York Convention] and [its] underlying purpose to increase the potential enforceability of arbitral awards." *Id*.; see also *id*. (noting that permitting enforcement of money judgment entered by foreign court "would appear to enhance the prospects for the effective recognition and enforcement of awards generally"). Neither the New York Convention nor the Foreign Arbitral Awards Convention Act poses a categorical bar to recognizing and enforcing foreign money judgments in the circumstances now before the Court.

* * * *

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

As discussed in *Digest 2013* at 452-59, the United States filed an *amicus* brief in the U.S. Supreme Court in *DaimlerChrysler AG v. Bauman*, arguing that U.S. courts lacked personal jurisdiction over an out-of-state corporation when that jurisdiction was based on the corporation's subsidiary's substantial contacts with a U.S. state. On January 14, 2014, the Supreme Court decided the case. *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). Excerpts follow (with footnotes omitted) from the Court's opinion, which, like the U.S. *amicus* brief, concludes that U.S. courts lacked personal jurisdiction over Daimler.

* * * *

This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States. The litigation commenced in 2004, when twenty-two Argentinian residents filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company, headquartered in Stuttgart, that manufactures Mercedes–Benz vehicles in Germany. The complaint alleged that during Argentina's 1976–1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes–Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes–Benz USA, LLC (MBUSA), a subsidiary of Daimler

incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint. Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. See Tr. of Oral Arg. 28–29. Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ——, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." *Id.*, at ——, 131 S.Ct., at 2851. Instructed by *Goodyear*, we conclude Daimler is not "at home" in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina.

* * * *

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. See Fed. Rule Civ. Proc. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). Under California's long-arm statute, California state courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code Ann. § 410.10 (West 2004). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. We therefore inquire whether the Ninth Circuit's holding comports with the limits imposed by federal due process. See, *e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

* * * *

"The canonical opinion in this area remains *International Shoe* [*Co. v. Washington*], 326 U.S. 310 [66 S.Ct. 154, 90 L.Ed. 95 (1945)], in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Goodyear*, 564 U.S., at ——, 131 S.Ct., at 2853 (quoting *International Shoe*, 326 U.S., at 316, 66 S.Ct. 154). Following *International Shoe*, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer*, 433 U.S., at 204,

97 S.Ct. 2569.

International Shoe ‘s conception of “fair play and substantial justice” presaged the development of two categories of personal jurisdiction. …

International Shoe distinguished between, on the one hand, exercises of specific jurisdiction, … and on the other, situations where a foreign corporation’s “continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” 326 U.S., at 318, 66 S.Ct. 154. As we have since explained, “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2851; see *id.,* at ——, 131 S.Ct., at 2853–2854; *Helicopteros,* 466 U.S., at 414, n. 9, 104 S.Ct. 1868.

* * * *

Our post- *International Shoe* opinions on general jurisdiction … are few. “[The Court’s] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.” *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2856 (internal quotation marks and brackets omitted). The defendant in *Perkins,* Benguet, was a company incorporated under the laws of the Philippines, where it operated gold and silver mines. Benguet ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company’s files, and oversaw the company’s activities. *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 448, 72 S.Ct. 413, 96 L.Ed. 485 (1952). The plaintiff, an Ohio resident, sued Benguet on a claim that neither arose in Ohio nor related to the corporation’s activities in that State. We held that the Ohio courts could exercise general jurisdiction over Benguet without offending due process. *Ibid.* That was so, we later noted, because “Ohio was the corporation’s principal, if temporary, place of business.” *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 780, n. 11, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).

The next case on point, *Helicopteros,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404, arose from a helicopter crash in Peru. Four U.S. citizens perished in that accident; their survivors and representatives brought suit in Texas state court against the helicopter’s owner and operator, a Colombian corporation. That company’s contacts with Texas were confined to “sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training.” *Id.,* at 416, 104 S.Ct. 1868. Notably, those contacts bore no apparent relationship to the accident that gave rise to the suit. We held that the company’s Texas connections did not resemble the “continuous and systematic general business contacts ... found to exist in *Perkins*.” *Ibid.* “[M]ere purchases, even if occurring at regular intervals,” we clarified, “are not enough to warrant a State’s assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.” *Id.,* at 418, 104 S.Ct. 1868.

Most recently, in *Goodyear*, we answered the question: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State? " 564 U.S., at ——, 131 S.Ct., at 2850. That case arose from a bus accident outside Paris that killed two boys from North Carolina. The boys' parents brought a wrongful-death suit in North Carolina state court alleging that the bus's tire was defectively manufactured. The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries. Those foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina, however, and on that ground, the North Carolina Court of Appeals held the subsidiaries amenable to the general jurisdiction of North Carolina courts.

We reversed, observing that the North Carolina court's analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.*, at ——, 131 S.Ct., at 2855. Although the placement of a product into the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction," we explained, such contacts "do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Id.*, at ——, 131 S.Ct., at 2857. As *International Shoe* itself teaches, a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U.S., at 318, 66 S.Ct. 154. Because Goodyear's foreign subsidiaries were "in no sense at home in North Carolina," we held, those subsidiaries could not be required to submit to the general jurisdiction of that State's courts. 564 U.S., at ——, 131 S.Ct., at 2857. See also *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. ——, ——, 131 S.Ct. 2780, 2797–2798, 180 L.Ed.2d 765 (2011) (GINSBURG, J., dissenting) (noting unanimous agreement that a foreign manufacturer, which engaged an independent U.S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in New Jersey courts based on those contacts).

* * * *

With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction. While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.

Daimler, on the other hand, failed to object below to plaintiffs' assertion that the California courts could exercise all-purpose jurisdiction over MBUSA. But see Brief for Petitioner 23, n. 4 (suggestion that in light of *Goodyear*, MBUSA may not be amenable to general jurisdiction in California); Brief for United States as *Amicus Curiae* 16, n. 5 (hereinafter U.S. Brief) (same). We will assume then, for purposes of this decision only, that MBUSA qualifies as at home in California.

A

In sustaining the exercise of general jurisdiction over Daimler, the Ninth Circuit relied on an agency theory, determining that MBUSA acted as Daimler's agent for jurisdictional purposes and then attributing MBUSA's California contacts to Daimler. The Ninth Circuit's agency analysis derived from Circuit precedent considering principally whether the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." 644 F.3d, at 920 (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (C.A.9 2001); emphasis deleted).

This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an "agency" relationship. …

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." 676 F.3d, at 777 (O'Scannlain, J., dissenting from denial of rehearing en banc). The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear*. 564 U.S., at ——, 131 S.Ct., at 2856.

B

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.

* * * *

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." Brief for Respondents 16–17, and nn. 7–8. That formulation, we hold, is unacceptably grasping.

As noted, … the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. See 326 U.S., at 317, 66 S.Ct. 154 (jurisdiction can be asserted where a corporation's in-state activities are not only "continuous and systematic, but also give rise to the liabilities sued on"). Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... *on causes of action arising from dealings entirely distinct from those activities*."

Id., at 318, 66 S.Ct. 154 (emphasis added… Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." 564 U.S., at ——, 131 S.Ct., at 2851.

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.*, 471 U.S., at 472, 105 S.Ct. 2174 (internal quotation marks omitted).

It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.

C

Finally, the transnational context of this dispute bears attention. The Court of Appeals emphasized, as supportive of the exercise of general jurisdiction, plaintiffs' assertion of claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350. See 644 F.3d, at 927 ("American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses."). Recent decisions of this Court, however, have rendered plaintiffs' ATS and TVPA claims infirm. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ——, ——, 133 S.Ct. 1659, 1669, 185 L.Ed.2d 671 (2013) (presumption against extraterritorial application controls claims under the ATS); *Mohamad v. Palestinian Authority*, 566 U.S. ——, ——, 132 S.Ct. 1702, 1705, 182 L.Ed.2d 720 (2012) (only natural persons are subject to liability under the TVPA).

The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is "domiciled," a term defined to refer only to the location of the corporation's "statutory seat," "central administration," or "principal place of business." European Parliament and Council Reg. 1215/2012, Arts. 4(1), and 63(1), 2012 O.J. (L. 351) 7, 18. See also *id.*, Art. 7(5), 2012 O.J. 7 (as to "a dispute *arising out of the operations of a branch, agency or other establishment*," a corporation may be sued "in the courts for the place where the branch, agency or other establishment is situated" (emphasis added)). The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." U.S. Brief 2 (citing Juenger, The American Law of General Jurisdiction, 2001 U. Chi. Legal Forum 141, 161–162). See also U.S. Brief 2 (expressing concern that unpredictable applications of general jurisdiction based on activities of U.S.-based subsidiaries could discourage foreign investors); Brief for Respondents 35 (acknowledging that "doing business" basis for general jurisdiction has led to "international

friction"). Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice" due process demands. *International Shoe*, 326 U.S., at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)).

* * * *

3. International Comity

a. Arab Bank v. Linde

On May 23, 2014, the United States filed a brief in the Supreme Court of the United States as *amicus curiae* in response to an order of the Court inviting the views of the United States in *Arab Bank, PLC v. Linde et al.*, No. 12-1485. The United States brief identifies several errors in the analysis of the district court in the case, but argues that the Supreme Court should nonetheless deny the petition for a writ of certiorari because of the extraordinary nature of the mandamus remedy sought by the petitioner in the court of appeals. Petitioner, Arab Bank, declined to produce certain bank records located in foreign jurisdictions due to bank secrecy laws. The records were sought in a suit brought, pursuant to the Antiterrorism Act of 1990, 18 U.S.C. § 2331 *et seq*. ("ATA"), by victims of terrorism who alleged that Arab Bank knowingly supported foreign terrorist organizations. The district court sanctioned Arab Bank for its nonproduction and Arab Bank sought a writ of mandamus to vacate the sanctions order. The court of appeals denied the writ of mandamus. Excerpts below from the U.S. brief (with footnotes omitted) detail the lower courts' errors in considering international comity concerns. The U.S. brief is available in full on the website of the Department of Justice at *www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2012-1485.pet.ami.inv.pdf*. On June 30, 2014, the Supreme Court denied the petition for certiorari.

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The lower courts' comity analysis was flawed in several respects.

1. The lower courts erred in suggesting that petitioner's reliance on foreign bank secrecy laws in this private action did not reflect good faith simply because petitioner previously produced some of the documents to the Departments of the Treasury and Justice. … That reasoning fails to account for the distinct United States and foreign interests implicated when the government, as opposed to a private party, seeks disclosure. It also threatens to undermine important United States law-enforcement and national-security interests by deterring private entities and foreign jurisdictions from cooperating with government requests.

The United States has a compelling sovereign interest in obtaining documents located abroad for use in criminal prosecutions, civil enforcement actions, and other proceedings through which the government investigates and addresses violations of United States law and protects the Nation. See, *e.g.*, *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-118 (S.D.N.Y. 1981). When it decides whether to

seek documents assertedly covered by foreign bank secrecy laws, the government balances the need for the information sought and the public interest in the investigation against the interests of the foreign jurisdictions where the information is located and any potential consequences for our foreign relations. See *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-415 (2003). A government request for production therefore reflects the Executive Branch's conclusion, in the exercise of its responsibility for both foreign affairs and the enforcement of laws requiring production, that disclosure would be consistent with both the domestic public interest and international comity concerns.

Although the United States government may seek to compel disclosure of foreign bank records in court when necessary, the United States also relies heavily on cooperative methods for obtaining documents. Government agencies often negotiate voluntary disclosures or agreements that allow examination of documents consistent with both United States and foreign law. The United States may also make state-to-state requests for information pursuant to mutual legal assistance treaties (which apply in criminal matters) and other bilateral and multilateral agreements that govern official requests for information. See, e.g., United Nations International Convention for the Suppression of the Financing of Terrorism, art. 12, Dec. 9, 1999, 2178 U.N.T.S. 235 (providing for mutual legal assistance in connection with criminal investigations, which may not be refused on bank-secrecy grounds); International Organization of Securities Commissions, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, paras. 6(b), 7(b), May 2012, http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf (providing for mutual state-to-state assistance in securities matters notwithstanding domestic secrecy laws). As such treaties and agreements reflect, many sovereigns recognize that government document requests reflect important sovereign interests and should be dealt with cooperatively when possible. That cooperation, by both foreign sovereigns and private entities under their auspices, directly advances the United States government's ability to investigate violations of United States law.

The balance of relevant interests is materially different when a private party seeks documents located in foreign jurisdictions. Private requests may intrude more deeply on foreign sovereign interests because private parties often do not "exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) (internal quotation marks and citation omitted); see Restatement § 442 rep. note 9. And although private litigants may be asserting a federal statutory claim that embodies important United States interests, their document requests do not reflect a specific determination by the government that the request is sufficiently in the public interest to warrant the adverse consequences that could ensue. In addition, banks may be able to produce documents to government agencies—but not private parties—consistent with foreign bank secrecy laws because of exceptions in the laws, applicable treaty provisions, or approval by governmental authorities. And a foreign state considering whether to permit or facilitate a bank's cooperation with a disclosure request—or whether to prosecute a bank for its disclosures—may view the matter differently based on whether the party requesting the information is a government entity or a private one. …

The lower courts therefore erred in concluding that petitioner had engaged in "selective compliance" with foreign bank secrecy laws by producing documents to United States agencies but not to respondents. … The district court appears to have relied solely on the fact of petitioner's production to government agencies, rather than on any conclusion that petitioner actually violated applicable foreign laws when it produced documents to the United States. …

The courts below also erred in assuming that petitioner would not be subjected to penalties for producing documents in this private action solely because it apparently was not prosecuted for providing documents to the United States. …

By equating the status of government and private-party document requests, the lower courts' reasoning may undermine the United States' ability to obtain documents located in foreign jurisdictions through cooperation by the entity in question or the foreign jurisdiction. If a foreign financial institution's previous cooperation with governmental authorities may be used against it when it resists production in private litigation, those institutions may restrict their cooperation with governmental authorities in the first place. And the United States' foreign-government partners may similarly be deterred from facilitating cooperation with government requests if their financial institutions may later have that cooperation weighed against them in private litigation.

2. The district court also gave insufficient weight to the interests of foreign governments in enforcing their own laws within their own territories. Although it is "well settled" that foreign laws "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate" those laws, *Aérospatiale*, 482 U.S. at 544 n.29, the extent to which "compliance with the request would undermine important interests of the state where the information is located" is an important component of the comity analysis. Restatement § 442(1)(c).

Here, criminal statutes governing bank secrecy in a number of foreign jurisdictions prohibit disclosing the records sought by respondents. … The lower courts identified no reason to conclude that those statutes were enacted to shield wrongdoers from foreign legal process, like the blocking statute at issue in *Aérospatiale*, or that they are anything other than laws of general applicability that reflect legitimate sovereign interests in protecting foreign citizens' privacy and confidence in the nations' financial institutions. …

Although the district court acknowledged that "maintaining bank secrecy is an important interest of the foreign jurisdictions where the discovery sought here resides," Br. in Opp. App. 21a-22a, the court gave that interest scant weight because it believed that "[b]oth Jordan and Lebanon[] have recognized the supremacy of [the] interest[]" in combating terrorism "over bank secrecy," *id*. at 22a. In so concluding, the court relied on those governments' adoption of a memorandum of understanding in which the signatory governments pledged not to rely on bank secrecy "as a basis for refusing requests for mutual legal assistance" in terrorist financing investigations. *Id*. at 22a n.5; Memorandum of Understanding Between the Governments of the Member States of the Middle East and North Africa Financial Action Task Force Against Money Laundering and Terrorist Financing, Nov. 30, 2004, *http://www.sic.gov.lb/downloads/MENAFATF_MOU_EN.pdf*. But that memorandum of understanding pertains only to official state-to-state requests for mutual legal assistance. It does not suggest that member states have agreed to subordinate their interest in protecting certain banking information from public disclosure when private litigants seek documents.…

3. Finally, in considering whether the United States' interests would be furthered by sanctioning petitioner for non-production, the lower courts did not consider the broad range of interests implicated by this case, including those that could favor a lesser sanction. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014). The lower courts viewed the government's interest in combatting terrorism by means of the ATA's private right of action as the sole United States interest at stake. … While private actions under the ATA can be one important means of

disrupting terrorism financing and compensating victims of terrorism, … other important interests are at stake as well.

a. The sanctions order could undermine the United States' vital interest in maintaining close cooperative relationships with Jordan and other key regional partners in the fight against terrorism. A primary means by which the United States government protects American citizens from international terrorism is by ensuring that foreign governments and entities continue to cooperate in United States-led counterterrorism efforts. See, *e.g.*, U.S. Dep't of State, *Bureau of Counterterrorism*, *http://www.state.gov/j/ct/index.htm* (last visited May 15, 2014). Jordan in particular is an invaluable partner in the region. The United States relies on Jordan in accomplishing a host of critical security and foreign-policy interests, including combatting terrorism. See White House Office of the Press Secretary, *Remarks by President Obama and His Majesty King Abdullah II of Jordan in a Joint Press Conference* (Mar. 22, 2013).

The sanctions order may have an impact on these important counterterrorism relationships. Jordan views the sanctions order as a "direct affront" to its sovereignty. Jordan Amicus Br. 14. The State Department has informed this Office that the governments of Saudi Arabia and the Palestinian Authority have also expressed significant concerns about the order and its effect on their relationships with the United States.

The sanctions order's potential to harm counterterrorism efforts is exacerbated by the lower courts' reasoning. … As discussed above, the possibility that foreign financial entities could be penalized based on their cooperation with United States government agencies may deter foreign private entities and governments from assisting in United States investigations or enforcement actions.

b. The United States has a significant interest in the stability of Jordan's financial and political system. Petitioner is the single largest financial entity in Jordan. … This Office is informed by the Departments of State and the Treasury that petitioner is responsible for processing financial assistance to Jordan through various United States foreign aid programs. Those Departments also report that petitioner is a constructive partner with the United States in working to prevent terrorist financing, including by reporting suspicious financial activities to the government of Jordan, which in turn exchanges information with the United States through international sharing arrangements. For example, petitioner is a leading participant in a number of regional forums on anti-money laundering and combatting the financing of terrorism.

Petitioner is also by market share the largest bank in the West Bank and Gaza, and it plays an important role in financing public debt there. See U.S. & Foreign Commercial Serv. & U.S. Dep't of State, *Doing Business in the West Bank & Gaza* 54-55 (updated June 12, 2013), http://export.gov/westbank/build/groups/public/@eg_we/documents/webcontent/eg_we_064047.pdf. In addition, petitioner processes the customs clearance revenues from Israel that represent the overwhelming majority of Palestinian Authority revenue. See U.N. Conference on Trade & Dev., *Report on UNCTAD assistance to the Palestinian people: developments in the economy of the Occupied Palestinian Territory* 8 (2013), *http://unctad.org/meetings/en/SessionalDocuments/tdb60d3_en.pdf.*

The district court's sanctions order, by (among other things) permitting the jury to draw an adverse inference with respect to petitioner's mental state, increases the likelihood that petitioner will be found liable at trial. … Beyond the obvious financial stakes for petitioner's shareholders, petitioner asserts… that correspondent banks and other counterparties could cease doing business with petitioner, and depositors might withdraw their accounts out of concern for petitioner's solvency. …

To be sure, petitioner would face the risk of losing at trial even in the absence of the sanctions imposed by the district court. But the sanctions order makes a finding of liability more likely by permitting the jury to draw inferences adverse to petitioner and by barring petitioner from presenting certain evidence. The possible effect of a judgment of liability on United States foreign-relations interests and the stability of the region was therefore a relevant consideration in determining the appropriate form and severity of the sanctions. See Restatement § 442 cmt. c.

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b. Gucci et al. v. Bank of China/Tiffany et al. v. China Merchants Bank et al.

On May 21, 2014, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the Second Circuit in consolidated cases brought by several manufacturers of luxury goods to enforce asset freeze injunctions against counterfeiters with bank accounts in China and to obtain discovery from a Chinese bank. *Gucci et al. v. Weixing Li*, and *Tiffany et al. v. China Merchants Bank et al*., Nos. 12-2317, 12-2330, 12-2349. The district courts in the cases denied motions of the Bank of China ("BOC") and other Chinese banks to modify the injunctions. The U.S. brief argues that the district courts erred in failing to perform a comity analysis with respect to the asset freeze. 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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The district courts erred in reviewing the Banks' motions to modify plaintiffs' asset freeze injunctions because the courts failed to properly apply legal principles of comity. BOC identified an apparent conflict between the injunctions and China's banking laws, and in determining whether to modify the injunctions, the district courts should have evaluated the reasonableness of subjecting Chinese banks to extraterritorial obligations that could require them to violate Chinese laws. These cases should be remanded so that the district courts can properly consider the important foreign and U.S. sovereign interests at issue.

Regarding the document subpoena in Gucci, the district court, having conducted a comity analysis, did not abuse its discretion in compelling BOC to comply, but should have given closer attention to certain considerations when weighing sovereign interests. Specifically, the district court should have viewed China's banking secrecy laws as having a broader purpose than merely impeding discovery, and should have considered the United States' interests in the ability of Lanham Act plaintiffs to obtain relevant information about the finances of persons alleged to have engaged in large-scale infringement of their trademarks. Nevertheless, the court recognized the need to evaluate competing sovereign interests, and appropriately applied Supreme Court precedent in concluding that Gucci was not required to seek evidence through the Hague Convention in the first instance.

POINT I

The District Courts' Denial of the Banks' Motions to Modify the Asset Freeze Injunctions Should Be Vacated and Remanded for a Full Comity Analysis

A. The District Courts Had the Power to Issue Prejudgment Asset Freeze Injunctions Against the Alleged Counterfeiters

The district courts did not err in relying on their inherent equitable authority to enter the asset freeze injunctions at issue. …

A district court may issue a preliminary injunction restraining a defendant from dissipating assets pursuant to the court's inherent equitable powers when the plaintiff is pursuing a claim for final equitable relief, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999), and the injunction is ancillary to that final relief, *De Beers Consol. Mines v. United States*, 325 U.S. 212, 219–20 (1945).

Plaintiffs in trademark infringement actions may recover defendants' profits, 15 U.S.C. § 1117(a), and it is settled that such an "accounting" of profits is an equitable remedy. …

* * * *

B. The District Courts Erred in Their Analyses of the Banks' Motions to Modify the Asset Freeze Injunctions as to the Banks

While district courts have the equitable power to enjoin Lanham Act defendants from disposing of assets during the pendency of the litigation, regardless of whether the assets in question are located in the United States or abroad, whether a court should exercise that authority in a particular case is a separate question that implicates additional considerations. After the Banks objected to the application of the asset freeze injunctions to them and asserted that there was a conflict between the obligations imposed by the injunctions and the requirements of Chinese banking law, the district courts were required to conduct a full comity analysis. Because the district courts did not sufficiently analyze the competing sovereign interests at stake, their orders should be vacated to allow those courts to perform a thorough comity inquiry.

In challenging the injunctions, the Banks identified foreign sovereign interests and asserted that foreign law conflicted with the district courts' orders. Namely, the Banks introduced declarations from Chinese law experts to demonstrate that Chinese banking laws prohibited them from freezing bank accounts pursuant to a foreign court order and that doing so could subject them to civil and criminal liability.… The 17 Banks also submitted the November 3 Letter from Chinese banking regulators stating that "China's commercial banks …may not … freeze or deduct funds from such accounts pursuant to a U.S. court's order." … The November 3 Letter set forth China's interests in enforcing banking secrecy laws to "help engender client confidence in the banking system and therefore promote the further development of the banking system." …

Legal principles of comity required the district courts to fully consider these issues. The doctrine of international comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n.27 (1987). Comity "is neither a matter of absolute obligation . . . nor of mere courtesy and good will," but is rather "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to

international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163– 64 (1895).

Here, the comity doctrine should have shaped the district courts' review of the Banks' motions to modify the asset freeze injunctions. Although case law regarding the extraterritorial enforcement of asset freeze injunctions as to international third parties is sparse, this Court has suggested that when the extraterritorial operation of a United States court order would infringe on sovereign interests of a foreign state, it is appropriate to conduct an analysis using the framework of Section 403 of the Restatement (Third) of Foreign Relations Law, entitled "Limitations on Jurisdiction to Prescribe." See *United States v. Davis*, 767 F.2d 1025, 1036–37 (2d Cir. 1985) (using Section 403 factors to hold that district court properly ordered litigant to terminate litigation in the Cayman Islands); see also, *e.g.*, *In re Grand Jury Proceedings*, 40 F.3d 959, 965–66 (9th Cir. 1994) (conducting Section 403 analysis to affirm court order that would potentially violate Austrian law by requiring Austrian citizen to execute a directive authorizing disclosure of bank information from foreign banks).

Section 403 instructs that when a state has jurisdiction, it should not exercise it "to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." RESTATEMENT § 403(1). It goes on to identify eight non-exclusive relevant factors to be evaluated in determining reasonableness, and notes that where a conflict exists between the reasonable exercise of jurisdiction of two states, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction." *Id*. § 403(2)–(3). In the context of this suit—where the Banks presented argument and evidence to the district courts that they should be relieved from the asset freeze injunctions because complying with the orders would cause them to violate China's banking laws and subject them to potential civil and criminal liability in China—the district courts should have conducted a comity analysis that takes account of the sorts of considerations identified in Section 403.

As described more fully in Point II below, before ordering discovery, the *Gucci* and *Tiffany* courts conducted relatively comprehensive analyses to weigh relevant interests, including foreign sovereign interests, under Restatement § 442, which offers a test to determine when a court may order production of foreign documents by a person subject to the court's jurisdiction. In contrast, in deciding whether to modify the asset freeze order, the *Gucci* court engaged in no express comity analysis and the *Tiffany* court merely relied on its discovery analysis. … The *Gucci* court's failure to address comity was error, as was the *Tiffany* court's inadequate approach.

Some overlap exists with respect to the factors laid out in Sections 403 and 442 of the Restatement, but the considerations relating to general extraterritorial enforcement of law differ from those that apply specifically to discovery. Compare RESTATEMENT § 403 with RESTATEMENT § 442. Of note, Section 403 identifies the following reasonableness factors that arguably are not reflected in Section 442:

> (a) the link of the activity to the territory of the regulating state; . . .
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; . . .
> (d) the existence of justified expectations that might be protected or hurt by the regulation; . . .

> (e) the importance of the regulation to the international political, legal, or economic system; . . .
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.

RESTATEMENT § 403(2). These factors capture interests that may otherwise be excluded when conducting a discovery analysis, and indeed reflect the types of considerations that are inherent in determinations that the United States undertakes, through its agencies, before pursuing foreign asset restraints in public enforcement actions.

In conducting their analyses of the asset restraints on remand, the district courts should consider a number of factors. These include the professed Chinese Government interests in its banking laws, as stated in the Regulators' Letter and otherwise, with appropriate weight given to the foreign sovereign's views regarding the purpose, importance, and requirements of its laws and regulations. The courts should weigh the United States' strong interest in enforcing the Lanham Act and providing robust remedies for private litigants. The Banks' justified expectations concerning regulation should be addressed, bearing in mind that they are not defendants in the litigation. As banks headquartered in China, they are subject to general regulation and enforcement by China; they have also chosen, however, to do business in the United States and have thereby subjected themselves to American regulatory and judicial authority. The courts should consider the location of the assets to be frozen and, consistent with *Grupo Mexicano*, also consider whether assets restrained abroad will ultimately be subject to attachment by plaintiffs. The courts should also bear in mind that this is a dispute between private litigants, rather than an action (such as a government enforcement action) "in furtherance of the public interest," where courts' equity powers would typically be broader. *First Nat'l City Bank*, 379 U.S. at 383 (quotation marks omitted).

In sum, these cases should be remanded for the district courts to conduct balancing analyses under Restatement Section 403.

POINT II
The Gucci Court Did Not Abuse Its Discretion in Ordering Compliance with Gucci's Subpoena

In contrast, there was no reversible error in the Gucci court's order compelling BOC to comply with Gucci's document subpoena and declining to require Gucci to seek evidence via the Hague Convention. The Gucci court conducted a multi-factored comity analysis, and while the parties disagree on the outcome of that analysis, they are in agreement (as is the United States) that the court considered the appropriate factors. The United States does wish to point out certain considerations the district court should have analyzed more closely in its comity analysis, but does not believe that the court's analysis amounted to an abuse of discretion. The government also wishes to clarify any ambiguity regarding revisions to a website maintained by the Department of State, and respond to certain representations in the Regulators' Letter.

The district court did not err in declining to require Gucci to seek evidence from BOC through the Hague Convention in the first instance. The Hague Convention "prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state." *Aérospatiale*, 482 U.S. at 524. However, the Hague Convention is not the exclusive means for obtaining evidence located abroad, and U.S. courts need not require litigants to resort to the Convention's procedures in the first instance. *Id*. at 539, 542. District courts may decide whether to apply Hague Convention procedures case by case, looking to "the particular facts, sovereign interests, and likelihood that resort to these procedures will prove

effective." *Id*. at 544. The Supreme Court has advised United States courts to "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state," but has declined to "articulate specific rules to guide this delicate task of adjudication." *Id*. at 546.

In deciding whether to compel extraterritorial discovery, district courts within this Circuit employ a seven-factor test that incorporates the five factors identified in Section 442 of the Restatement (Third) of Foreign Relations Law, entitled "Requests for Disclosure: Law of the United States." See, *e.g.*, *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522–23 (S.D.N.Y. 1987) (deriving factors from Restatement (Second) of Foreign Relations Law § 40 (superseded by Section 442), *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972), and *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208–13 (1958)); *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 552 (S.D.N.Y. 2012).

Before granting Gucci's motion to compel BOC to comply with the document subpoena, the Gucci court analyzed all seven factors: (1) the importance to the litigation of the documents requested; (2) the specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; (5) the extent to which noncompliance would undermine important interests of the United States, or compliance would undermine important interests of the state where the information is located; (6) the hardship of compliance; and (7) whether a party has proceeded in bad faith. … In performing its analysis, the district court evaluated the record before it, and on the whole, its decision to accord more weight to certain factors than others did not amount to an abuse of discretion.

While the United States has not identified an abuse of discretion necessitating reversal or remand, it believes that the district court did not give adequate weight to certain considerations relevant to the fifth factor—the balancing of sovereign interests— which the court concluded weighed in Gucci's favor. … Specifically, the court appears to have discounted the importance of China's banking secrecy laws by incorrectly characterizing them as "blocking statutes." … Blocking statutes, like the French law at issue in *Aérospatiale*, exist solely to prohibit the disclosure of evidence in foreign judicial proceedings outside a treaty or international agreement. *Aérospatiale*, 482 U.S. at 526 n.6. China's banking secrecy laws have a broader purpose: according to the expert declarations submitted by BOC and the November 3 Letter, those laws were enacted to engender confidence in and promote the development of China's banking system, and China has an interest in enforcing them to achieve those goals. The November 3 Letter also undercuts the Gucci court's conclusion that "China's bank secrecy laws merely confer an individual privilege on customers rather than reflect a national policy entitled to substantial deference." …Particularly with respect to the November 3 Letter, the Gucci court should have been more mindful that a "foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference," *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), and should not have summarily dismissed representations describing the national importance of China's banking secrecy laws.

Additionally, in balancing national interests under the fifth factor, the Gucci court relied mainly on the United States' general interests in enforcing acts of Congress. … But it also should have weighed additional relevant considerations. Enforcing the Lanham Act is of special importance because the United States has a strong continuing interest in keeping counterfeit

goods out of the domestic marketplace: counterfeiting is not simply a violation of a private citizen's property rights, but also entails a significant risk to public health and safety involving products as diverse as medications, food products, aircraft parts, and key components of national defense systems. Apart from its interests in the specific statute at issue, the United States has a strong interest in maintaining a litigation system that provides for timely and fair opportunities for parties to obtain evidence that lies outside their control, and in securing the good-faith participation of entities that choose to do business in the United States. These interests should also have been part of the district court's analysis.

Regarding the sixth factor—hardship of compliance—the *Gucci* court based its conclusion that any hardship to BOC was unduly speculative on a review of expert declarations describing the potential consequences of violating China's banking secrecy laws, cases in which banks were found liable under those laws, and (on BOC's motion for reconsideration) the November 3 Letter's statement that the regulators issued a "severe warning" to BOC and were considering further sanctions. … Only after BOC filed and briefed its appeal did a December 4, 2013, decision from a Chinese court show that certain of the infringers in the *Gucci* case sued BOC for freezing their accounts. … The Chinese court ordered BOC to resume services to those infringers and ordered BOC to pay a court fee of 70 renminbi (approximately eleven U.S. dollars). …If this information had been properly before the district court, it should have been considered along with the other facts in the record in evaluating the actual extent of any hardship to BOC in complying with an order that could conflict with China's banking secrecy laws.

Finally, with respect to the fourth factor in its comity analysis—the availability of alternative means of securing information—the *Gucci* court concluded that the Hague Convention was "not a viable alternative method of securing the information Plaintiffs seek." … The United States does not make or report compliance determinations with respect to the operation of the Hague Convention in other states. However, the *Gucci* court was properly "reluctant to discount Plaintiffs' evidence and the case law cited . . . solely because of an unexplained revision to the State Department's website." … BOC presented evidence to the district court that in 2011, the State Department removed language from its website stating that Hague Convention requests in the People's Republic of China "have not been particularly successful in the past." … We have been informed by the State Department that it did not intend to express any opinion by eliminating characterizations of other countries' practices on its website, and that the revision does not reflect any conclusion concerning China's performance under the Hague Convention. The Gucci court appropriately declined to read meaning into this website revision, and future courts should as well.

The Regulators' Letter does not contain any information compelling reversal of the Gucci court's discovery order. As indicated above, official statements by foreign governments regarding the effect of extraterritorial applications of United States law on their sovereign interests are to be respectfully received and evaluated, and official representations about the requirements of foreign laws and the scope of sovereign interests associated with such laws should be given due consideration by courts in the framing and enforcement of judicial orders with extraterritorial effect.

In this case, however, the Regulators' entreaty to United States courts to require use of the Hague Convention as the exclusive means of foreign evidence-gathering is contrary to the Supreme Court's decision in *Aérospatiale*. 482 U.S. at 539, 542. …

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As the U.S. brief recommended, the Court of Appeals remanded the *Gucci* and *Tiffany* cases so that a full comity analysis could be conducted by the district courts. On September 17, 2014, the Court of Appeals for the Second Circuit vacated the district court's orders in the *Gucci* case and remanded in order for the district court to "consider its jurisdiction over the Bank and, if jurisdiction exists, apply principles of comity to determine whether compliance with its orders should be compelled." *Gucci America Inc., et al. v. Weixing Li*, 768 F.3d 122 (2d. Cir. 2014). The Court issued a summary order in the *Tiffany* case simultaneously with its opinion in *Gucci*. The Court also held that the district court failed to consider whether it could properly exercise jurisdiction over the Bank to compel compliance with its orders.[**] Excerpts follow (with footnotes omitted) from the opinion of the Court of Appeals regarding the comity analysis.

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BOC next argues that the district court's August 23 Order (compelling the Bank to comply with the Asset Freeze Injunction and denying the Bank's motion to modify it) must also be vacated because the district court failed properly to consider legal principles of comity. Although we need not reach this issue, we do so in order to give guidance to the district court in the event that the district court concludes that the exercise of personal jurisdiction over BOC is appropriate. If it so concludes, the district court should undertake a comity analysis before ordering the Bank to comply with the Asset Freeze Injunction.

Before the district court, the Bank, which is domiciled and principally based in China, identified an apparent conflict between the obligations set forth in the Asset Freeze Injunction and applicable Chinese banking laws. Specifically, the Bank introduced a declaration from a Chinese law expert, Professor Zhipan Wu, asserting that Chinese banking laws prohibit BOC from freezing bank accounts pursuant to a foreign court order, and that doing so could render it civilly and criminally liable. The Bank also submitted the November 3 Regulators' Letter with its motion for reconsideration, which states that "China's commercial banks . . . may not . . . freeze or deduct funds from such accounts pursuant to a U.S. court's order." …According to the Bank's expert and the November 3 Regulators' Letter, China's sovereign interest in such laws is to "engender client confidence in the banking system and therefore promote the further development of the banking system." …

In such circumstances, where the Bank objected to application of the Asset Freeze Injunction to it, specifically citing an apparent conflict with the requirements of Chinese banking law, comity principles required the district court to consider the Bank's legal obligations pursuant to foreign law before compelling it to comply with the Asset Freeze Injunction. Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its

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[**] Editor's note: The Court of Appeals for the Second Circuit applied the Supreme Court's decision in *Daimler*, discussed *supra*, to conclude that the district court in *Gucci* erred in exercising general jurisdiction over the Bank.

laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). The doctrine of international comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 10 (1987).

We have previously suggested that when a court order will infringe on sovereign interests of a foreign state, district courts may appropriately conduct an analysis using the framework provided by § 403 of the Restatement (Third) of Foreign Relations Law, entitled "Limitations on Jurisdiction to Prescribe." See *United States v. Davis*, 767 F.2d 1025, 1036-39 (2d Cir. 1985) (using § 403 factors to hold that district court properly ordered a litigant to terminate litigation in the Cayman Islands); see also *Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 n.6 (2014). (noting that "other sources of law" — including "comity interests" — might limit district courts' discretion when issuing orders extraterritorially). As the district court recognized with regard to § 442 and the 2010 Subpoena, courts in this circuit, before "order[ing] a party to produce documents in contravention of the laws of a foreign country," already conduct a comity analysis pursuant to Restatement(Third) 5 of Foreign Relations Law § 442(1)(c), entitled "Requests for Disclosure: Law of the United States." … See also *Gucci Am., Inc. v. Curveal Fashion*, No. 09-cv-8458, 7 2010 WL 808639, at *2 (S.D.N.Y. Mar. 8, 2010); *Strauss v. Credit Lyonnais*, S.A., 249 8 F.R.D. 429, 438 (E.D.N.Y. 2008). A comity analysis drawing upon § 403 is similarly appropriate before ordering a nonparty foreign bank to freeze assets abroad in apparent contravention of foreign law to which it is subject.

Acknowledging that the district court did not conduct such an analysis, plaintiffs make three arguments opposing vacatur and remand on this basis, but none are persuasive. First, they argue that remand would serve no purpose because the district court, in analyzing whether to order BOC to produce documents in response to the 2010 Subpoena, considered the comity factors listed in § 442, which overlap with the factors in § 403. Ordering compliance with an asset freeze, however, implicates different concerns from those implicated by an order for the production of documents. And while the factors in §§ 403 and 442 of the Restatement partially overlap, subsections 403(2)(a), (c), (d), (e), (g), and (h), in particular, are not fully reflected in § 442.

Second, plaintiffs posit that by not requesting that the district court apply § 403 below, the Bank has waived the issue. It is correct that the Bank did not make this argument below. However, given the important role that comity plays in ensuring the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience," see *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 9 1046 (2d Cir. 1996) (quoting *Hilton*, 1259 U.S. at 164), we do not deem the issue forfeited.

Finally, plaintiffs review a variety of the comity factors and urge that remand is not necessary because even upon a full analysis employing § 403's factors, the August 23 Order properly issued. We express no view on this question, but conclude simply that the district court on remand should conduct a comity analysis in the first instance if it determines that it has specific jurisdiction over the bank. In doing so, it should give due regard to the various interests at stake, including: (1) the Chinese Government's sovereign interests in its banking laws; (2) the Bank's expectations, as a nonparty, regarding the regulation to which it is subject in its home state and also in the United States, by reason of its choice to conduct business here; and (3) the United States' interest in enforcing the Lanham Act and providing robust remedies for its violation.

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Cross References

Hague Abduction Convention, **Chapter 2.B.2.**
Exceptions to immunity from jurisdiction: commercial activity, **Chapter 10.A.2.**
Antitrust, **Chapter 11.G.1.**
International Financial System, **Chapter 11.G.**

CHAPTER 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2014 relating to sanctions, export controls, and certain other restrictions relating to travel or U.S. government assistance. It does not cover developments in many of the United States' longstanding financial sanctions regimes, which are discussed in detail at *www.treasury.gov/resource-center/sanctions/Pages/default.aspx*. It also does not cover comprehensively developments relating to the export control programs administered by the Commerce Department or the defense trade control programs administered by the State Department. Detailed information on the Commerce Department's activities relating to export controls is provided in the U.S. Department of Commerce, Bureau of Industry and Security's Annual Report to the Congress for Fiscal Year 2014, available at *http://www.bis.doc.gov/index.php/about-bis/newsroom/publications*. Details on the State Department's defense trade control programs are available at *www.pmddtc.state.gov*.

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS

1. Iran

a. Implementation of the Joint Plan of Action ("JPOA")

In 2014, negotiations with Iran continued pursuant to the Joint Plan of Action ("JPOA"). See *Digest 2013* at 468-71. For further discussion of the U.S. approach to Iran's nuclear program in 2014, see Chapter 19.B.5(b).

As discussed in Chapter 19, once it could be confirmed that Iran was taking steps to halt its nuclear program, the United States committed to implement specific, temporary, and limited sanctions relief. On January 13, 2014, the parties reached an understanding on the specific steps that would be taken, which were summarized by a

U.S. government official in a background briefing, available at *www.state.gov/r/pa/prs/ps/2014/01/219571.htm*, as follows:

> Once the IAEA has confirmed Iran is implementing its commitments, in return the P5+1 has committed to do the following on the first day of implementation: suspend the implementation of sanctions on Iran's petrochemical exports and Iran's imports of goods and services for its automotive manufacturing sector; suspend sanctions on Iran's import and export of gold and other precious metals with significant limitations that prevent Iran from using its restricted assets overseas to pay for these purchases; begin to process expeditiously license applications for the supply of spare parts and services, including inspection services for the safety of flight of Iran's civil aviation sector; pause efforts to reduce Iran's exports of crude oil to the six countries still purchasing from Iran; facilitate the establishment of a financial channel intended to support humanitarian trade to Iran, including the supply of medical services; and to facilitate payments for UN obligations and tuition payments for Iranian students studying abroad; and modify the thresholds for EU internal procedures for the authorization of permitted financial transactions.
>
> The P5+1 has also committed to take certain actions to facilitate Iran's access to $4.2 billion in restricted Iranian funds on a set schedule at regular intervals throughout the six-month period of the Joint Plan of Action. Access to a portion of these funds will be linked to Iran's progress in completing the dilution process for 20 percent enriched uranium. Iran will not have access to the final installment of the 4.2 billion until the last day of the six-month period.

On January 20, 2014, the International Atomic Energy Agency ("IAEA") confirmed that Iran was implementing its specific commitments under the JPOA, including ceasing to enrich uranium above 5 percent, disabling cascades used to enrich up to 20 percent, and beginning to dilute and convert its 20 percent stockpile. Accordingly, the United States took immediate steps to roll back sanctions. The steps taken on January 20, 2014 were explained in a briefing by U.S. government officials, available at *www.state.gov/r/pa/prs/ps/2014/01/220058.htm*, and excerpted below.

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* * * *

As of today, the Administration has suspended for six months secondary sanctions on foreign persons engaged in transactions related to Iran's petrochemical exports, certain trade in gold and precious metals with Iran, and the provision of goods and services to Iran's automotive sector. For the six months, we will also hold steady efforts to reduce Iran's exports of crude oil to the six jurisdictions that still purchase oil from Iran. I would note that Iran is currently exporting around 60 percent less than it was just two years ago, and it will be held to those reduced levels.

The Administration will also license transactions for spare parts, inspections, and associated services necessary for the safety of flight of Iranian passenger aircraft. In order to qualify for a lease under any of these categories, the transactions must be initiated and completed during the JPOA period—in other words, commencing no earlier than today and concluding no later than July 20th.

In addition, we will be taking action to allow Iran to access, in installments, $4.2 billion of its restricted funds on a set schedule across the six months. Access to a portion of these funds will be linked to Iran's progress in completing its dilution of 20 percent enriched uranium. Iran will not have access to the last installment until the final day of the six-month period. We are also working with our partners in Iran to establish carefully constrained financial channels to enable Iran to make payments for humanitarian transactions, university tuition assistance for Iranian students abroad, and Iran's UN obligations.

All of these suspensions are contingent upon Iran's continuing adherence to the steps outlined in the JPOA and in the detailed associated technical understanding. If it is determined that Iran has failed to meet its commitments, the United States Government will revoke this limited release.

All told, if Iran adheres to its commitments at the end of six months, it will have been able to access $4.2 billion of its restricted reserves and perhaps brought in another $2 billion in trade. This is a drop in the bucket compared to the crippling pressure that Iran still faces. Over this six-month period, oil sanctions alone will cost Iran $30 billion. And at the end of the period, we expect that over $100 billion of Iran's foreign reserves will continue to be restrained. Indeed, at the close of the six-month period, we forecast that Iran will be in a net-negative position due to the substantial costs borne by ongoing sanctions.

Finally, just to emphasize a few top-line sanctions points, as noted, this temporary relief will not fix the Iranian economy. It will not come close. Iran needs … $60 to $70 billion a year to finance its foreign imports. …$6 to $7 billion will not fill that hole. Inflation in Iran remains near 40 percent, one of the highest inflation rates in the world, and its economy, which contracted 6 percent in the last Persian year, is expected to contract again this year.

Second, as the President has made clear, we will continue to vigorously enforce the vast array of sanctions that are not being suspended, so sanctions that reach Iran's energy, banking, and trade sectors, along with its access to the international financial system. And we will continue to target Iran's support for terrorism and human rights abuses.

Finally, we are actively reaching out to international counterparts to remind them of their obligations under the existing sanctions regime. Iran is not and will not be open for business until it reaches a comprehensive agreement with the international community that addresses all outstanding concerns. …

* * * *

The U.S Department of State outlined in a Federal Register notice the actions taken, effective January 20, 2014, to implement the sanctions relief aspects of the JPOA. 79 Fed. Reg. 4522 (Jan. 28, 2014). Excerpts follow from that notice (with footnotes omitted).

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On November 24, 2013, the P5+1 (China, France, Germany, Russia, the United States, and the United Kingdom, coordinated by EU High Representative Catherine Ashton) reached an initial understanding with Iran, outlined in a Joint Plan of Action (JPOA), that halts progress on Iran's nuclear program and rolls it back in key respects. The JPOA includes the first meaningful limits Iran has accepted on its nuclear program in close to a decade. In return for important steps to constrain Iran's nuclear program, the P5+1 committed to provide Iran with limited, temporary, and targeted sanctions relief for a period of six months, starting on January 20, 2014, and concluding on July 20, 2014 (the "JPOA period").

The sanctions relief specified in the JPOA focuses on a limited number of commercial activities and associated services for: Iran's exports of petrochemical products; Iran's purchase and sale of gold and precious metals; the provision of goods and services to Iran's automotive sector; and the licensing of safety-of-flight inspections and repairs for Iranian civil aviation. The sanctions relief also pauses efforts to further reduce Iran's crude oil exports, enabling the current importers of Iranian crude oil—China, Japan, South Korea, India, Turkey, and Taiwan—to maintain purchases at current average levels during the JPOA period. (The purchase of Iranian crude oil by entities in jurisdictions outside of China, Japan, South Korea, India, Turkey, and Taiwan remains sanctionable under U.S. law.) Iran will also gain access, in installments, to $4.2 billion of its restricted revenues now held in overseas accounts. Finally, Iran and the P5+1 have committed to establish a financial channel to facilitate Iran's import of certain humanitarian goods, the payment of medical expenses incurred by Iranians overseas, payments of Iran's UN obligations, and up to $400 million toward university tuition for Iranian students studying abroad.

To implement this limited sanctions relief, the U.S. government has executed temporary, partial waivers of certain statutory sanctions and has issued guidance regarding the suspension of sanctions under relevant Executive Orders and regulations. Because some of the waivers have a duration less than the six-month period of the JPOA, the USG plans to take such additional actions as may be necessary to extend this limited sanctions relief to July 20, 2014.

All U.S. sanctions not explicitly waived or suspended through these actions remain fully in force. Furthermore, U.S. persons and foreign entities owned or controlled by U.S. persons ("U.S.-owned or -controlled foreign entities") continue to be generally prohibited from conducting transactions with Iran, including any transactions of the types permitted pursuant to the JPOA, unless licensed to do so by OFAC. The U.S. government will continue to enforce U.S. sanctions laws and regulations against those who engage in sanctionable activities that are not covered by the suspensions and temporary waivers announced on January 20, 2014.

Acting under the authorities vested in me as Secretary of State, including through the applicable delegations of authority, I hereby make the following determinations and certifications:

Pursuant to Sections 1244(i), 1245 (g), 1246(e), and 1247(f) of the Iran Freedom and Counter-Proliferation Act of 2012 (subtitle D of title XII of Public Law 112-239, 22 U.S.C. 8801 et seq.) (IFCA), I determine that it is vital to the national security of the United States to waive the imposition of sanctions pursuant to:

1. Section 1244(c)(1) of IFCA to the extent required for:

a. Transactions by non-U.S. persons for the export from Iran of petrochemical products,and for associated services, excluding any transactions involving persons on the list of specially designated nationals and blocked persons of the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury (hereinafter the SDN List) except for the

following companies: Bandar Imam Petrochemical Company; Bou Ali Sina Petrochemical Company; Ghaed Bassir Petrochemical Products Company; Iran Petrochemical Commercial Company; Jam Petrochemical Company; Marjan Petrochemical Company; Mobin Petrochemical Company; National Petrochemical Company; Nouri Petrochemical Company; Pars Petrochemical Company; Sadaf Petrochemical Assaluyeh Company; Shahid Tondgooyan Petrochemical Company; Shazand Petrochemical Company; and Tabriz Petrochemical Company;

b. Transactions by U.S. or non-U.S. persons for the supply and installation of spare parts necessary for the safety of flight for Iranian civil aviation, for safety-related inspections and repairs in Iran, and for associated services, provided that OFAC has issued any required licenses, excluding any transactions involving persons on the SDN List except for Iran Air;

c. Transactions by non-U.S. persons to which sanctions would not apply if an exception under section 1244(g)(2) of IFCA were applied to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, and for insurance and transportation services associated with such transactions, provided that such transactions are consistent with the purchase amounts provided for in the Joint Plan of Action of November 24, 2013, excluding any transactions or associated services involving persons on the SDN List except for the National Iranian Oil Company and the National Iranian Tanker Company;

d. Transactions by non-U.S. persons for the sale, supply or transfer to or from Iran of precious metals, provided that such transactions are within the scope of the waiver of Sections 1245(a)(1)(A) and 1245(c) of IFCA (section 3 below), and for associated services, excluding any transactions involving persons on the SDN List except for any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599;

2. Section 1244(d) of IFCA to the extent required for the sale, supply or transfer of goods or services by non-U.S. persons in connection with transactions by non-U.S. persons to which sanctions would not apply if an exception under section 1244(g)(2) of IFCA were applied to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, and for insurance and transportation services associated with such transactions, provided that such transactions are consistent with the purchase amounts provided for in the Joint Plan of Action of November 24, 2013, excluding any transactions or associated services involving persons on the SDN List except for the National Iranian Oil Company and the National Iranian Tanker Company;

3. Sections 1245(a)(1)(A) and 1245(c) of IFCA to the extent required for transactions by non-U.S. persons for the sale, supply, or transfer to or from Iran of precious metals, provided that:

a. Such transactions do not involve persons on the SDN List, except for any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599 or any Iranian depository institution listed solely pursuant to E.O. 13599; and

b. This waiver shall not apply to transactions for the sale, supply, or transfer to Iran of precious metals involving funds credited to an account located outside Iran pursuant to Section 1245(d)(4)(D)(ii)(II) of the National Defense Authorization Act for Fiscal Year 2012;

4. Section 1246(a) of IFCA to the extent required for the provision of underwriting services or insurance or reinsurance:

a. By non-U.S. persons for the export from Iran of petrochemical products and for associated services, excluding any transactions involving persons on the SDN List except for the following companies: Bandar Imam Petrochemical Company; Bou Ali Sina Petrochemical Company; Ghaed Bassir Petrochemical Products; Iran Petrochemical Commercial Company;

Jam Petrochemical Company; Marjan Petrochemical Company; Mobin Petrochemical Company; National Petrochemical Company; Nouri Petrochemical Company; Pars Petrochemical Company; Sadaf Petrochemical Assaluyeh Company; Shahid Tondgooyan Petrochemical Company; Shazand Petrochemical Company; and Tabriz Petrochemical Company;

b. By U.S. persons or non-U.S. persons for the supply and installation of spare parts necessary for the safety of flight for Iranian civil aviation, for safety-related inspections and repairs in Iran, and for associated services, provided that OFAC has issued any required licenses, excluding any transactions involving persons on the SDN List except for Iran Air;

c. By non-U.S. persons for transactions to which sanctions would not apply if an exception under section 1244(g)(2) of IFCA were applied to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, and for insurance and transportation services associated with such transactions, provided that such transactions are consistent with the purchase amounts provided for in the Joint Plan of Action of November 24, 2013, excluding any transactions or associated services involving persons on the SDN List except for the National Iranian Oil Company and the National Iranian Tanker Company; and

d. By non-U.S. persons for the sale, supply or transfer to or from Iran of precious metals, provided that such transactions are within the scope of the waiver of Sections 1245(a)(1)(A) and 1245(c) of IFCA, and for associated services, excluding any transactions involving persons on the SDN List except for any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599;

e. By non-U.S. persons for the sale, supply or transfer to Iran of goods and services used in connection with the automotive sector of Iran and for associated services, excluding any transactions involving persons on the SDN List.

5. Section 1247(a) of IFCA to the extent required for transactions by foreign financial institutions on behalf of:

a. Bandar Imam Petrochemical Company; Bou Ali Sina Petrochemical Company; Ghaed Bassir Petrochemical Products; Iran Petrochemical Commercial Company; Jam Petrochemical Company; Marjan Petrochemical Company; Mobin Petrochemical Company; National Petrochemical Company; Nouri Petrochemical Company; Pars Petrochemical Company; Shahid Tondgooyan Petrochemical Company; Sadaf Petrochemical Assaluyeh Company; Shahid Tondgooyan Petrochemical Company; Shazand Petrochemical Company; and Tabriz Petrochemical Company for the export from Iran of petrochemicals;

b. Iran Air for the supply and installation of spare parts necessary for the safety of flight by Iran Air and for safety-related inspections and repairs for Iran Air, provided that OFAC has issued any required licenses;

c. The National Iranian Oil Company and the National Iranian Tanker Company for transactions by non-U.S. persons to which sanctions would not apply if an exception under section 1244(g)(2) of IFCA were applied to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, provided that such transactions are consistent with the purchase amounts provided for in the Joint Plan of Action of November 24, 2013, excluding any transactions or associated services involving any other persons on the SDN List; and

d. Any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599 for the sale, supply or transfer to or from Iran of precious metals, provided that such transactions are within the scope of the waiver of Sections 1245(a)(1)(A) and 1245(c) of IFCA.

Pursuant to section 1245(d)(5) of the National Defense Authorization Act for Fiscal Year 2012, I determine that it is in the national security interest of the United States to waive the imposition of sanctions under Section 1245(d)(1) with respect to:

(1) Foreign financial institutions under the primary jurisdiction of China, India, Japan, the Republic of Korea, the authorities on Taiwan, and Turkey, subject to the following conditions:

a. This waiver shall apply to a financial transaction only for trade in goods and services between Iran and the country with primary jurisdiction over the foreign financial institution involved in the financial transaction (but shall not apply to any transaction for the sale, supply, or transfer to Iran of precious metals involving funds credited to an account described in paragraph (b));

b. Any funds owed to Iran as a result of such trade shall be credited to an account located in the country with primary jurisdiction over the foreign financial institution involved in the financial transaction; and

c. With the exception that certain foreign financial institutions notified directly in writing by the U.S. Government may engage in financial transactions with the Central Bank of Iran in connection with the repatriation of revenues and the establishment of a financial channel, to the extent specifically provided for in the Joint Plan of Action of November 24, 2013; and

(2) Foreign financial institutions under the primary jurisdiction of Switzerland that are notified directly in writing by the U.S. Government, to the extent necessary for such foreign financial institutions to engage in financial transactions with the Central Bank of Iran in connection with the repatriation of revenues and the establishment of a financial channel as specifically provided for in the Joint Plan of Action of November 24, 2013.

Pursuant to Section 302(e) of the Iran Threat Reduction and Syria Human Rights Act of 2012 (Public Law 112-158) (TRA), I determine that it would cause damage to the national security of the United States to identify or designate a foreign person under section 302(a) of TRA in connection with transactions by non-U.S. persons with the National Iranian Oil Company to which sanctions would not apply if an exception under section 1244(g)(2) of IFCA were applied to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, and for insurance and transportation services associated with such transactions, provided that such transactions are consistent with the purchase amounts provided for in the Joint Plan of Action of November 24, 2013.

Pursuant to Section 4(c)(1)(A) of the Iran Sanctions Act of 1996 (Pub. L. 104-172, 50 U.S.C. 1701 note) (ISA), I certify that it is vital to the national security interests of the United States to waive the application of section 5(a)(7) of ISA to the National Iranian Oil Company and the National Iranian Tanker Company to the extent required for insurance and transportation services provided on or after the date of transmittal of this certification to the appropriate congressional committees and associated with transactions to which sanctions would not apply if an exception under section 1244(g)(2) of IFCA were applied to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, provided that such transactions are consistent with the purchase amounts provided for in the Joint Plan of Action of November 24, 2013.

These waivers shall take effect upon their transmittal to Congress, unless otherwise provided in the relevant provision of law.

(Signed John F. Kerry, Secretary of State)

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The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") also published guidance in the Federal Register that was issued jointly by the Departments of the Treasury and State on January 20, 2014 relating to the sanctions relief provided pursuant to the JPOA. 79 Fed. Reg. 5025 (Jan. 30, 2014). Excerpts follow from OFAC's published guidance.

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I. Sanctions Related to Iran's Export of Petrochemical Products

The JPOA provides for the temporary suspension of U.S. sanctions on "Iran's petrochemical exports, as well as sanctions on any associated services." To implement this provision of the JPOA, the USG will take the following steps to allow for the export of petrochemical products from Iran, as well as associated services, by non-U.S. persons not otherwise subject to section 560.215 of the Iranian Transactions and Sanctions Regulations, 31 CFR part 560 (ITSR), (hereinafter "non-U.S. persons not otherwise subject to the ITSR'"):

1. Correspondent or Payable-Through Account Sanctions: …
2. Blocking Sanctions: …
3. Menu-based Sanctions: …

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II. Sanctions Related to Iran's Auto Industry

The JPOA provides for the temporary suspension of U.S. sanctions on "Iran's auto industry, as well as sanctions on associated services." To implement this provision, the USG will take the following steps to allow for the sale, supply, or transfer to Iran of significant goods or services used in connection with the automotive sector of Iran, as well as the provision of associated services by non-U.S. persons not otherwise subject to the ITSR:

1. Correspondent or Payable-through Account Sanctions: …
2. Menu-based Sanctions: …

* * * *

III. Sanctions Related to Gold and Other Precious Metals

The JPOA provides for the temporary suspension of U.S. sanctions on "gold and precious metals, as well as sanctions on associated services." To implement this provision of the JPOA, the USG will take the following steps to allow for the sale of gold and other precious metals to or from Iran, as well as the provision of associated services, by non-U.S. persons not otherwise subject to the ITSR:

1. Correspondent or Payable-through Account Sanctions: …
2. Blocking Sanctions: …

* * * *

IV. Sanctions Related to Civil Aviation

The JPOA provides for the temporary licensing of "the supply and installation in Iran of spare parts for safety of flight for Iranian civil aviation and associated services. License safety related inspections and repairs in Iran as well as associated services." To implement this provision, the USG will take the following steps:

1. Statement of Licensing Policy: OFAC will issue a new Statement of Licensing Policy (SLP) that covers certain activities related to the safety of Iran's civil aviation industry. The SLP will establish, during the JPOA Period, a favorable licensing policy regime under which U.S. persons, U.S.-owned or -controlled foreign entities, and non-U.S. persons involved in the export of U.S.-origin goods can request specific authorization from OFAC to engage in transactions that are initiated and completed entirely within the JPOA Period to ensure the safe operation of Iranian commercial passenger aircraft, including transactions involving Iran Air.

2. Correspondent or Payable-through Account Sanctions: …

3. Blocking Sanctions: …

* * * *

V. Sanctions Related to Iran's Export of Crude Oil

The JPOA provides for certain sanctions relief related to Iran's crude oil sales. … To implement this provision of the JPOA, the USG will take the following steps to allow for China, India, Japan, the Republic of Korea, Taiwan, and Turkey to maintain their current average level of imports from Iran during the JPOA Period and to render non-sanctionable a limited number of transactions for the release in installments of an agreed amount of revenue to Iran for receipt at participating foreign financial institutions in selected jurisdictions:

1. Correspondent or Payable-through Account Sanctions: …

2. Blocking Sanctions: …

3. Menu-based Sanctions: …

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VI. Facilitation of Humanitarian and Certain Other Transactions

The JPOA provides for the establishment of "a financial channel to facilitate humanitarian trade for Iran's domestic needs using Iranian oil revenues held abroad. Humanitarian trade [is] defined as transactions involving food and agricultural products, medicine, medical devices, and medical expenses incurred abroad. This channel could also enable transactions required to pay Iran's UN obligations …and direct tuition payments to universities and colleges for Iranian students studying abroad." In furtherance of the JPOA, the P5 + 1 and Iran are establishing mechanisms to further facilitate the purchase of, and payment for, the export of food, agricultural commodities, medicine, and medical devices to Iran, as well as to facilitate Iran's payments of UN obligations, Iran's payments for medical expenses incurred abroad by Iranian citizens, and Iran's payments of an agreed amount of governmental tuition assistance for Iranian students studying abroad. Foreign financial institutions whose involvement in hosting these new mechanisms is sought by Iran will be contacted directly by the U.S. Department of the Treasury and provided specific guidance.

Please note that the new mechanism for humanitarian trade transactions is not the exclusive way to finance or facilitate the sale of food, agricultural commodities, medicine, and medical devices to Iran by non-U.S. persons not otherwise subject to the ITSR, which is not

generally sanctionable so long as the transaction does not involve persons designated in connection with Iran's support for international terrorism or Iran's proliferation of weapons of mass destruction (WMD) or WMD delivery systems. Therefore, transactions for the export of food, agricultural commodities, medicine, and medical devices to Iran generally may be processed pursuant to pre-existing exceptions and are not required to be processed through the new mechanism.

In addition, please see Section VII below, which describes the exercise of certain waiver authorities relevant to the activities and transactions described in this section.

VII. Waivers

To enable the implementation of the sanctions relief outlined in the JPOA and described in detail in sections I through VI of this guidance, the USG has issued limited waivers of sanctions under: section 1245(d)(1) of the National Defense Authorization Act for Fiscal Year 2012 (NDAA) in connection with exports of crude oil from Iran to China, India, Japan, the Republic of Korea, Taiwan, and Turkey and for transactions related to the release in installments of an agreed amount of revenues to Iran for receipt at participating foreign financial institutions in selected jurisdictions and the establishment of the financial channel provided for in the JPOA; section 302(a) of the TRA with respect to certain transactions involving NIOC; section 5(A)(7) of ISA with respect to certain transactions involving NIOC and NITC; and the following sub-sections of IFCA:

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On July 19, 2014, the JPOA was extended to allow negotiations of a final solution regarding Iran's nuclear program to continue. This necessitated extending temporary sanctions relief measures as well. The Department of State published a notice in the Federal Register outlining these sanctions relief measures. 79 Fed. Reg. 45,228 (Aug. 4, 2014). The sanctions relief includes the waivers exercised previously. See 79 Fed. Reg. 4522 (Jan. 28, 2014), excerpted *supra*.

The JPOA was renewed again by mutual consent of the P5+1 and Iran on November 24, 2014, extending the temporary sanctions relief provided under the JPOA to allow negotiations to continue into 2015, with expiration of the JPOA set at June 30, 2015. OFAC issued new guidance on the temporary sanctions relief on November 25, 2014. 79 Fed. Reg. 73,141 (Dec. 9, 2014).

b. Implementation of UN Security Council resolutions

The UN Security Council has adopted four resolutions under Article 41 of Chapter VII of the UN Charter imposing sanctions targeting Iran's nuclear and ballistic missile programs: Resolution 1929 (2010), Resolution 1803 (2008), Resolution 1747 (2007), and Resolution 1737 (2006). U.N. Docs. S/RES/1929, S/RES/1803, S/RES/1747, and S/RES/1737. See *Digest 2010* at 632-45, *Digest 2008* at 969–75, *Digest 2007* at 1031–36, and *Digest 2006* at 1280–84 for discussions of the Security Council's Iran resolutions. In Resolution 1929 (2010), the Council established, for an initial period of one year, a Panel of Experts to assist the Committee in carrying out its mandate. The Panel's mandate has been renewed yearly, most recently in Resolution 2159 (2014) on June 9, 2014.

In 2014, the United States continued to demonstrate strong support for full implementation of the Security Council resolutions on Iran through statements at the Security Council and actions taken to implement the resolutions. On March 20, 2014, U.S. Deputy Permanent Representative to the UN Rosemary DiCarlo addressed the Security Council at a briefing on Iran and Resolution 1737. Ambassador DiCarlo's remarks are excerpted below and also available in full at *http://usun.state.gov/briefing/statements/223868.htm*.

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Today I'd like to touch on three [subjects]. The first relates to the ongoing P5+1 talks. Second, to troubling signs of sanctions violations. And the third, to the important roles of the Committee and the Panel of Experts—which is set to begin work on its next report, the details of which will be essential.

On the nuclear talks with Iran, the Security Council has a clear stake in the outcome. The Council has imposed four rounds of sanctions in response to Iran's failure to adhere to its nuclear obligations.

Any deal with Iran must address squarely the Security Council's multiple resolutions on this matter, a key principle of the Joint Plan of Action.

It is critical that all Member States continue to fully implement sanctions on Iran. Full implementation of sanctions will support the diplomacy, as well as limit Iran's illicit smuggling of arms, funds and technology.

In this regard, we find the recent indications of serious violations of the UN sanctions troubling. Earlier this month, Israel announced that it had stopped a massive shipment of rockets, mortars and ammunition that Iran was smuggling to Gaza militants. We call on the Committee, with the support of the Panel, to investigate all aspects of this incident. The Committee should also be prepared to impose real consequences, such as possible sanctions designations, on those responsible.

At the same time, reports that Iran sought to transfer arms to Iraq in violation of Security Council resolution [1747] are alarming.

We note that the Iraqi authorities have committed publicly to respect fully all relevant Security Council resolutions—which is welcome. In this connection, we encourage the Committee and the Panel, in cooperation with the Iraqi authorities, to investigate these reports and confirm full compliance with resolution [1747].

This leads me to my last point, about the important role of the Committee and the Panel. As a rule, if and when violations like this occur, the Security Council's Iran Sanctions Committee has a responsibility to tighten enforcement. We look to the Committee to step up efforts to help states implement the sanctions—and to be poised to respond to all reports of sanctions non-compliance.

In addition, it is essential that the Panel continue its aggressive travel schedule and continue to raise awareness about sanctions. In this context, as the Panel begins work to draft its next annual report, we encourage the Panel to present as much information as possible regarding sanctions compliance.

We commend the Panel for its independent reporting and urge it to continue its cooperation with Member States and the Committee. The Committee needs to know the names of violators and their methods. We also encourage the Panel to ensure that its report has specific, implementable recommendations that can tangibly improve sanctions implementation. The Panel's recent recommendations, which were specific in nature, enabled the Committee to engage in productive discussions on how best to move forward.

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c. U.S. sanctions and other controls

In 2014, President Obama again continued the national emergency under IEEPA with respect to Iran (79 Fed. Reg. 68,091 (Nov. 13, 2014)), thereby maintaining the existing sanctions program. The United States also implemented additional sanctions intended to pressure Iran to comply with its international obligations. Additional sanctions specific to Iran are described below. Further information on Iran sanctions is available at *www.state.gov/e/eb/tfs/spi/iran/index.htm* and *www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx*.

(1) E.O. 13608

For background on E.O. 13608, "Prohibiting Certain Transactions With and Suspending Entry Into the United States of Foreign Sanctions Evaders With Respect to Iran and Syria," see *Digest 2012* at 497-98. OFAC designated three individuals and eight entities pursuant to E.O. 13608, effective February 6, 2014. 79 Fed. Reg. 53,104 (Sep. 5, 2014). The persons designated are: Houshang FARSOUDEH, Houshang HOSSEINPOUR, Pourya NAYEBI, CAUCASUS ENERGY, EUROPEAN OIL TRADERS, GEORGIAN BUSINESS DEVELOPMENT, GREAT BUSINESS DEALS, KSN FOUNDATION, NEW YORK GENERAL TRADING, NEW YORK MONEY EXCHANGE, and ORCHIDEA GULF TRADING. OFAC provided notice of actions taken to implement sanctions pursuant to E.O. 13608, among other authorities, with respect to Ferland Company Ltd. 79 Fed. Reg. 53,109 (Sep. 5, 2014). OFAC also provided notice of actions taken to implement sanctions pursuant to E.O. 13608 with respect to Vitaly Sokolenko (Ferland's general manager). 79 Fed. Reg. 53,251 (Sep. 8, 2014).

(2) E.O. 13599

President Obama issued Executive Order 13599, "Blocking Property of the Government of Iran and Iranian Financial Institutions," in 2012. See *Digest 2012* at 504-06. On April 29, 2014, OFAC, in consultation with the State Department, unblocked and removed from the SDN list an entity, Libra Shipping, which had been designated in 2013 pursuant to E.O. 13599. OFAC provided updated names and flagging information for 33 vessels previously identified pursuant to E.O. 13599 as property of Iran. 79 Fed. Reg. 53,106 (Sep. 5, 2014). OFAC designated the following persons pursuant to E.O. 13599 on August

29, 2014: KHAVARMIANEH BANK, KISH INTERNATIONAL BANK, GHARZOLHASANEH RESALAT BANK, KAFOLATBANK, and GHAVAMIN BANK. 79 Fed. Reg. 55,072 (Sep. 15, 2014).

(3) Iran Sanctions Act, as amended

As discussed in *Digest 2012* at 509-11, Congress amended the Iran Sanctions Act ("ISA") in 2012 with passage of the Iran Threat Reduction Act and Syria Human Rights Act of 2012 ("TRA") (Pub. L. 112–158). OFAC amended the Iranian Financial Sanctions Regulations ("IFSR") to implement sections 503 and 504 of the TRA, which amended section 1245 of the National Defense Authorization Act for Fiscal Year 2012; and section 1, portions of section 6, and other related provisions of Executive Order 13622 of July 30, 2012. E.O. 13622 is discussed in *Digest 2012* at 507-9. See discussion in Section A.1.a., *supra*, regarding sanctions relief for Iran, including in relation to ISA, TRA, and E.O. 13622.

On January 7, 2014, the Secretary of State made the determination that Associated Shipbroking (a.k.a. SAM) was no longer engaging in sanctionable activity described in section 5(a) of ISA, as amended, and based on this determination and reliable assurances from SAM that it would not knowingly engage in such activities in the future, the sanctions that had been imposed on SAM on May 24, 2011 were lifted effective February 7, 2014. 79 Fed. Reg. 8781 (Feb. 13, 2014). OFAC provided notice of actions taken to implement sanctions pursuant to ISA, among other authorities, with respect to Ferland Company Ltd. 79 Fed. Reg. 53,109 (Sep. 5, 2014). OFAC provided notice of actions taken to implement sanctions pursuant to E.O. 13622 with respect to two entities, JAM Petrochemical Co. and Niksima Food and Beverage. 79 Fed. Reg. 53,110 (Sep. 5, 2014). On August 29, 2014, OFAC designated ASIA BANK pursuant to E.O. 13622. 79 Fed. Reg. 55,072 (Sep. 15, 2014). On August 28, 2014, the Secretary of State made the requisite determination and imposed sanctions pursuant to ISA on Dettin SpA. 79 Fed. Reg. 59,890 (Oct. 3, 2014).

(4) E.O. 13628

As discussed in *Digest 2012* at 514-15, President Obama issued Executive Order 13628, "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions With Respect to Iran" in 2012. On May 23, 2014, OFAC designated one individual pursuant to E.O. 13628: Morteza TAMADDON. 79 Fed. Reg. 32,819 (June 6, 2014). OFAC also took actions as directed by E.O. 13628 to implement sanctions imposed on KISH PROTECTION & INDEMNITY and CENTRAL INSURANCE OF IRAN by the Secretary of State pursuant to TRA. 79 Fed. Reg. 53,105 (Sep. 5, 2014). OFAC provided notice of actions taken to implement sanctions pursuant to E.O. 13628, among other authorities, with respect to Ferland Company Ltd. 79 Fed. Reg. 53,109 (Sep. 5, 2014). OFAC provided notice of

actions it had taken to implement sanctions pursuant to E.O. 13628 with respect to Dimitris Cambis and Impire Shipping Company, 79 Fed. Reg. 53,111 (Sep. 5, 2014).

(5) E.O. 13645

As discussed in *Digest 2013* at 481, President Obama issued Executive Order 13645, "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions With Respect To Iran," in 2013. Effective April 29, 2014, OFAC designated two individuals and one entity pursuant to Executive Order 13645. 79 Fed. Reg. 26,303 (May 7, 2014). The designated persons are: Mohamed Saeed AL AQILI, AL AQILI GROUP LLC, and Anwar Kamal NIZAMI. OFAC provided notice of actions taken to implement sanctions pursuant to E.O. 13645, among other authorities, with respect to Ferland Company Ltd. 79 Fed. Reg. 53,109 (Sep. 5, 2014). OFAC provided notice that it had blocked the property of three entities (Mid Oil Asia Pte. Ltd., Singa Tankers Pte. Ltd., and Siqiriya Maritime Corp.), and identified the vessels associated with one of those entities, pursuant to E.O. 13645. 79 Fed. Reg. 53,112 (Sep. 5, 2014). OFAC also provided notice of actions taken to implement sanctions pursuant to E.O. 13645 with respect to Vitaly Sokolenko (Ferland's general manager). 79 Fed. Reg. 53,251 (Sep. 8, 2014). On August 29, 2014, OFAC designated three individuals and two entities pursuant to E.O. 13645: Muzaffer POLAT, Abdelhak KADDOURI, and Seyedeh Hanieh Seyed Nasser Mohammad SEYYEDI; LISSOME MARINE SERVICES LLC, and FAYLACA PETROLEUM. 79 Fed. Reg. 55,072 (Sep. 15, 2014). OFAC also listed six vessels as blocked property of persons designated pursuant to E.O. 13645 at the same time. *Id*. On August 29, 2014, the Secretary of State made the requisite determination pursuant to IFCA and imposed sanctions on Goldentex FZE. 79 Fed. Reg. 59,890 (Oct. 3, 2014).

(6) Iran Freedom and Counter-Proliferation Act

See *Digest 2013* at 480-82 for background on the Iran Freedom and Counter-Proliferation Act of 2012 ("IFCA"), part of the National Defense Authorization Act for Fiscal Year 2013 (signed January 2, 2013). See also discussion in Section A.1.a., *supra*, regarding sanctions relief for Iran, including in relation to IFCA. On February 10, 2014, the Secretary of State determined pursuant to Sections 1244(i), 1245(g), 1246(e), and 1247(f) of IFCA that it was vital to the national security of the United States to temporarily waive the imposition of sanctions to allow for a discrete range of transactions related to the provision of satellite connectivity services to the Islamic Republic of Iran Broadcasting ("IRIB"). 79 Fed. Reg. 9030 (Feb. 14, 2014). The Secretary issued waivers based on Iran's commitment to ensure that harmful satellite interference does not emanate from its territory, and verification by the U.S. government that harmful satellite interference is not currently emanating from the territory of Iran. IFCA

required the designation of the IRIB for the imposition of sanctions. The waivers were renewed in August. 79 Fed. Reg. 51,390 (Aug. 28, 2014).

Also on February 10, 2014, the Secretary provided the requisite report to Congress pursuant to IFCA. Excerpts follow from the report, which was published in the Federal Register on April 7, 2014. 79 Fed. Reg. 19,167 (Apr. 7, 2014).

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Section 1245(e) of the … Iran Freedom and Counterproliferation Act of 2012, as delegated, requires that the Secretary of State, in consultation with the Secretary of the Treasury, determine (1) whether Iran is (a) using any of the materials described in subsection (d) of Section 1245 of the FY13 NDAA as a medium for barter, swap, or any other exchange or transaction; or (b) listing any of such materials as assets of the Government of Iran for purposes of the national balance sheet of Iran; (2) which sectors of the economy of Iran are controlled directly or indirectly by Iran's Islamic Revolutionary Guard Corps (IRGC); and (3) which of the materials described in subsection (d) are used in connection with the nuclear, military, or ballistic missile programs of Iran. Materials described in subsection (d) of Section 1245 are graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes.

Following a review of the available information, and in consultation with the Department of the Treasury and the intelligence community, the Under Secretary for Political Affairs has determined, pursuant to further delegated authority, that Iran is not using the materials described in Section 1245(d) as a medium for barter, swap, or any other exchange or transaction; nor is Iran listing any such materials as assets of the Government of Iran for purposes of the national balance sheet of Iran.

Following a review of the available information, and in consultation with the Department of the Treasury and the intelligence community, the Under Secretary for Political Affairs has also determined, pursuant to that further delegated authority, that the IRGC exercises indirect control over Iran’s energy sector.

Finally, following a review of the available information, and in consultation with the Department of the Treasury and the intelligence community, the Under Secretary for Political Affairs has determined, pursuant to that further delegated authority, that of the 31 materials expected to be included within the scope of subsection (d), certain types of the following materials are used in connection with the nuclear, military, or ballistic missile programs of Iran: Aluminum, beryllium, boron, cobalt, copper, copper-infiltrated tungsten, copper-beryllium, graphite, hastelloy, inconel, magnesium, molybdenum, nickel, niobium, silver-infiltrated tungsten, steels (including, but not limited to, maraging steels and stainless steels), titanium, titanium diboride, tungsten, tungsten carbide, and zirconium.

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(7) Section 1245 of the 2012 National Defense Authorization Act

Section 1245(d) of the NDAA requires the U.S. Government to report to Congress on the availability of petroleum and petroleum products in countries other than Iran and determine whether price and supply permit purchasers of petroleum and petroleum products from Iran to "reduce significantly in volume their purchases from Iran." Sanctions shall not be imposed on foreign financial institutions in countries that are determined to have made such significant reductions. See *Digest 2012* at 506-7. Effective January 20, 2014, President Obama delegated to the Secretary of State, in consultation with the Secretary of the Treasury, the authority conferred upon the President by section 1245(d)(5) of the NDAA. 79 Fed. Reg. 6453 (Feb. 4, 2014). On March 4, 2014, the Secretary of State determined that Belgium, the Czech Republic, France, Germany, Greece, Italy, Netherlands, Poland, Spain, and the United Kingdom, each qualified for the 180-day exception outlined in section 1245(d)(4)(D). 79 Fed. Reg. 18,382 (Apr. 1, 2014). Those countries again qualified for the exception on September 5, 2014. 79 Fed. Reg. 54,342 (Sep. 11, 2014). On May 27, 2014, the Secretary determined that Malaysia, Singapore, and South Africa qualified for the 180-day exception. 79 Fed. Reg. 32,011 (June 3, 2014). Malaysia, Singapore, and South Africa again received the exception based on a determination on November 28, 2014. 79 Fed. Reg. 72,054 (Dec. 4, 2014). In Presidential Determination No. 2014-11 of June 4, 2014, the President determined that the availability of petroleum and petroleum products was sufficient to permit purchasers to reduce their purchases from Iran. 79 Fed. Reg. 33,841 (June 12, 2014). The President made the same determination again on November 21, 2014 in Presidential Determination No. 2015-02. 79 Fed. Reg. 71,617 (Dec. 2, 2014).

(8) Modification of sanctions

As discussed in *Digest 2013* at 483, OFAC issued a General License authorizing the exportation to Iran of certain services, software, and hardware incident to personal communications. On February 7, 2014, OFAC issued a new General License (D-1) superseding and clarifying the license previously granted (D), authorizing the exportation, reexportation, or provision to Iran of certain services, software, and hardware incident to personal communications, subject to certain limitations, as well as the importation into the United States of certain software and hardware previously exported to Iran. 79 Fed. Reg. 13,736 (Mar. 11, 2014).

Effective April 7, 2014, OFAC amended the Iranian Transactions and Sanctions Regulations ("ITSR") by expanding an existing general license that authorizes the exportation or reexportation of food to individuals and entities in Iran to include the broader category of agricultural commodities. 79 Fed. Reg. 18,990 (Apr. 7, 2014). OFAC also simultaneously amended its regulations to clarify and add certain definitions and to add a new general license authorizing the exportation or reexportation of certain replacement parts for certain medical devices. *Id*.

See also the discussion in Section A.1.a. of steps taken to waive or temporarily suspend sanctions as part of implementation of the JPOA.

2. Syria

Effective May 2, 2014, OFAC amended and reissued the Syrian Sanctions Regulations, implementing executive orders pertaining to Syria (including E.O. 13399, E.O. 13460, E.O. 13572, E.O. 13573, E.O. 13582, and E.O. 13606). 79 Fed. Reg. 25,414 (May 2, 2014). The new regulations incorporate general licenses, some of which had been posted previously on OFAC's website, and include updates and technical and conforming changes.

3. Nonproliferation

a. Democratic People's Republic of Korea

(1) UN sanctions

As discussed in *Digest 2013* at 493-94, a North Korea-flagged ship named the Chong Chon Gang was detained and inspected by authorities in Panama based on suspicion it was transporting illicit cargo in July 2013. On July 28, 2014, Ambassador Power delivered a statement on the actions of the UN Security Council's DPRK Sanctions Committee in response to the Chong Chon Gang incident. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/229873.htm*.

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On July 2013, Panama seized arms aboard the vessel Chong Chon Gang that were en route from Cuba to North Korea, one of the most serious violations of the UN arms embargo on North Korea. This was a cynical, outrageous and illegal attempt by Cuba and North Korea to circumvent United Nations sanctions prohibiting the export of weapons to North Korea. That is why the Security Council's DPRK Sanctions Committee acted today to punish the North Korean regime for its latest attempt to side-step international law.

Since the Chong Chon Gang incident, the Committee has undertaken a comprehensive investigation into the violation and uncovered irrefutable facts that clearly prove Cuba and the DPRK's intentions to violate sanctions by employing highly sophisticated deception and obfuscation techniques, including Cuba's false claims about the transaction being a routine repair effort when detected by Panamanian and UN authorities.

With today's welcome imposition of a global asset freeze on Ocean Maritime Management (OMM), the North Korean firm that operated the vessel, its fleet of shipping vessels will no longer be able to operate internationally. The designation of OMM sends an important message to the companies directly involved in violations of UN sanctions regimes: we will find you and hold you accountable.

We also welcome the Committee's release of an Implementation Assistance Notice to publicize the facts of the case and advise states on how to protect themselves from future arms smuggling attempts. We are pleased that with this Notice, the international community has refuted Cuba's erroneous and misleading claim that this arms shipment was allowed under UN Security Council resolutions.

The United States remains concerned about attempts by North Korea to circumvent international sanctions, and strongly condemns any efforts by nations such as Cuba to assist in the illegal evasion of binding decisions of the Council. We will remain vigilant in the enforcement of Security Council sanctions, and applaud the actions of Panama in this instance. Likewise, we applaud the cooperation and efforts of the DPRK Sanctions Committee and urge the Committee to do everything in its power to enforce the vital North Korean sanctions regime.

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(2) U.S. sanctions

On July 23, 2014, OFAC designated two entities, and identified eighteen vessels in which those entities have interests, pursuant to E.O. 13551, "Blocking Property of Certain Persons With Respect to North Korea." 79 Fed. Reg. 47,176 (Aug. 12, 2014).

b. Iran, North Korea, and Syria Nonproliferation Act

The Department of State imposed sanctions pursuant to the Iran, North Korea, and Syria Nonproliferation Act on multiple foreign persons based on a determination on August 5, 2014 that those persons had engaged in transfers or acquisitions to or from Iran, North Korea, or Syria of goods, services, or technology controlled under multilateral control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. 79 Fed. Reg. 78,548 (Dec. 30, 2014). Those sanctioned include individuals and entities in Belarus, China, Iran, North Korea, Russia, Sudan, Syria, and Venezuela. *Id*.

c. Executive Order 13382

On February 6, 2014, OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated seven entities and three individuals whose property and interests in property are blocked pursuant to Executive Order 13382, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters": Pere PUNTI, ADVANCE ELECTRICAL AND INDUSTRIAL TECHNOLOGIES SL, TIVA DARYA, TIVA POLYMER CO., TIVA SANAT GROUP, TIVA KARA CO. LTD., Ali CANKO, Ulrich

WIPPERMANN, DF DEUTSCHE FORFAIT AMERICAS INC., DF DEUTSCHE FORFAIT AKTIENGESELLSCHAFT.

On April 29, 2014 OFAC designated eight entities pursuant to E.O. 13382: SUCCESS MOVE LTD., DALIAN ZHONGCHUANG CHAR-WHITE CO., LTD., TEREAL INDUSTRY AND TRADE LIMITED, DALIAN ZHENGHUA MAOYI YOUXIAN GONGSI, KARAT INDUSTRY CO., LTD., MTTO INDUSTRY AND TRADE LIMITED, SINOTECH INDUSTRY CO., LTD., SINOTECH DALIAN CARBON AND GRAPHITE MANUFACTURING CORPORATION. 79 Fed. Reg. 26,806 (May 9, 2014).

OFAC designated additional persons pursuant to E.O. 13382 on August 29, 2014: Ali GHOLAMI, Marzieh BOZORG, Mohammed Javad IMANIRAD, and Arman IMANIRAD; SAZEH MORAKAB CO. LTD. and NEFERTITI SHIPPING COMPANY. 79 Fed. Reg. 55,072 (Sep. 15, 2014). On August 29, 2014, the Department of State designated the Iranian entities Jahan Tech Rooyan Pars, Mandegar Baspar Kimiya Company, Organization of Defensive Innovation and Research, and Nuclear Science and Technology Research Institute pursuant to E.O. 13382. 79 Fed. Reg. 56,846 (Sep. 23, 2014).

On October 16, 2014, OFAC unblocked and delisted DEUTSCHE FORFAIT and DF DEUTSCHE FORFAIT AMERICAS INC. pursuant to E.O. 13382. 79 Fed. Reg. 64,013 (Oct. 27, 2014).

4. Terrorism

a. Security Council actions

On May 22, 2014, the Security Council sanctioned Boko Harm pursuant to Resolution 1267 (1999), as updated by Resolution 2083 (2012), due to its being associated with Al-Qaida and the Organization of Al-Qaida in the Islamic Maghreb ("AQIM"). For background on Resolution 1267, see *Digest 1991-99* at 1966 and for background on Resolution 2083, see *Digest 2012* at 525. Ambassador Power issued a statement, available at *http://usun.state.gov/briefing/statements/226467.htm*, welcoming the addition of Boko Haram to the UN's 1267 list. Ambassador Power stated:

> The sanctions designation is the latest step in the international community's long-term effort to help Nigeria counter this terrorist threat. Last weekend in Paris, the United States and our partners agreed to assist Nigeria in developing a comprehensive strategy to address Boko Haram's threat to the region by strengthening regional cooperation on counterterrorism, including intelligence sharing and border security. Today's listing also supports and facilitates regional cooperation in confronting Boko Haram. The United States has been working with Nigeria to provide critical tools and support for confronting Boko Haram, like helping professionalize its military; working on law enforcement so that they can better investigate and assist in hostage situations; and providing economic assistance, including education and job training programs, to help lift people out of poverty and provide an alternative to extremist ideologies.

> In the early hours of April 15, more than 200 school girls were snatched from their classrooms and taken hostage in one of many merciless Boko Haram attacks that have killed thousands. We will continue doing everything we can to help the people of Nigeria bring back their girls, and we will work with the government of Nigeria to eliminate Boko Haram, including refuting their backwards and bloodthirsty ideology, because no child anywhere should ever be afraid to pursue a brighter future.

On August 15, 2014, the Security Council adopted resolution 2170 on the Islamic State in Iraq and the Levant ("ISIL") and the al-Nusrah Front. Ambassador Power delivered the explanation of vote for the United States on the resolution. Her statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/230658.htm*.

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The growth of the Islamic State in Iraq and the Levant (ISIL), al-Nusrah Front, and other associates of al-Qaeda represents a grave threat to the people of Syria and the people of Iraq, as well as to the region and the larger international community.

Through its rapid and brutal advance across northern Iraq, ISIL has secured heavy weapons and used them to push back Iraqi and Peshmerga forces trying to defend towns and cities. It has seized some of the country's precious natural resources and taken control of critical infrastructure. Now ISIL has the ability to block the flow of electricity and control access to the water supplies on which people depend.

ISIL and the al-Nusrah Front have used Syria's civil war and Iraq's instability to claim territory into which they attract others bent on violent extremism—and territory from which they can potentially launch attacks across the region and to other parts of the world.

This is the new front of the terrorist threat, and one with a devastating human cost. ISIL's recent attacks in Ninewa have displaced an estimated 200,000 people, bringing the total number of internally displaced persons in Iraq since January to a staggering 1.4 million.

The stories that have emerged from ISIL's bloody wake are the stuff of nightmares. Christians have been driven from their homes with the threat of "convert or die." I met earlier today with a bishop who was in Iraq just after the fall of Mosul. He described one ISIL attack on a hospital: one Christian patient who refused to convert was shot in the head; two who agreed to convert had their throats slit, denounced as infidels.

The Yezidis have been buried alive, beheaded, or killed in mass executions, and thousands were forced to flee to Mount Sinjar, where many ultimately perished from thirst or exposure to the elements. The Iraqi Human Rights Ministry estimates 500 Yezidi women and girls have been abducted; and there are reports of them being raped, trafficked, and killed.

ISIL and al-Nusrah continue to carry out similar atrocities in Syria, and they do so with seeming pride, posting gleeful images to the internet. ISIL also continues to confiscate much needed humanitarian aid bound for thousands of civilians in eastern Syria. They have no shame. None whatsoever.

Today's resolution, which the United States is proud to co-sponsor, represents the Council's strong, unified position that all Member States must disrupt the terrorist financing and foreign fighter recruitment networks that are fueling the violence perpetrated by ISIL, the al-Nusrah Front, and other associates of al-Qaeda in the region.

In imposing sanctions on six individuals, this resolution demonstrates the Council's sense of urgency and its willingness to take concrete action against those who carry the guns, and those who supply them.

Unchecked, the current terrorist financing and the foreign fighter recruitment networks will only prolong the terror we've seen unleashed in the region. The numbers of foreign fighters in Syria and Iraq, as well as their source nations, are unprecedented, reportedly as many as 12,000 have participated in the conflict. And the return of radicalized, battle-hardened jihadists to their home countries or other vulnerable destinations has the potential to widen the scope of the violence. This resolution should help stem the flow of money and people and I urge all Member States to expend every effort to help achieve these goals.

The United States is proud to have taken unprecedented steps to protect and assist the Yezidis who were trapped on Mount Sinjar. Today, we join with others on the Council in calling on all parties to prevent or stop the widespread or systematic attacks directed against any civilian populations because of their ethnic background, political views, religion, or beliefs.

We believe that Iraq's future political success will depend on preserving its unity and maintaining its vibrant diversity. We are encouraged by Prime Minister al-Maliki's decision to support Prime Minister-designate al-Abadi. This peaceful and historic transition of power demonstrates that Iraq is on its way to developing the kind of fully inclusive government it will need if it is to unify all Iraqis in the fight against ISIL. The international community must support Iraq to this end.

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b. U.S. targeted financial sanctions implementing Security Council resolutions

(1) Overview

The United States implements its counterterrorism obligations under UN Security Council Resolution 1267 (1999), subsequent UN Security Council resolutions concerning al-Qaida/Afghanistan sanctions including Resolutions 2083 (2012), 1988 (2011), 1989 (2011), and 1373 (2001) through Executive Order 13224 of September 24, 2001. Executive Order 13224 imposes financial sanctions on persons who have been designated in the annex to the executive order; persons designated by the Secretary of State for having committed or for posing a significant risk of committing acts of terrorism; and persons designated by the Secretary of the Treasury for working for or on behalf of, providing support to, or having other links to, persons designated under the executive order. See 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

The United States had previously made some Taliban-related sanctions designations pursuant to a separate executive order (E.O. 13129) and accompanying OFAC-administered sanctions regulations. For a discussion of E.O. 13129, see *Digest 1991-99* at 1964-67. However, Executive Order 13268, issued by President George W. Bush in 2002, terminated E.O. 13129 and amended E.O. 13224 to include references to those sanctioned under E.O. 13129. See *Digest 2002* at 882-84. In 2011, OFAC revoked the Taliban Sanctions Regulations, leaving Taliban sanctions to be covered by its Global Terrorism Sanctions Regulations and E.O. 13224. 76 Fed. Reg. 31,470 (June 1, 2011).

(2) Department of State

In 2014, the Department of State announced the Secretary of State's designation of numerous entities and individuals (including their known aliases) pursuant to E.O. 13224.

In a Federal Register notice dated January 13, 2014, the Department announced the designation of Ansar al-Shari'a in Benghazi, Ansar al-Shari'a in Darnah, and Ansar al-Shari'a in Tunisia, along with individuals Ahmed Abu Khattalah, Sufian bin Qumu, and Seifallah Ben Hassine, commonly known as "Abou Iyadh." 79 Fed. Reg. 2243 (Jan. 13, 2014). The State Department issued a media note on January 10, 2014, available at *www.state.gov/r/pa/prs/ps/2014/01/219519.htm*, identifying these groups as responsible for carrying out terrorist attacks including the September 11, 2012 attacks against the U.S. Special Mission and Annex in Benghazi, Libya and the September 14, 2012 attack against the U.S. Embassy and American school in Tunis. On January 23, 2014, the Department announced the designation of Ziyad al-Nakhalah in a media note available at *www.state.gov/r/pa/prs/ps/2014/01/220540.htm*. 79 Fed. Reg. 6668 (Feb. 4, 2014). As described in the media note, Ziyad is the Deputy Secretary General of the Palestinian Islamic Jihad ("PIJ"), a U.S.-designated Foreign Terrorist Organization, and has personally taken credit for numerous attacks against Israel.

On February 6, 2014, the Department announced, in a media note available at *www.state.gov/r/pa/prs/ps/2014/02/221398.htm*, the designations of the group Lashkar I Jhangvi ("LJ") and one of LJ's co-founders and its current leader, Malik Ishaq. The notice of the designation of Malik Ishaq was published in the Federal Register on February 7, 2014. 79 Fed. Reg. 7497 (Feb. 7, 2014).

On March 28, 2014, the Secretary of State designated Ansar Bayt al-Maqdis pursuant to E.O. 13224. 79 Fed. Reg. 19,958 (Apr. 10, 2014). On April 9, 2014, the Department issued a media note, available at *www.state.gov/r/pa/prs/ps/2014/04/224566.htm*, announcing and providing further information about the designation of Ansar Bayt al-Maqdis:

> Created in 2011 following the Egyptian uprisings, Ansar Bayt al-Maqdis (ABM) is responsible for attacks on Israel and security services and tourists in Egypt. ABM—who shares some aspects of AQ [Al Qaeda] ideology, but is not a formal AQ affiliate and generally maintains a local focus—was responsible for a July

> 2012 attack against a Sinai pipeline exporting gas to Israel. In August 2012, ABM claimed responsibility for a rocket attack on the southern Israeli city of Eilat, and in September 2012, ABM militants attacked an Israeli border patrol, killing one soldier and injuring another.
>
> In October 2013, ABM claimed responsibility for a suicide bombing targeting the South Sinai Security Directorate in el Tor, which killed three people and injured more than 45. In January 2014, ABM successfully downed a military helicopter in a missile attack, killing five soldiers on board, and claimed responsibility for four attacks involving car bombs and hand grenades in Cairo, which left six people dead and over 70 wounded, many of them civilian bystanders.
>
> ABM has also targeted government officials, including the September 2013 attempted assassination of the Egyptian Interior Minister, and the January 2014 assassination of the head of the Interior Minister's technical office. In February 2014, ABM expanded its targets to include foreign tourists, and claimed responsibility for the bombing of a tour bus in the Sinai Peninsula, killing the Egyptian driver and three South Korean tourists.

Effective May 12, 2014, the Department designated Shawki Ali Ahmed al-Badani under E.O. 13224. 79 Fed. Reg. 35,629 (June 23, 2014). On June 17, 2014, the Department announced the designation of al-Badani in a media note, available at *www.state.gov/r/pa/prs/ps/2014/06/227678.htm*. The media note explains :

> Al-Badani is a leader and operative for al-Qa'ida in the Arabian Peninsula (AQAP), and he has long been involved in terrorist activity as a member of the group. The State Department designated AQAP as a Foreign Terrorist Organization and as an SDGT entity in January 2010.
>
> In 2012, al-Badani reportedly assigned an AQAP operative to target the U.S. Embassy in Sanaa, Yemen, for attacks. He also has been described as being connected to a suicide bomber who killed over 100 Yemeni soldiers in a May 2012 attack. Furthermore, he played a key role in a plan for a major attack in summer 2013 that led the United States to close 19 diplomatic posts across the Middle East and Africa.
>
> Al-Badani is on Yemen's Most Wanted list and the Yemeni government has offered a $100,000 reward for anyone who can offer information about him, describing him as one of "the most dangerous terrorists affiliated with al-Qa'ida."

In May 2014, the Department of State amended the designation of al-Qa'ida in Iraq ("AQI") under E.O. 13224 to add the alias Islamic State of Iraq and the Levant ("ISIL") as its primary name and remove all aliases associated with al-Nusrah Front ("ANF"). 79 Fed. Reg. 27,972 (May 15, 2014). The Department simultaneously announced the designation of ANF under E.O. 13224. 79 Fed. Reg. 27,973 (May 15,

2014); see also Department of State media note, available at *www.state.gov/r/pa/prs/ps/2014/05/226067.htm*.

In June 2014, the Department amended the designation of Lashkar-e-Tayyiba to include the following new aliases: Al-Anfal Trust Tehrik-e-Hurmat-e-Rasool Tehrik-e-Tahafuz Qibla Awwal. 79 Fed. Reg. 36,376 (June 26, 2014). On June 16, 2014, the Department designated Anders Cameroon Ostensvig Dale (and known aliases) pursuant to E.O. 13224. 79 Fed. Reg. 41,623 (July 16, 2014).

On July 23, 2014, the Department amended the designation of Harakat ul-Mujahidin to include the additional alias Ansar ul-Ummah. 79 Fed. Reg. 46,500 (Aug 8, 2014). On August 1, 2014, the Department designated Mujahidin Shura Council in the Environs of Jerusalem ("MSC"). 79 Fed. Reg. 49,370 (Aug. 20, 2014). On August 8, the Department designated Said Arif. 79 Fed. Reg. 50,980 (Aug. 26, 2014). On August 15, the Department designated Abu Mohammed al-Adnani. 79 Fed. Reg. 53,248 (Sep. 8, 2014).

On September 10, 2014, the Department designated Amru al-Absi pursuant to E.O. 13224. 79 Fed. Reg. 60,567 (Oct. 7, 2014). On September 17, 2014, the Department designated Lavdrim Muhaxheri. 79 Fed. Reg. 59,549 (Oct. 2, 2014). Also on September 17, the Department designated Khan Said. 79 Fed. Reg. 63,207 (Oct. 22, 2014). On September 19, 2014, the Department designated Murad Margoshvili. 79 Fed. Reg. 59,549 (Oct. 2, 2014). Also on September 19, the Department designated Mohammed Abdel-Halim Hemaida Saleh and Salim Benghalem. 79 Fed. Reg. 60,567 (Oct. 7, 2014). On September 22, 2014, the Department designated Maalim Salman. 79 Fed. Reg. 60,567 (Oct. 7, 2014). On September 23, 2014, the Department designated Nusret Imamovic. 79 Fed. Reg. 59,549 (Oct. 2, 2014). Also on September 23, the Department designated Muhannad al-Najdi, Harakat Sham al-Islam, Abdessamad Fateh, and Abd al-Baset Azzouz. 79 Fed. Reg. 60,568 (Oct. 7, 2014). Jaish al-Muhajireen wal-Ansar was also designated on September 23. 79 Fed. Reg. 60,569 (Oct. 7, 2014). On September 29, the Department designated Hakimullah Mehsud. 79 Fed. Reg. 63,207 (Oct. 22, 2014).

On October 10, the Department designated Ramzi Mawafi pursuant to E.O. 13224. 79 Fed. Reg. 63,206 (Oct. 22, 2014). Also on October 10, the Department designated Qari Hussain and Sangeen Zadran . 79 Fed. Reg. 63,207 (Oct. 22, 2014).

On December 18, 2014, the Department announced the designations of Ajnad Misr and Ibrahim al-Rubaysh in a media note available at *www.state.gov/r/pa/prs/ps/2014/12/235386.htm*. See also 79 Fed. Reg. 77,590 (Dec. 24, 2014). The media note provides information about the basis for the designations:

> Ajnad Misr is an Egyptian violent extremist group that splintered from Ansar Bayt al-Maqdis (ABM), a designated foreign terrorist organization (FTO) and Specially Designated Global entity. Ajnad Misr officially announced its formation in January 2014, and has since claimed numerous attacks on Egyptian security forces at government buildings, public spaces and universities, often injuring or killing innocent bystanders.

Ibrahim al-Rubaysh is a senior leader of AQAP, a designated FTO and Specially Designated Global entity. He serves as a senior advisor for AQAP operational planning and is involved in the planning of attacks. He has served as a senior AQAP sharia official since 2013, and as a senior AQAP sharia official, al-Rubaysh provides the justification for attacks conducted by AQAP. In addition, he has made public statements, including one in August 2014 where he called on Muslims to wage war against the United States. In addition, since October 14, 2014, Ibrahim al-Rubaysh has been subject to a five million dollar Reward for Justice.

Many of these U.S. designated entities and individuals are also listed by the Security Council's 1267/1989 Committee. See *www.un.org/sc/committees/1267/index.shtml*. The 1988 (Afghanistan/Taliban) Committee also lists many of the same individuals and entities that have been designated by the United States. See *www.un.org/sc/committees/1988*.

The State Department also continued to review designations and delist persons who had been designated under E.O. 13224. On March 19, 2014, the Department revoked the designation of Wali Ur Rehman as a Specially Designated Global Terrorist pursuant to Section 1(b) of E.O. 13224. 79 Fed. Reg. 18,603 (Apr. 2, 2014). On November 24, 2014, the Department revoked the designation of Said Ali al-Shihri. 79 Fed. Reg. 73,686 (Dec. 11, 2014).

(3) OFAC

(i) OFAC designations

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2014. The designated individuals and entities typically are owned or controlled by, act for or on behalf of, or provide support for or services to individuals or entities the United States has designated as terrorist organizations pursuant to the order. See 79 Fed. Reg. 8540 (Feb. 12, 2014) (eight individuals—Pejman Mahmood KOSARAYANIFARD, Hamidreza MALEKOUTI POUR, Gholamreza MAHMOUDI, Sayyed Kamal MUSAVI, Mahmud AFKHAMI RASHIDI, Olimzhon Adkhamovich SADIKOV, Alireza HEMMATI, Akbar SEYED ALHOSSEINI—and two entities—AVIA TRUST FZE and BLUE SKY AVIATION CO FZE); 79 Fed. Reg. 9048 (Feb. 14, 2014) (three individuals—Muhammad Omar ZADRAN, Yahya HAQQANI, and Saidullah JAN); 79 Fed. Reg. 9049 (Feb. 14, 2014) (three individuals—Pere PUNTI, Ali CANKO, and Ulrich WIPPERMANN and seven entities—ADVANCE ELECTRICAL AND INDUSTRIAL TECHNOLOGIES SL, TIVA DARYA, TIVA POLYMER CO., TIVA SANAT GROUP, TIVA KARA CO. LTD., DF DEUTSCHE FORFAIT AMERICAS INC., DF DEUTSCHE FORFAIT AKTIENGESELLSCHAFT); 79 Fed. Reg. 29,266 (May 21, 2014) (two individuals—'Abd Al-Rahman Muhammad Zafir Al-Dubaysi AL-JUHNI and Abd Al-Rahman Muhammad Mustafa AL-QADULI; 79 Fed. Reg. 41,627 (July 16, 2014) (five individuals—Issam

Mohamad AMHAZ, Kamel Mohamad AMHAZ, Ayman IBRAHIM, Hanna Elias KHALIFE and Ali ZEAITER—and seven entities—FASTLINK SARL, STARS COMMUNICATIONS LTD, STARS COMMUNICATIONS OFFSHORE SAL, STARS GROUP HOLDING, STARS INTERNATIONAL LTD, TELESERVE PLUS SAL, and UNIQUE STARS MOBILE PHONES LLC);[*] 79 Fed. Reg. 37,845 (July 2, 2014) (two individuals—Muhammad Hussein GILL and Nazir Ahmad CHAUDHRY); 79 Fed. Reg. 47,725 (Aug. 14, 2014) (three individuals—'Abd al-Rahman Khalaf 'Ubayd Juday' AL-'ANIZI, Shafi Sultan Mohammed AL-AJMI, Hajjaj Fahd Hajjaj Muhammad Shabib AL-'AJMI); 79 Fed. Reg. 52,112 (Sep. 2, 2014) (two individuals— Qari RAHMAT and Haji Abdul BASIR—and one entity—HAJI BASIR AND ZARJMIL COMPANY HAWALA); 79 Fed. Reg. 55,072 (Sep. 15, 2014) (one individual— Sayyed Jabar HOSSEINI—and four entities—PIONEER LOGISTICS, ASIAN AVIATION LOGISTICS COMPANY LIMITED, CASPIAN AIRLINES, MERAJ AIR); 79 Fed. Reg. 59,554 (Oct. 2, 2014) (11 individuals and one entity); 79 Fed. Reg. 61132 (Oct. 9, 2014) (three individuals—Muhammed Naeem Sheikh, Umair Naeem Sheikh, and Fazl-ur Rehman—and two entities—ABDUL HAMEED SHAHAB-UD-DIN and NIA INTERNATIONAL); 79 Fed. Reg. 64,648 (Oct. 30, 2014) (one individual—Muhammed Haji IQBAL—and one entity—ASMA MONEY EXCHANGERS);

During 2014 the Security Council's 1267/1989 and 1988 Committee added some individuals to its lists who had been designated by the United States. See *www.un.org/sc/committees/1267/index.shtml* and *www.un.org/sc/committees/1988*.

(ii) OFAC de-listings

In 2014, OFAC determined that two persons that had been designated pursuant to E.O. 13224 should be removed from the Treasury Department's list of Specially Designated Nationals and Blocked Persons. On July 11, 2014, OFAC delisted KINDHEARTS FOR CHARITABLE HUMANITARIAN DEVELOPMENT, INC. 79 Fed. Reg. 42,073 (July 18, 2014). On November 26, 2014, OFAC delisted Yasin Abdullah Ezzedine AL-QADI. 79 Fed. Reg. 72,248 (Dec. 5, 2014).

c. Annual certification regarding cooperation in U.S. antiterrorism efforts

On May 12, 2014, the Secretary of State certified to Congress pursuant to Section 40A of the Arms Export Control Act that Cuba, Eritrea, Iran, Democratic People's Republic of Korea (DPRK, or North Korea), Syria, and Venezuela are "not cooperating fully with United States antiterrorism efforts." 79 Fed. Reg. 32,357 (June 4, 2014).

[*] Editor's note: Among those designated on July 10 were several persons identified as part of a procurement network for Hezbollah in a July 10, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/07/229013.htm*.

5. Russia and Ukraine

a. Sanctions in response to Russia's actions in Ukraine

As discussed in Chapter 9, the United States responded to the Russian government's actions against the territorial integrity of Ukraine in several ways during 2014. The U.S. and international response includes several sanctions measures.

(1) U.S. Sanctions Measures

(i) E.O. 13660

On March 6, 2014, President Obama issued Executive Order 13660, "Blocking Property of Certain Persons Contributing to the Situation in Ukraine." 79 Fed. Reg. 13,493 (Mar. 10, 2014). E.O. 13660 was a response to "persons who have asserted governmental authority in the Crimean region without the authorization of the Government of Ukraine that undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets." *Id*. Section 1 of E.O. 13660 authorizes the Secretary of Treasury, in consultation with the Secretary of State, to block the property of persons (entities and individuals) who have taken actions to undermine democratic processes or threatened the peace, security, stability, sovereignty, or territorial integrity of Ukraine or misappropriated Ukraine's state assets, as well as those who have asserted unauthorized governmental control of the territory of Ukraine or those who have assisted others in taking such actions. Section 2 imposes visa and travel restrictions on these persons. As of March 2015, 62 individuals and entities had been designated pursuant to E.O. 13660.

(ii) E.O. 13661

On March 16, 2014, President Obama issued Executive Order 13661, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine." 79 Fed. Reg. 15,535 (Mar. 19, 2014). E.O. 13661 came in response to the deployment of Russian Federation military forces in the Crimea region of Ukraine. E.O. 13661 blocks the property of persons listed in the Annex to the order, as well as additional persons determined by Treasury (in consultation with State):

> (A) to be an official of the Government of the Russian Federation;
> (B) to operate in the arms or related materiel sector in the Russian Federation;
> (C) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly:
>
> > (1) a senior official of the Government of the Russian Federation; or

(2) a person whose property and interests in property are blocked pursuant to this order; or

(D) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of:

(1) a senior official of the Government of the Russian Federation; or

(2) a person whose property and interests in property are blocked pursuant to this order.

Like E.O. 13660, E.O. 13661 also includes visa sanctions on the persons whose property is blocked pursuant to the order. As of March 2015, 70 individuals and entities had been designated pursuant to E.O. 13661.

OFAC published a comprehensive list of all individuals and entities sanctioned pursuant to E.O. 13660 and E.O. 13661 as of July 31, 2014, which included: four individuals whose property and interests were blocked on March 17, 2014 pursuant to E.O. 13660 (former president of Ukraine Viktor Yanukovych among them); twenty individuals (many Russian government officials) and one entity (Bank Rossiya) whose property and interests were blocked on March 20, 2014 pursuant to E.O. 13661; seven individuals and one entity whose property and interests were blocked pursuant to E.O. 13660 on April 11, 2014; seven individuals and seventeen entities whose property and interests were blocked pursuant to E.O. 13661 on April 28, 2014; seven individuals whose property and interests were blocked pursuant to E.O. 13660 on June 20, 2014. 79 Fed. Reg. 46,302 (Aug. 7, 2014).

(iii) E.O. 13662

On March 20, 2014, President Obama issued Executive Order 13662, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine." 79 Fed. Reg. 16,169 (Mar. 24, 2014). The further actions taken in E.O. 13662 came in response to the continuing actions and policies of the Government of the Russian Federation, including its purported annexation of Crimea and its use of force in Ukraine. As defined in Section 1 of the order, the persons whose property is blocked include those determined:

(i) to operate in such sectors of the Russian Federation economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, such as financial services, energy, metals and mining, engineering, and defense and related materiel;

(ii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to this order; or

(iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

E.O. 13662 again includes visa sanctions as well as blocking sanctions on the designated persons. As of March 2015, 14 individuals and entities had been designated pursuant to E.O. 13662.

Section 1(b) of E.O. 13662 also allows that regulations, licenses, directives and the like may be issued regarding the application of the blocking sanctions. OFAC has issued regulations regarding the implementation of E.O. 13660, E.O. 13661, and E.O. 13662. 79 Fed. Reg. 26,365 (May 8, 2014). OFAC has also issued several general licenses, links to which are available at *www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx*. On September 12, 2014, OFAC issued Directives 3 and 4 and superseded its previous Directives 1 and 2 pursuant to E.O. 13662. These directives are also available at *www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx*. As summarized on OFAC's webpage addressing Frequently Asked Questions about the E.O. 13662 Directives, available at *http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#ukraine*, these directives prohibit certain financial transactions:

> Directive 1, issued on July 16, 2014, prohibits transacting in, providing financing for, or otherwise dealing in debt with a maturity of longer than 90 days or equity if that debt or equity is issued on or after the sanctions effective date ("new debt" or "new equity") by, on behalf of, or for the benefit of the persons operating in Russia's financial sector named under Directive 1, their property, or their interests in property. On September 12, 2014, OFAC amended Directive 1, reducing the tenor of prohibited debt from longer than 90 days to longer than 30 days.
>
> Directive 2 separately prohibits transacting in, providing financing for, or otherwise dealing in new debt of greater than 90 days maturity if that debt is issued on or after the sanctions effective date by, on behalf of, or for the benefit of the persons operating in Russia's energy sector named under the Directive 2, their property, or their interests in property.
>
> * * * *
>
> OFAC issued Directive 3, introducing new prohibitions on all transactions in, provision of financing for, and other dealings in new debt of longer than 30 days maturity of persons determined to be subject to the Directive, their property, or their interests in property. Transactions by U.S. persons or within the United States involving derivative products whose value is linked to an underlying asset that constitutes new debt with maturity of longer than 30 days issued by a person subject to Directive 3 are authorized by General License 1A pursuant to Executive Order 13662.
>
> * * * *

> OFAC issued Directive 4, introducing new prohibitions on the provision of goods, services (except for financial services), and technology for certain activities involving certain persons operating in the energy sector of the Russian Federation. Directive 4 prohibits the direct or indirect provision, exportation, or reexportation of goods, services (except for financial services), or technology in support of exploration or production for deepwater, Arctic offshore, or shale projects that have the potential to produce oil in the Russian Federation, or in maritime area claimed by the Russian Federation and extending from its territory, and involve any person determined to be subject to Directive 4 or that person's property or interests in property. …
>
> * * * *

OFAC published updates on its actions pursuant to Executive Orders 13660, 13661 and 13662 as well as the directives and licenses issued pursuant to E.O. 13662. 79 Fed. Reg. 63,021 (Oct. 21, 2014). OFAC designated one individual and three entities on July 16, 2014 pursuant to E.O. 13660. *Id*. Also on July 16, OFAC designated four individuals and eight entities pursuant to E.O. 13661. On July 29, 2014, OFAC designated one entity pursuant to E.O. 13661. *Id*. OFAC designated five more entities pursuant to E.O. 13661 on September 12, 2014. *Id*. Sectoral determinations made by the Treasury Department pursuant to E.O. 13662 include the financial services and energy sectors (as of July 16, 2014); the defense and related materiel sector (as of September 12, 2014). *Id*. Two entities were determined on July 16 pursuant to Original Directive 1 to be part of the financial services sector and three more were subsequently determined to be subject to Original Directive 1 on July 29. *Id*. Two entities were determined to be subject to Original Directive 2 as part of the energy sector on July 16, 2014. *Id*. On September 12, the five entities originally subject to Original Directive 1 were determined to be subject to Directive 1 as amended and one new entity was also determined to be in the financial services sector and subject to Directive 1. *Id*. Similarly, the two entities previously subject to Original Directive 2 were determined to be subject to Directive 2 as amended and two new entities were determined to be subject to Directive 2. *Id*. Also on September 12, OFAC determined that one entity was subject to Directive 3 as operating in the defense and related materiel sector and five entities were identified as subject to Directive 4 (as operating in the energy sector). *Id*.

(iv) Restrictions on defense exports

On April 28, 2014, the United States announced that it was implementing additional restrictions on defense exports to Russia in response to Russia's actions in southern and eastern Ukraine. See press statement, available at *www.state.gov/r/pa/prs/ps/2014/04/225241.htm*, in which a Department of State spokeperson explains:

> …the Department of State is expanding its export restrictions on technologies and services regulated under the U.S. Munitions List (USML).
>
> Effective immediately, the Department's Directorate of Defense Trade Controls (DDTC) will deny pending applications for export or re-export of any high technology defense articles or services regulated under the U.S. Munitions List to Russia or occupied Crimea that contribute to Russia's military capabilities. In addition, the Department is taking actions to revoke any existing export licenses which meet these conditions. All other pending applications and existing licenses will receive a case-by-case evaluation to determine their contribution to Russia's military capabilities.
>
> The United States will continue to adjust its export licensing policies toward Russia, as warranted by Russia's actions in Ukraine. We urge Russia to honor the commitments it made in Geneva on April 17 to deescalate the situation in Ukraine.

(v) Ukraine Freedom Support Act

On December 18, 2014, President Obama signed the Ukraine Freedom Support Act, P.L. 113-272 (H.R. 5859). President Obama's signing statement follows, and is available at *www.whitehouse.gov/the-press-office/2014/12/18/statement-president-ukraine-freedom-support-act*.

> Today, I have signed H.R. 5859, the Ukraine Freedom Support Act of 2014, into law. Signing this legislation does not signal a change in the Administration's sanctions policy, which we have carefully calibrated in accordance with developments on the ground and coordinated with our allies and partners. At this time, the Administration does not intend to impose sanctions under this law, but the Act gives the Administration additional authorities that could be utilized, if circumstances warranted.
>
> My Administration will continue to work closely with allies and partners in Europe and internationally to respond to developments in Ukraine and will continue to review and calibrate our sanctions to respond to Russia's actions. We again call on Russia to end its occupation and attempted annexation of Crimea, cease support to separatists in eastern Ukraine, and implement the obligations it signed up to under the Minsk agreements.
>
> As I have said many times, our goal is to promote a diplomatic solution that provides a lasting resolution to the conflict and helps to promote growth and stability in Ukraine and regionally, including in Russia. In this context, we continue to call on Russia's leadership to implement the Minsk agreements and to reach a lasting and comprehensive resolution to the conflict which respects Ukraine's sovereignty and territorial integrity. We remain prepared to roll back sanctions should Russia take the necessary steps.

(vi) E.O. 13685

On December 19, 2014, President Obama issued Executive Order 13685, "Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine." 79 Fed. Reg. 77,357 (Dec. 24, 2014). Sections 1 and 2 of the order prohibit transactions with Crimea and block property of those who operate, lead, or provide support for those operating or leading in Crimea, as follows:

> Section 1. (a) The following are prohibited:
>
> (i) new investment in the Crimea region of Ukraine by a United States person, wherever located;
>
> (ii) the importation into the United States, directly or indirectly, of any goods, services, or technology from the Crimea region of Ukraine;
>
> (iii) the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, services, or technology to the Crimea region of Ukraine; and
>
> (iv) any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this section if performed by a United States person or within the United States.
>
> (b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.
>
> Sec. 2. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person (including any foreign branch) of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:
>
> (i) to operate in the Crimea region of Ukraine;
>
> (ii) to be a leader of an entity operating in the Crimea region of Ukraine;
>
> (iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order; or
>
> (iv) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to this order.
>
> (b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that

> may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

The Russian National Commercial Bank has been designated pursuant to E.O. 13685.

(2) International Sanctions Measures

On September 11, 2014, President Obama issued a statement on the coordinated sanctions measures taken by the United States and the European Union against Russia. Daily Comp. Pres. Docs. 2014 DCPD No. 00656 (Sep. 11, 2014). The President's statement on international sanctions follows.

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Today we join the European Union in announcing that we will intensify our coordinated sanctions on Russia in response to its illegal actions in Ukraine. I have said from the very beginning of this crisis that we want to see a negotiated political solution that respects Ukraine's sovereignty and territorial integrity. Together with G–7 and European partners and our other allies, we have made clear that we are prepared to impose mounting costs on Russia. We are implementing these new measures in light of Russia's actions to further destabilize Ukraine over the last month, including through the presence of heavily armed Russian forces in eastern Ukraine. We are watching closely developments since the announcement of the cease-fire and agreement in Minsk, but we have yet to see conclusive evidence that Russia has ceased its efforts to destabilize Ukraine.

We will deepen and broaden sanctions in Russia's financial, energy, and defense sectors. These measures will increase Russia's political isolation as well as the economic costs to Russia, especially in areas of importance to President Putin and those close to him. My administration will outline the specifics of these new sanctions tomorrow.

The international community continues to seek a genuine negotiated solution to the crisis in Ukraine. I encourage President Putin to work with Ukraine and other international partners, within the context of the Minsk agreement and without setting unreasonable conditions, to reach a lasting resolution to the conflict. As I said last week, if Russia fully implements its commitments, these sanctions can be rolled back. If, instead, Russia continues its aggressive actions and violations of international law, the costs will continue to rise.

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b. Magnitsky Act

For background on the Sergei Magnitsky Rule of Law Accountability Act of 2012 ("Magnistky Act"), see *Digest 2013* at 505-06. On May 20, 2014, the State Department submitted to Congress a list of additional persons determined to meet the criteria in the Magnitsky Act, which include responsibility for the detention, abuse, or death of Sergei Magnitsky, or involvement in certain other gross human rights violations, in particular

acts against individuals seeking to expose illegal activity by Russian officials, or seeking to obtain, exercise, defend, or promote human rights and freedoms in Russia. The sanctions imposed on the listed persons include ineligibility to receive visas and be admitted into the United States as well as blocking their property and interests in property subject to U.S. jurisdiction. See May 20, 2014 Department press statement, available at *www.state.gov/r/pa/prs/ps/2014/05/226367.htm*. The names of those added to the "Magnitsky list" on May 20, 2014 are available at *http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140520.aspx*. See also Federal Register notice regarding the twelve persons designated on May 20, 2014. 79 Fed. Reg. 53,517 (Sep. 9, 2014).

On December 29, 2014, the State Department submitted to Congress, the second annual report on implementation of the Magnitsky Act. The report added four persons to the list of those designated for visa and blocking sanctions pursuant to the Act. The persons designated on December 29 are: Apti Kharonovich ALAUDINOV, Magomed Khozhakhmedovich DAUDOV, Victor Yakovlevich GRIN, and Andrei Alexandrovich STRIZHOV. A State Department press statement announced and explained the submission of the report and the new designations:

> The criteria include persons involved in the criminal conspiracy uncovered by Sergei Magnitsky, a Russian lawyer who died of medical neglect on November 16, 2009, after a year in pre-trial detention in a Moscow prison, after he uncovered a large tax fraud scheme perpetrated by Russian officials. The criteria also include individuals responsible for Magnitsky's detention, abuse, or death, and those who engaged in subsequent cover-up efforts. Additionally, the criteria also cover persons responsible for extrajudicial killings, torture, or other gross violations of human rights against whistleblowers and individuals attempting to exercise, defend, or promote their internationally recognized human rights and freedoms in the Russian Federation. The list now comprises 34 names, including 16 individuals added in the past year.

On December 29, 2014, the Department held a briefing on the Magnitsky Act sanctions in conjunction with the transmittal of the report to Congress identifying additional persons to be sanctioned pursuant to the Magnitsky Act. The transcript of the briefing is excerpted below and available at *www.state.gov/r/pa/prs/ps/2014/12/235535.htm*.

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…Today, Secretary Kerry transmitted to the Congress the third of our Magnitsky reports, or reports to Congress pursuant to the Magnitsky Act. This report included a list of four Russian officials newly added to the list. They … are … subject to both a visa restriction, a ban on entry into the United States; and an asset freeze, in accordance with the Magnitsky Act. … Two are

Russian officials who were implicated in the death and subsequent cover-up … of Sergei Magnitsky himself. Two are Chechen officials who were implicated in the kidnapping, torture, and later framing of a noted Chechen activist … earlier this year.

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In each Magnitsky list so far, we have combined those designations associated with Magnitsky himself with those associated with other gross human rights violations. The same is true in this case. The numbers of Magnitsky-related designations have dropped, you have noticed. This is … largely due to the fact that the numbers of individuals whom we can designate, whom we can tie through fact-based analysis to Magnitsky's death and the subsequent cover-up of that death, will drop. We're not done with that process, but it is going to become more of a challenge to designate Magnitsky-related individuals. And just as a matter of reality, our efforts will begin to turn to the gross violations of human rights, as in the case of the Chechen activist, Mr. Kutayev.

One other thing worth mentioning about the two Russian officials, Viktor Grin, deputy prosecutor general, and Andrei Strizhov, investigator under the investigative committee, who were, of course, designated because of their involvement in the … cover-up of Magnitsky's killing. … They are also… associated with arrests, prosecutions, and other problematic actions with respect to the Bolotnaya case. You remember the demonstrations in Bolotnaya Square in the beginning of 2012, … during which and after which people were rounded up and prosecuted. They were not designated under the Magnitsky Act because of this involvement, but it is a fact that they were involved in Bolotnaya cases, and one of them—Deputy Prosecutor General Grin—was also involved in the Khodorkovsky and Lebedev case[s].

…[S]pecifically Grin was responsible for opening two posthumous cases against Magnitsky. They put Magnitsky on trial … after he was dead, which astonished us. We didn't know it was possible. And in fact, it really isn't possible under Russian law, as I understand it, except in response to the request of the family. And Magnitsky's family has gone on record saying they did not request their family member to be put on trial again after he was dead. So Viktor Grin's involvement of this … bizarre…action was one that is particularly satisfying to those of us who want to see the Magnitsky Act implemented fairly.

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We intend to continue to administer the Magnitsky Act. Specifically, we intend to pursue additional designations. I can't make promises in advance as to the timing or the extent, but I can tell you that we are committed to continuing this process.

As to effectiveness, … in pursuit of any sustained human rights policy, results come unevenly and there tend to be tipping points. That is, our listing of individuals may have the indirect effect of putting Russian officials on notice that if they are involved in gross violations of human rights, trumped-up cases, false accusations, grotesque examples of … mishandling of justice, such as putting a dead man on trial, under this law they may be held personally liable. Now, this is not an ideal situation. In democracies, in the rule of law, governments and a free media inside the country are responsible for correcting mistakes and issuing reports—sometimes embarrassing to the host government …. But absent that process, the Magnitsky Act can serve as an admittedly imperfect tool to advance human rights and ultimately the cause of justice, which

was, I believe, its intent. And it is that tool which we will attempt to advance, working with the Congress, with human rights communities, inside and outside Russia, and with the knowledge that now as in the Soviet period, a sustained, determined human rights policy can, in fact, be effective.

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…There have been 34 individual designations so far under the Magnitsky Act in the three tranches of names we have provided to Congress. …

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6. Threats to Democratic Process

a. Burma

In 2014, the United States continued to modify sanctions in response to the government of Burma's implementation of democratic reforms, while maintaining targeted sanctions on those who pose a threat to Burma's peace and stability. Effective June 30, 2014, OFAC amended and reissued in their entirety the Burmese Sanctions Regulations implementing E.O. 13448, E.O. 13464, E.O. 13619, and E.O. 13651. 79 Fed. Reg. 37,105 (June 30, 2015). OFAC designated one person (Aung Thaung) pursuant to E.O. 13448, "Blocking Property and Prohibiting Certain Transactions Related to Burma," on October 30, 2014. 79 Fed. Reg. 70,616 (Nov. 26, 2014).

b. Coup Determinations: Thailand and Fiji

On May 22, 2014, in a press statement available at *www.state.gov/secretary/remarks/2014/05/226446.htm*, Secretary Kerry expressed disappointment that the Thai military had suspended the constitution and taken control of the government. He warned that the military coup in Thailand had prompted the United States government to review its U.S.-Thai assistance and engagement programs. On May 28, 2014, the Department of State confirmed that it had suspended approximately $3.5 million in unspent and unobligated Foreign Military Financing ("FMF") assistance and $85,000 of unspent International Military Education and Training ("IMET") funds that could have been provided by the United States to Thailand were it not for the military coup. See response to a question taken at the Mary 27, 2014 daily press briefing, available at *www.state.gov/r/pa/prs/ps/2014/05/226620.htm*.

On October 24, 2014, the Department of State determined that since its previous determination to terminate assistance to Fiji due to a 2006 military coup, a democratically elected government had taken office in Fiji. 79 Fed. Reg. 70,265 (Nov. 25, 2014).

c. Zimbabwe

Effective April 7, 2014, OFAC removed from its list of those designated under the Zimbabwe sanctions program the names of one individual (Muller RAUTENBACH) and one entity (RIDGEPOINT OVERSEAS DEVELOPMENTS LIMITED) whose property and interests in property were unblocked pursuant to Executive Order 13469 of July 25, 2008, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." 79 Fed. Reg. 26,302 (May 7, 2014). Effective April 17, 2014, nine individuals were delisted and their property unblocked pursuant to Executive Order 13288 of March 6, 2003, "Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe," as amended by Executive Order 13391 of November 22, 2005, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." 79 Fed. Reg. 27,973 (May 15, 2014). The individuals, several of whom hold positions in the government of Zimbabwe, are: Victoria CHITEPO, Marian CHOMBO, Kumbirai KANGAI, Munyaradzi Paul MANGWANA, Sharlottie MSIPA, John Landa NKOMO, Peter Baka NYONI, Sithembiso NYONI, Isaiah Masvayamwanda SHUMBA.

Effective April 17, 2014, three individuals and one entity were added to the list of persons sanctioned pursuant to E.O. 13469. 79 Fed. Reg. 34,565 (June 17, 2014). The persons designated are: Sam PA, Jimmy ZERENIE, Tobaiwa MUDEDE, and SINO ZIM DEVELOPMENT (PVT) LTD.

On July 10, 2014, OFAC issued, as a final rule, the amended Zimbabwe Sanctions Regulations to implement E.O. 13391 and E.O. 13469. 79 Fed. Reg. 39,312 (July 10, 2014).

d. Cuba

As discussed in Chapter 9, on December 17, 2014, President Obama announced a new U.S. policy on Cuba that would include restoring diplomatic relations and easing sanctions. President Obama's announcement is available at *www.whitehouse.gov/issues/foreign-policy/cuba*. Secretary Kerry's remarks on the announcement of policy changes toward Cuba are available at *www.state.gov/secretary/remarks/2014/12/235352.htm*. The White House issued a fact sheet entitled "Charting a New Course on Cuba," available at *www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba*. Portions of the fact sheet pertaining to changes in U.S. sanctions programs are excerpted below.

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It is clear that decades of U.S. isolation of Cuba have failed to accomplish our enduring objective of promoting the emergence of a democratic, prosperous, and stable Cuba. At times, longstanding U.S. policy towards Cuba has isolated the United States from regional and

international partners, constrained our ability to influence outcomes throughout the Western Hemisphere, and impaired the use of the full range of tools available to the United States to promote positive change in Cuba. Though this policy has been rooted in the best of intentions, it has had little effect—today, as in 1961, Cuba is governed by the Castros and the Communist party.

We cannot keep doing the same thing and expect a different result. It does not serve America's interests, or the Cuban people, to try to push Cuba toward collapse. We know from hard-learned experience that it is better to encourage and support reform than to impose policies that will render a country a failed state. With our actions today, we are calling on Cuba to unleash the potential of 11 million Cubans by ending unnecessary restrictions on their political, social, and economic activities. In that spirit, we should not allow U.S. sanctions to add to the burden of Cuban citizens we seek to help.

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Adjusting regulations to more effectively empower the Cuban people

- The changes announced today will soon be implemented via amendments to regulations of the Departments of the Treasury and Commerce. Our new policy changes will further enhance our goal of empowering the Cuban population.
- Our travel and remittance policies are helping Cubans by providing alternative sources of information and opportunities for self-employment and private property ownership, and by strengthening independent civil society.
- These measures will further increase people-to-people contact; further support civil society in Cuba; and further enhance the free flow of information to, from, and among the Cuban people. Persons must comply with all provisions of the revised regulations; violations of the terms and conditions are enforceable under U.S. law.

Facilitating an expansion of travel under general licenses for the 12 existing categories of travel to Cuba authorized by law

- General licenses will be made available for all authorized travelers in the following existing categories: (1) family visits; (2) official business of the U.S. government, foreign governments, and certain intergovernmental organizations; (3) journalistic activity; (4) professional research and professional meetings; (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (8) support for the Cuban people; (9) humanitarian projects; (10) activities of private foundations or research or educational institutes; (11) exportation, importation, or transmission of information or information materials; and (12) certain export transactions that may be considered for authorization under existing regulations and guidelines.
- Travelers in the 12 categories of travel to Cuba authorized by law will be able to make arrangements through any service provider that complies with the U.S. Treasury's Office of Foreign Assets Control (OFAC) regulations governing travel services to Cuba, and general licenses will authorize provision of such services.
- The policy changes make it easier for Americans to provide business training for private Cuban businesses and small farmers and provide other support for the growth of Cuba's nascent private sector. Additional options for promoting the growth of entrepreneurship and the private sector in Cuba will be explored.

Facilitating remittances to Cuba by U.S. persons

- Remittance levels will be raised from $500 to $2,000 per quarter for general donative remittances to Cuban nationals (except to certain officials of the government or the Communist party); and donative remittances for humanitarian projects, support for the Cuban people, and support for the development of private businesses in Cuba will no longer require a specific license.
- Remittance forwarders will no longer require a specific license.

Authorizing expanded commercial sales/exports from the United States of certain goods and services

- The expansion will seek to empower the nascent Cuban private sector. Items that will be authorized for export include certain building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers. This change will make it easier for Cuban citizens to have access to certain lower-priced goods to improve their living standards and gain greater economic independence from the state.

Authorizing American citizens to import additional goods from Cuba

- Licensed U.S. travelers to Cuba will be authorized to import $400 worth of goods from Cuba, of which no more than $100 can consist of tobacco products and alcohol combined

Facilitating authorized transactions between the United States and Cuba

- U.S. institutions will be permitted to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions.
- The regulatory definition of the statutory term "cash in advance" will be revised to specify that it means "cash before transfer of title"; this will provide more efficient financing of authorized trade with Cuba.
- U.S. credit and debit cards will be permitted for use by travelers to Cuba.
- These measures will improve the speed, efficiency, and oversight of authorized payments between the United States and Cuba.

Initiating new efforts to increase Cubans' access to communications and their ability to communicate freely

- Cuba has an internet penetration of about five percent—one of the lowest rates in the world. The cost of telecommunications in Cuba is exorbitantly high, while the services offered are extremely limited.
- The commercial export of certain items that will contribute to the ability of the Cuban people to communicate with people in the United States and the rest of the world will be authorized. This will include the commercial sale of certain consumer communications devices, related software, applications, hardware, and services, and items for the establishment and update of communications-related systems.
- Telecommunications providers will be allowed to establish the necessary mechanisms, including infrastructure, in Cuba to provide commercial telecommunications and internet services, which will improve telecommunications between the United States and Cuba.

Updating the application of Cuba sanctions in third countries

- U.S.-owned or -controlled entities in third countries will be generally licensed to provide services to, and engage in financial transactions with, Cuban individuals in third countries. In addition, general licenses will unblock the accounts at U.S. banks of Cuban nationals who have relocated outside of Cuba; permit U.S. persons to participate in third-

country professional meetings and conferences related to Cuba; and, allow foreign vessels to enter the United States after engaging in certain humanitarian trade with Cuba, among other measures.

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These changes announced by the President were implemented in the form of amendments to regulations administered by the Departments of Treasury (OFAC) and Commerce (BIS) and went into effect upon publication in the Federal Register on January 16, 2015.

Also in 2014, OFAC delisted one person, Pierre BOILEAU, whose property had been blocked pursuant to the Cuban Assets Control Regulations. 79 Fed. Reg. 51,651 (Aug. 29, 2014).

7. Restoration of Peace, Security, Stability

a. Yemen

The U.S. Department of State issued a fact sheet on UN Security Council Resolution 2140 on Yemen on February 26, 2014. As explained in the fact sheet, Resolution 2140 established a sanctions committee to target those threatening the peace, security, or stability of Yemen as it transitions from the autocratic reign of former President Saleh. The fact sheet appears below and is available at *www.state.gov/r/pa/prs/ps/2014/02/222601.htm*.

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On February 26, 2014, the UN Security Council adopted a resolution welcoming the conclusion of Yemen's historic National Dialogue Conference and reaffirming Council support for the implementation of subsequent stages in the country's political transition process. The Council emphasized the critical need to turn the page on the presidency of former President Saleh and called for a cessation of all actions meant to disrupt the political transition in Yemen.

With this resolution, the Council has taken a significant, forward-leaning step in setting up a sanctions committee, which will allow the Council to respond quickly with targeted sanctions against individuals engaging in or providing support for acts that threaten the peace, security or stability of Yemen.

Resolution 2140 continues the Council's active engagement on Yemen and reaffirms its support for Yemen's political transition on the basis of the Gulf Cooperation Council (GCC) Initiative and Implementation Mechanism, signed by the Yemenis on November 23, 2011.

Resolution 2140 welcomes the outcomes of the comprehensive National Dialogue Conference, which provide a road map for Yemen's continued democratic transition.

Resolution 2140 commends the leadership of President Hadi and the ongoing commitment of the people of Yemen to a peaceful and meaningful transition.

Resolution 2140 reaffirms the need for the full and timely implementation of Yemen's political transition, as outlined in the GCC Initiative and its implementation mechanism, including the drafting of a new constitution and the holding of a referendum on the draft constitution and, ultimately, national elections. It encourages all stakeholders to continue their constructive, nonviolent engagement in implementing the transition.

Resolution 2140 establishes a sanctions committee with a mandate to sanction individuals found to be engaging in or providing support for acts that threaten the peace, security or stability of Yemen. The committee will be supported by a four-person panel of UN experts who will compile information about those who may engage in or provide support for such acts.

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On November 10, 2014, OFAC designated three individuals pursuant to E.O. 13661, "Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen." 79 Fed. Reg. 68,507 (Nov. 17, 2014). For background on E.O. 13661, see *Digest 2012* at 530-31. The persons designated on November 10 are: former president Ali Abdullah SALEH, Huthi military commander Abd al-Khaliq AL-HUTHI, and the Huthi group's second in command Abdullah Yahya AL HAKIM.

b. South Sudan

On April 3, 2014, President Obama issued E.O. 13664, "Blocking Property of Certain Persons With Respect to South Sudan." 79 Fed. Reg. 19,281 (Apr. 7, 2014). The President issued the order based on the emergency presented by "the situation in and in relation to South Sudan, which has been marked by activities that threaten the peace, security, or stability of South Sudan and the surrounding region, including widespread violence and atrocities, human rights abuses, recruitment and use of child soldiers, attacks on peacekeepers, and obstruction of humanitarian operations." *Id*. Section 1 of the order defines the persons who may be designated by the Secretary of the Treasury, in consultation with the Secretary of State, such that their property is blocked.

On April 3, 2014, Ambassador Power delivered remarks on the situation in South Sudan, available at *http://usun.state.gov/briefing/statements/224389.htm*. In her remarks, which are excerpted below, Ambassador Power referred to the new executive order by President Obama imposing sanctions on those who threaten the peace in South Sudan.

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The United States is deeply disturbed that government and anti-government forces in South Sudan continue to violate the Cessation of Hostilities agreement, have failed to enter into an inclusive, political dialogue, and continue to jeopardize the security and economic stability of the people of South Sudan. In just over 100 days since this conflict began, the violence has forced one million people to flee their homes; millions more are in need of humanitarian assistance.

We condemn in the strongest possible terms the repeated attacks on and harassment of United Nations Mission in South Sudan (UNMISS) personnel. Attacks against UN personnel involved in humanitarian assistance or peacekeeping are unacceptable and the perpetrators must be held accountable. All parties should regard UNMISS sites as inviolable and the work of UNMISS personnel should be respected, supported and protected as they carry out their critical mission of protecting civilians and facilitating the delivery of humanitarian assistance to those in need.

Today, President Obama signed an Executive Order that will provide the U.S. government with a flexible tool for imposing targeted sanctions on any person, including Government of South Sudan officials and opposition leaders, determined to be responsible for threating the peace in South Sudan, obstructing the Intergovernmental Authority for Development-led peace talks or reconciliation process, or responsible for the commission of human rights abuses in South Sudan. As this new E.O. clearly indicates, we firmly intend to hold accountable those bent on undermining a peaceful, political settlement of the crisis in South Sudan, and anyone who threatens the safety and well-being of civilians. We call on all parties to immediately halt the violence, meet their obligations under the Cessation of Hostilities agreement, and engage in inclusive, political dialogue.

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On May 6, 2014, when the United States designated two individuals pursuant to E.O. 13664, 79 Fed. Reg. 28,601 (May 16, 2014), Ambassador Power again addressed the subject of targeted U.S. sanctions against South Sudan at the United Nations. Her statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/225686.htm*

* * * *

Today, the United States announced targeted sanctions on two South Sudanese whose actions, including the targeting of civilians and fomenting ethnic violence, are contributing to the mounting humanitarian and human rights catastrophe unfolding in South Sudan.

The measures taken against Marial Chanuong and Peter Gadet are only a first step and should serve as a clear warning to those in the Government of South Sudan and those who have taken up arms against it: the United States is determined to hold accountable those who choose violence. To that end, we will also seek in the United Nations Security Council to authorize targeted sanctions against those who continue to undermine South Sudan's stability.

President Salva Kiir and former Vice President Riek Machar have agreed to travel to Addis Ababa, Ethiopia for face-to-face talks. We strongly urge both leaders to live up to this commitment to meet and to implement the Cessation of Hostilities agreement they signed on January 23.

South Sudan's crisis has led to tens of thousands of deaths, driven over 1.2 million people from their homes, and brought the country to the brink of famine. It is long past time for South Sudan's political and military leaders to set aside their political and economic self-interests and begin to address the dire needs of their people.

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U.S. officials provided further information about the U.S. targeted sanctions against South Sudan in a background briefing held on May 6, 2014. Excerpts follow from the briefing, which is available at *www.state.gov/r/pa/prs/ps/2014/05/225701.htm*.

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…[T]he Treasury Department's Office of Foreign Asset Control has rolled out sanctions against two individuals who have been driving and directing the conflict in South Sudan. The individuals are a South Sudan anti-government force leader by the name of Peter Gadet and a commander within the South Sudanese Government's Presidential Guard by the name of Marial Chanuong.
…

Marial Chanuong, first, is, as I noted, the commander of the Presidential Guard for the South Sudanese Government, so he is reporting to President Salva Kiir. The Presidential Guard led the operations in Juba following the fighting that began on December 15th of 2013. And the second individual, Peter Gadet, who is fighting among the anti-government forces, is commanding a group of troops who were responsible for some of the horrific violence we saw just last month in Bentiu, the capital of Unity State in South Sudan.

Both of these individuals were sanctioned under the recently issued Executive Order by President Obama EO 13664, which allows us to target those responsible for or complicit in actions or policies that threaten the peace, security, or stability of South Sudan. That EO was signed by the President just last month on April 3rd, 2014. And it is a broad and flexible EO, which gives us the authority to target not just commanders but those directly engaged in violence and those who are providing material support to the forces that we see directing the violence, including those who are targeting UN peacekeepers or those delivering humanitarian supplies.

This new EO will be a critical new peace to our efforts to hold accountable those who obstruct the peace process and those responsible for violence against civilians. Today's actions are the first designations under this authority, and we expect them to serve as a warning to those engaged in continuing the cycle of violence that has already claimed thousands of lives in South Sudan since December 2013.

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On July 1, 2014, OFAC issued regulations implementing E.O. 13664. 79 Fed. Reg. 37,190 (July 1, 2014). On September 18, 2014, OFAC added two individuals, James Koang Chuol and Santino Deng Wol, to the list of South Sudan designations pursuant to E.O. 13664. 79 Fed. Reg. 61,133 (Oct. 9, 2014).

c. Democratic Republic of the Congo

Effective July 1, 2014, OFAC designated one entity pursuant to E.O. 13413, "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of Congo": ALLIED DEMOCRATIC FORCES. 79 Fed. Reg. 39,065 (July 9, 2014).

On July 8, 2014, President Obama issued E.O. 13671, "Taking Additional Steps to Address the National Emergency With Respect to the Conflict in the Democratic Republic of the Congo." 79 Fed. Reg. 39,949 (July 10, 2014). The introductory paragraph to E.O. 13671 explains the circumstances leading to the order, which amends E.O. 13413:

> in view of multiple United Nations Security Council Resolutions including, most recently, Resolution 2136 of January 30, 2014, and in light of the continuation of activities that threaten the peace, security, or stability of the Democratic Republic of the Congo and the surrounding region, including operations by armed groups, widespread violence and atrocities, human rights abuses, recruitment and use of child soldiers, attacks on peacekeepers, obstruction of humanitarian operations, and exploitation of natural resources to finance persons engaged in these activities…

d. Central African Republic

On May 10, 2014, after the UN Security Council's Central African Republic Sanctions Committee issued new sanctions designations, Ambassador Power delivered a statement on the designations at the UN. Her statement is available at *http://usun.state.gov/briefing/statements/225944.htm*, and includes the following:

> The United States welcomes the decision by the United Nations Security Council's Central African Republic (CAR) Sanctions Committee to impose sanctions on three individuals in CAR. The Committee has designated CAR's former president Francois Bozize, Nourredine Adam, and Levy Yakete for their roles in furthering the crisis that has pushed the Central African Republic to the brink of catastrophe. We will continue to review additional designations of those responsible for undermining stability and tormenting the people of CAR.
>
> Throughout the crisis in CAR, the Security Council has been united both in its repeated condemnations of the horrific violence that has seized the country as well as in its efforts to assist the transitional government courageously led by Catherine Samba-Panza. In three resolutions, the Security Council has worked to facilitate the delivery of humanitarian assistance, authorize the French and African-led MISCA stabilization forces currently in the country, stand up a UN peacekeeping operation, and impose sanctions.

On May 15, 2014, the President issued E.O. 13667, "Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic." 79 Fed. Reg. 28385 (May 15, 2014). The blocking sanctions authorized by the new executive order on CAR respond to:

> the situation in and in relation to the Central African Republic, which has been marked by a breakdown of law and order, intersectarian tension, widespread violence and atrocities, and the pervasive, often forced recruitment and use of child soldiers, which threatens the peace, security, or stability of the Central African Republic and neighboring states, and which was addressed by the United Nations Security Council in Resolution 2121 of October 10, 2013, Resolution 2127 of December 5, 2013, and Resolution 2134 of January 28, 2014.

Id. Section 1 authorizes blocking sanctions on those listed in an annex to the order as well as those subsequently designated by the Secretary of the Treasury, in consultation with the Secretary of State, as having engaged in any of the listed activities that contribute to the crisis in CAR.

Effective July 7, 2014, OFAC issued CAR sanctions regulations implementing E.O. 13667. 79 Fed. Reg. 38,248 (July 7, 2014).

e. Côte d'Ivoire

On April 29, 2014, the Security Council adopted resolution 2153, extending the arms embargo and financial and travel restrictions against Côte d'Ivoire until April 30, 2015. U.N. Doc. S/RES/2153. Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative to the United Nations for Special Political Affairs, delivered an explanation of the U.S. vote in favor of Resolution 2153 on Côte D'Ivoire, which is excerpted below and available at *http://usun.state.gov/briefing/statements/225353.htm*.

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Madame President, the United States voted in favor of this resolution because we fully support the renewal of these sanctions and the mandate of the UN's Group of Experts—both of which constitute an important part of the Council's effort to support peace and stability in Côte d'Ivoire.

We welcome the progress Côte d'Ivoire has made under the leadership of President Ouattara and his government. We also applaud the Ivoirian Government's achievement of the Kimberley Process Certification Scheme's minimum requirements, thereby allowing for the lifting of the embargo on the import of rough diamonds originating in Cote d'Ivoire.

Madame President, despite this progress, however, we note that the security situation in Côte d'Ivoire remains challenging as the country moves into its 2015 electoral cycle. This Council has expressed repeatedly the importance of significant security sector reform, effective demobilization and reintegration of ex-combatants, meaningful reconciliation, and equitable justice for crimes committed during the crisis.

In light of these challenges, the United States had advocated for a more gradual approach to adjusting the arms embargo. We recognize the Government of Côte d'Ivoire's need to build capable and professional security forces. We were concerned, however, by the findings in the Group of Experts report regarding inconsistent compliance with existing arms embargo

procedures. We therefore urge Côte d'Ivoire to tighten its control over arms and ammunition and to continue the important work of security sector reform.

We urge the Council to closely monitor developments on the ground. If the arms embargo modifications in this resolution have any negative repercussions on stability in Cote d'Ivoire, then the Council should be prepared to take appropriate action.

Madame President, Côte d'Ivoire is an important partner of the United States. We look forward to continuing to work with the government and people of Côte d'Ivoire to further the country's peace, stability, and prosperity.

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f. Libya

On March 19, 2014, the UN Security Council adopted Resolution 2146 on Libya, which authorizes sanctions relating to the theft of Libyan oil. Ambassador Power delivered the following U.S. statement on the resolution, available at *http://usun.state.gov/briefing/statements/223709.htm*.

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Libya is in the midst of a difficult political transition after more than 40 years of dictatorship. We stand with those working to build a brighter, democratic future for the Libyan people, and strongly support Libya's efforts to strengthen security, protect human rights, and grow the country's economy. Good stewardship of Libya's oil resources is critical to supporting Libya's successful democratic transition. Libya's oil revenue funds the vast majority of the country's budget, allowing the government to provide security, deliver basic services, and invest in the Libyan people. Theft of Libyan oil is theft from the Libyan people.

Today's resolution will make such theft much more difficult. This measure will allow the international community to impose sanctions on any vessels transporting crude oil without authorization. States are now required to prohibit transactions with respect to such oil on designated vessels. Designated vessels carrying unauthorized Libyan oil are now barred from using any bunkering services or ports. Member States are now authorized to take the necessary and appropriate measures to intervene and secure the return of designated vessels to Libya. These enforcement measures signal to the people and government of Libya that the international community supports Libya's sovereignty and its right to manage its own natural resources.

The United States supports Libyan efforts to address transparently and inclusively all matters of national concern. We urge all UN Member States to swiftly implement the provisions of this resolution in order to deter the actions of those who seek to steal Libyan oil.

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On September 11, 2014, OFAC unblocked the property of Dalene Sanders and removed her from the SDN list. 79 Fed. Reg. 55,869 (Sep. 17, 2014). Sanders had been sanctioned pursuant to E.O. 13566 due to links to a member of the Qadhafi family.

h. Balkans

Effective February 6, 2014, OFAC unblocked the property and interests in property of three individuals who had been subject to E.O. 13219, "Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans," as amended by E.O. 13304 "Termination of Emergencies With Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001." 79 Fed. Reg. 7280 (Feb. 6, 2014).

i. Iraq

On April 29, 2014, OFAC determined that one individual and four entities whose property and interests in property were blocked pursuant to E.O. 13315, "Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions," should be delisted. 79 Fed. Reg. 28,601 (May 16, 2014). The persons whose names were removed from the SDN list and whose property was unblocked are: Kassim ABBAS, S.M.I. SEWING MACHINES ITALY S.P.A., EUROMAC TRANSPORTI INTERNATIONAL SRL, EUROMAC, LTD, and BAY INDUSTRIES, INC.

On May 19, 2014, President Obama continued for another year the national emergency declared with respect to Iraq in E.O. 13303, as modified and relied upon in E.O. 13315, E.O. 13350, E.O. 13364, and E.O. 13438. 79 Fed. Reg. 29,069 (May 21, 2014).

On May 27, 2014, President Obama issued E.O. 13668, "Ending Immunities Granted to the Development Fund for Iraq and Certain Other Iraqi Property and Interests in Property Pursuant to Executive Order 13303, as Amended." 79 Fed. Reg. 31,019 (May 29, 2014). The developments in Iraq that provide the basis for terminating the immunities of the Fund and other property in Iraq are summarized in the introductory paragraph of the order:

> the situation that gave rise to the actions taken in Executive Order 13303 of May 22, 2003, to protect the Development Fund for Iraq and certain other property in which the Government of Iraq has an interest has been significantly altered. Recognizing the changed circumstances in Iraq, including the Government of Iraq's progress in resolving and managing the risk associated with outstanding debts and claims arising from actions of the previous regime, I hereby terminate the prohibitions contained in section 1 of Executive Order 13303 of May 22, 2003, as amended by Executive Order 13364 of November 29, 2004, on any attachment, judgment, decree, lien, execution, garnishment, or other judicial process with respect to the Development Fund for Iraq and Iraqi petroleum,

petroleum products, and interests therein, and the accounts, assets, investments, and other property owned by, belonging to, or held by, in the name of, on behalf of, or otherwise for, the Central Bank of Iraq. This action is not intended otherwise to affect the national emergency declared in Executive Order 13303 of May 22, 2003, as expanded in scope by Executive Order 13315 of August 28, 2003, which shall remain in place. This action is also not intended to affect immunities enjoyed by the Government of Iraq and its property under otherwise applicable law.

8. Reach of Sanctions for Organizations Providing Humanitarian Assistance

On October 17, 2014, OFAC issued guidance related to the provision of humanitarian assistance by not-for-profit non-governmental organizations. OFAC's guidance is excerpted below and available at *www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo_humanitarian.pdf*.

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This memorandum is intended to clarify the reach of economic sanctions for those non-governmental organizations involved in the provision of humanitarian assistance. … OFAC has long had a favorable specific licensing policy supporting the provision of humanitarian assistance notwithstanding economic sanctions, especially in countries subject to comprehensive economic sanctions. OFAC prioritizes requests for licenses to provide humanitarian assistance and endeavors to review such applications expeditiously.

The following guidance applies to transactions by non-governmental organizations that may implicate sanctioned persons or countries.

1. OFAC is fully supportive of the broader U.S. Government approach to facilitating humanitarian assistance. The President's imposition of economic sanctions against regimes or groups carrying out violence against innocent civilians is a complement to—and not in opposition to—the objectives of humanitarian assistance.

2. Consistent with U.S. foreign policy, OFAC issues general licenses where appropriate and prioritizes license applications, compliance questions, and other requests from non-governmental organizations seeking to provide humanitarian assistance.

3. Non-governmental organizations may provide humanitarian assistance in countries that are not subject to comprehensive sanctions (such as Yemen, Iraq, Somalia, South Sudan, or Côte d'Ivoire) without the need for a license from OFAC, so long as they are not dealing with persons blocked by sanctions, such as those listed on OFAC's Specially Designated Nationals and Blocked Persons List (SDNs) or any entity owned 50% or more by blocked persons.

4. Some areas may be dominated by armed groups under circumstances where the group's leaders have been designated by OFAC but the group as a whole has not been designated. An entity that is commanded or controlled by an individual designated by OFAC is not considered blocked by operation of law.

2 Thus, payments—including "taxes" or "access payments"—made to non-designated individuals or entities under the command or control of an SDN do not, in and of themselves, constitute prohibited activity. U.S. persons should employ due diligence, however, to ensure that an SDN is not, for example, profiting from such transactions.

5. In areas dominated by designated armed entities, for example those listed as Specially Designated Global Terrorists, U.S. persons should exercise caution not to provide financial, material, technological, or other services to or in support of the designated entity. In circumstances involving a dangerous and highly unstable environment combined with urgent humanitarian need, OFAC recognizes that some humanitarian assistance may unwittingly end up in the hands of members of a designated group. Such incidental benefits are not a focus for OFAC sanctions enforcement.

6. Finally, if a non-governmental organization is confronted with a situation in which, in order to provide urgently needed humanitarian assistance, the non-governmental organization learns that it must provide funds or material support directly or indirectly to an SDN group that is necessary and incidental to the provision of such humanitarian assistance, the non-governmental organization should reach out to OFAC directly. OFAC and its interagency partners will work with the non-governmental organization to address any such issues on a case-by-case basis in an expeditious manner.

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B. LITIGATION RELATING TO SANCTIONS

See Chapter 15.3.a. for a discussion of *Arab Bank v. Linde*, a case involving claims under the Antiterrorism Act of 1990 brought by victims of terrorism who allege that Arab Bank knowingly supported U.S.-designated foreign terrorist organizations.

C. EXPORT CONTROLS

1. General

On March 16, 2014, Vann Van Diepen, Principal Deputy Assistant Secretary of State for the Bureau of International Security and Nonproliferation ("ISN"), delivered opening remarks for the United States at the 14th International Export Control Conference, held in Dubai, United Arab Emirates. Mr. Van Diepen's remarks are excerpted below and are also available at *www.state.gov/t/isn/rls/rm/2014/223626.htm*. Closing remarks for the United States at the conference were delivered on March 18, 2014 by Simon Limage, ISN Deputy Assistant Secretary of State for Nonproliferation Programs, and are available at *www.state.gov/t/isn/rls/rm/2014/223627.htm*.

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The theme of this conference is Strategic Trade Controls: From Foundations to Practice. So we'll talk about all the layers of a strategic trade control system, from the legal foundations of your export control laws, to the licensing practices and adherence to control lists, to industry outreach and buy-in for trade controls, to well-trained and well-equipped border guards and customs officials at the borders who can spot irregularities, to the cooperation with other countries, and within your own governments to share crucial targeting information.

I will briefly discuss three challenges in managing trade of strategic goods.

First, the size and velocity of legitimate trade is high and growing. In a global economy, sensitive items are produced by more and more companies around the world. And more small and medium enterprises inexperienced with international trading norms are considering entering the export marketplace. The same is true for distribution channels, which have also grown with the global economy. And containerized shipping has accelerated international trade through lower transportation costs and higher cargo load capacity.

Second, our task also is complicated by the increasing interest of proliferators in dual-use items, not just weapons and items only used in weapons. Especially as proliferators move toward indigenous production of weapons, they seek for use in those production programs items that also have equally legitimate commercial applications.

Many of these dual-use items have weapons applications significant enough to warrant control by the multilateral regimes.—.the Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group, and the Wassenaar Arrangement. In addition, however, proliferators seek items that fall just below the threshold of regime controls – in order to avoid those controls. They also seek items with no counterparts on regime lists -- such as basic chemicals, electronics, and structural materials -- that are key building blocks of weapons production programs, just as they are of any industrial activity.

This challenge of identifying and dealing with those relatively few listed and unlisted dual-use items intended for proliferation programs hiding in a sea of such items for legitimate uses requires catch-all authorities, information-sharing (both domestically and internationally), and industry outreach – all issues that we will be addressing over the next few days.

Third, we all face the challenge of improving our ability to search, seize, investigate and prosecute trade control law violations with minimal impact on the high volume of otherwise legitimate trade. Given that various UN Security Council Resolutions provide us the legal authority to search, seize, and dispose of a wide array of proliferation sensitive good to and from proliferant countries, we need to ask ourselves what types of targeting and enforcement mechanism will help us uncover violations? How can prosecutions help to deter future proliferators? How can states provide incentives to their enforcement personnel to uncover elicit diversions, without fear that those enforcement personnel will unduly hamper legitimate trade? Without proper regulation of transshipment activities, transshipment hubs will continue to be the prime target for this kind of proliferation- related trade. These circumstances compel regulators and enforcement agencies to find technically feasible and economically viable ways to fight back.

Common Obligations

We have to build a network of non-proliferators to counter the threat to national security and global trade from rogue state and non-state actors. This is a challenge that no one nation can solve on its own. We all share a responsibility for global security and economic prosperity; therefore we are all part of this network.

We have common international obligations to help meet these threats. Through the Non-Proliferation Treaty, UN Security Council Resolution 1540, the nonproliferation and terrorism sanction resolutions, the multilateral control regimes, the World Customs Organization (WCO), and the Proliferation Security Initiative (PSI), the international community has adopted a strengthened system to counter these threats.

This is further strengthened by the valuable outreach efforts of these organizations and initiatives. …

The Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group, and the Wassenaar Arrangement contain international suppliers' standards for implementing nonproliferation export controls. Their control lists are referred to in UNSCR 1540. In many cases the regimes' control lists are also incorporated into other UN Security Council resolutions, such as those concerning Iran and North Korea. These resolutions create specific obligatory limits on commerce with countries, individuals, and entities that have engaged in proliferation.

UN Security Council Resolutions provide a legal basis for countries to undertake measures within their territories to search, seize, and dispose of a wide array of proliferation sensitive goods moving in or out of proliferant countries. Since the adoption of UNSCR 1540 in 2004, I am pleased to note that many of the countries represented in this room have made progress in meeting their 1540 obligations with respect to developing strategic trade controls.

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2. Resolution of Export Control Violations

a. Esterline Technologies Corporation

On March 6, 2014, the State Department announced the conclusion of an administrative settlement with Esterline Technologies Corporation of Bellevue, Washington. Due to Esterline's cooperation in reaching the settlement, the Department determined that administrative debarment was not appropriate. A Department media note, available at *www.state.gov/r/pa/prs/ps/2014/03/223052.htm*, summarizes the agreement reached to address violations of the Arms Export Control Act ("AECA") (22 U.S.C. § 2778) and the International Traffic in Arms Regulations ("ITAR")(22 C.F.R. parts 120-130), including the payment of a $20 million civil penalty:

> … Over the course of many years, Esterline and its operating divisions, subsidiaries, and business units disclosed to the Department hundreds of alleged AECA and ITAR violations consisting of unauthorized exports of defense articles, including technical data, and defense services; unauthorized temporary imports of defense articles; violations of terms and conditions of licenses or approvals granted; exports of defense articles in excess of quantity and value authorized; improper use of exemptions; and failure to file or filing of incorrect documentation with the Automated Export System.

> …[M]any of these alleged violations occurred because Esterline did not properly establish jurisdiction over its defense articles and technical data, did not properly administer licenses and agreements, and had incomplete or poor recordkeeping. The alleged violations involved defense articles, technical data, and defense services that are or were controlled at the time of the alleged violations by the U.S. Munitions List …
>
> Under the terms of a three year Consent Agreement with the Department, Esterline will pay a civil penalty of $20 million. The Department agreed to suspend $10 million of this amount on the condition the Department approves expenditures for self-initiated, pre-Consent Agreement remedial compliance measures and Consent Agreement-authorized remedial compliance costs. Additionally, Esterline will engage a Special Compliance Official to oversee the Consent Agreement, and Esterline will conduct two audits of its compliance program as well as implement additional compliance measures, such as improved policies and procedures, and additional training for employees and principals.

b. Intersil

On June 18, 2014, the State Department announced that it reached an administrative settlement agreement resolving alleged AECA and ITAR violations by Intersil Corporation of California. See Department media note, available at *www.state.gov/r/pa/prs/ps/2014/06/227845.htm*. Due to Intersil's cooperation, administrative debarment was deemed inappropriate in this case. The media note provides further details regarding the findings of the compliance review and details of the settlement:

> DDTC's compliance review concluded that many of these alleged violations occurred because Intersil did not properly establish ITAR jurisdiction over its radiation hardened and tolerant integrated circuit commodities. These commodities are defense articles controlled on the U.S. Munitions List under Category XV(d) and (e). Certain commodities were exported, re-exported, or retransferred to entities on DDTC's Watch List. Some of these entities were known front companies for or diversion points to countries proscribed under ITAR Section 126.1. These transactions were contrary to U.S. foreign policy and potentially harmed U.S. national security.
>
> Under the terms of a two year Consent Agreement with the Department, Intersil will pay a civil penalty of $10 million. The Department agreed to suspend $4 million of the penalty amount on the condition the Department approves expenditures for self-initiated, pre-Consent Agreement remedial compliance measures and Consent Agreement-authorized remedial compliance costs. Additionally, Intersil will establish an Internal Special Compliance Official position

> at the company to oversee the Consent Agreement, and Intersil will conduct two audits of its compliance program as well as implement additional compliance measures, such as improved policies and procedures, and additional training for employees and principals.

c. Debarment

On June 4, 2014, the State Department administratively debarred Carlos Dominguez and his companies, Elint, S.A., Spain Night Vision, S.A. and SNV, S.A., for a period of three years after a default order on charges of violating the AECA and ITAR in relation to the unauthorized re-export and retransfer of night vision devices and related technical data. 79 Fed. Reg. 35,210 (June 19, 2014).

2. Export Control Reform

In 2014, the U.S. Government continued to issue new rules to carry out extensive export control reforms. See *Digest 2013* at 515-16 for a discussion of the initial sets of new rules reforming U.S. export controls. On January 2, 2014, the Department of State issued a final rule, effective July 1, 2014, amending the International Traffic in Arms Regulations ("ITAR") to revise five more U.S. Munitions List ("USML") categories and provide other changes. 79 Fed. Reg. 34 (Jan. 2, 2014). As described in the Federal Register notice:

> Pursuant to the President's Export Control Reform (ECR) initiative, the Department published proposed revisions to thirteen USML categories—and upon the effective date of this rule will have revised fifteen USML categories—to create a more positive control list and eliminate, where possible, "catch all" controls in the USML.

Cross References

Visa restrictions and limitations, **Chapter 1.C.4.**
Foreign terrorist organizations, **Chapter 3.B.1.d.**
Institutions of primary money laundering concern, **Chapter 3.B.4.**
Organized crime, **Chapter 3.B.5.**
Designations under the International Religious Freedom Act, **Chapter 6.L.1.a.**
Attachment of blocked assets, **Chapter 10.A.4.**
Arab Bank v. Linde*,* **Chapter 15.3.a**.
Central African Republic, **Chapter 17.B.4.**
South Sudan, **Chapter 17.B.6.**
Iran, **Chapter 19.B.10.b.**
Russia/Ukraine, **Chapter 19.B.10.c.**
Implementation of UNSCR 1540, **Chapter 19.C.**

CHAPTER 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

On April 29, 2014, Ambassador Samantha Power, U.S. Permanent Representative to the UN, delivered remarks at a Security Council open debate on the Middle East. Ambassador Power first addressed Israeli-Palestinian issues and, in particular, the pause in the peace negotiations. That portion of her remarks appears below. The remarks in their entirety are available at *http://usun.state.gov/briefing/statements/225356.htm*.

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The United States recognizes that the path to a comprehensive peace settlement in the Middle East is littered with obstacles. But we also believe that the goal is as essential as the process is turbulent. For this reason, we will continue to support negotiations between the parties. However, ultimately the choice is up to the leaders and their people. None of us can make the difficult decisions required for peace and the parties have decided to take a pause in the negotiations. We have clearly reached a difficult moment, but we continue to believe that there is only one real viable solution for the Israeli-Palestinian conflict: two states living side by side in peace and security. And if the parties are willing to go down the path—this path—we will be there to support them.

In this connection, we are grateful for the strong support the negotiations have received from the Arab League, the European Union, the Quartet, and other key partners. We will continue to look to you for support in the weeks and months ahead.

Regarding the recent announcement by Fatah and Hamas that they intend to form a technocratic government to prepare for new elections, the timing of the announcement was clearly unhelpful in terms of efforts that were underway between the parties to reach an agreement on extending the negotiations. The United States and the other members of the Quartet have been clear about the principles that must be accepted by a Palestinian government

in order for it to achieve peace and build an independent Palestinian state. These principles have not changed. Any Palestinian government must unambiguously and explicitly commit to nonviolence, recognition of the State of Israel, and acceptance of previous agreements and obligations between the parties. President Abbas has been committed to these principles and has declared that any government he forms will be committed in the same way. If a new Palestinian government is formed, we will assess it based on its composition and actions as well as its adherence to these principles.

We continue to oppose unilateral actions that seek to circumvent or prejudge outcomes that can be negotiated only between the parties, including efforts to enhance Palestinian claims to statehood absent a negotiated final status agreement.

Similarly, we continue to view Israeli settlements in the West Bank as illegitimate and oppose any efforts to establish new settlements, expand existing ones, or legalize settlement outposts.

Our positions on other aspects of the process are also well known and have not changed.

The United States remains deeply concerned by the uptick in tensions and violence at the Temple Mount / Haram al-Sharif compound around the Passover and Easter holidays and urges all parties to redouble efforts to reduce tensions, while maintaining the status quo. We continue to maintain high-level engagement on this issue.

My government also condemns other acts of violence, including rocket strikes into Israel from the Gaza Strip, the April 14 murder of an Israeli police official, and settler attacks and demolitions directed against Palestinian civilians in the West Bank. We call upon all concerned to avoid incidents that might make further disturbances more likely. We look to the authorities on both sides to investigate and hold accountable persons responsible for acts of violence. We also call on both sides to respect the terms of the November 2012 ceasefire involving Israel and Gaza.

In addition, the United States remains troubled by the humanitarian situation in Gaza. Several UN relief projects, which are important to improving the conditions there, are still awaiting Israeli approval. We urge all parties to continue to work together to increase the access of humanitarian supplies into that area.

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On November 25, 2014, Ambassador Power addressed the UN General Assembly on the situation in the Middle East. Ambassador Power expressed regret at the numerous General Assembly resolutions targeting Israel, but was also critical of steps by the Israeli government that run counter to the peace process. Ambassador Power's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/234426.htm*.

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Like everyone in this assembly hall, we are deeply concerned about the volatile situation in the Middle East. The United States has made an enormous effort, especially over the last year and a half, to work with the parties in trying to pave the road towards achieving a negotiated final-status agreement allowing two states to live side-by-side in peace and security.

In this context, the United States remains profoundly troubled by the repetitive and disproportionate number of one-sided General Assembly resolutions condemning Israel—a total of 18 this year. This grossly one-sided approach damages the prospects for peace by undermining trust between parties and damaging the kind of international support critical to achieving peace. All parties to the conflict have direct responsibilities for ending it, and we are disappointed that UN Members continually single out Israel without acknowledging the responsibilities and difficult steps that must be taken on all sides. These unbalanced, one-sided resolutions set back our collective efforts to advance a peaceful resolution to the conflict in the Middle East, and they damage the institutional credibility of the United Nations.

Of these annual resolutions, which unfairly single out one country and consistently lack balance, three are particularly troubling to the United States: the "Division for Palestinian Rights of the Secretariat;" the "Committee on the Exercise of the Inalienable Rights of the Palestinian People;" and the "Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories." These resolutions renew mandates for UN bodies established decades ago, wasting valuable resources and reinforcing the perception of systematic UN bias against Israel. All member states should evaluate the effectiveness of supporting and funding these bodies.

I do want to add that our continued opposition to the resolution on "Israeli Settlements in the Occupied Palestinian Territory, including Jerusalem, and the Occupied Golan," which will come up for a vote in this Assembly next month, should not be understood to mean that we support settlement activity. On the contrary, we reject in the strongest terms Israeli settlements in territories occupied in 1967. Settlements are illegitimate, and they damage Israel's security and the hopes for peace.

Continued settlement activity is contrary to Israel's stated goal of negotiating a permanent status agreement with the Palestinians and is inconsistent with Israel's international commitments.

During the past year, we have been deeply concerned by Israel's advancement of plans for thousands of additional housing units in the West Bank and East Jerusalem. We have made clear that such action only draws condemnation from the international community, poisons the atmosphere not only with the Palestinians but also with the very Arab governments with which the Israeli government says it wants to build relations, and undermines the prospect for a peaceful negotiated agreement with the Palestinians.

Both sides took unhelpful steps that undercut the most recent round of final status negotiations. The scale and timing of Israel's settlement activities contributed significantly to the erosion of trust between the parties.

The United States is in full agreement about the urgent need to resolve the conflict between Israel and the Palestinians, based on the two-state solution and an agreement that establishes a viable, independent, and contiguous state of Palestine, once and for all. We've invested a tremendous amount of effort and resources in pursuit of this shared goal, and we firmly believe that the parties need to resolve the conflict through direct negotiations. If the

parties are willing and ready to take that step, we stand ready to support them and to continue our efforts to advance the cause of peace.

In closing, while the United States unequivocally rejects Israeli settlements in territories occupied in 1967, they do not justify the repetitive, disproportionate, and one-sided General Assembly resolutions condemning Israel, which do not advance our collective efforts to advance a peaceful resolution to the conflict.

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On December 30, 2014, Ambassador Power again addressed the Security Council on the situation in the Middle East, delivering the explanation of the U.S. vote against a resolution on the Palestinian question. Ambassador Power's remarks are excerpted below and available in full at *http://usun.state.gov/briefing/statements/235547.htm*.

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In recent years, no government has invested more in the effort to achieve Israeli-Palestinian peace than the United States. Peace—however difficult it may be to forge—is too important to give up on. As we were reminded this summer in Gaza, and as we've been reminded too painfully recently in Jerusalem and the West Bank, the human consequences of ensuing cycles of violence are too grave. The United States every day searches for new ways to take constructive steps to support the parties in making progress toward achieving a negotiated settlement.

The Security Council resolution put before us today is not one of those constructive steps; it would undermine efforts to get back to an atmosphere that makes it possible to achieve two states for two people.

Regrettably, instead of giving voice to the aspirations of both Palestinians and Israelis, this text addresses the concerns of only one side. It is deeply imbalanced and contains many elements that are not conducive to negotiations between the parties, including unconstructive deadlines that take no account of Israel's legitimate security concerns. In addition, this resolution was put to a vote without a discussion or due consideration among Council members, which is highly unusual, especially considering the gravity of the matter at hand. We must proceed responsibly, not take actions that would risk a downward spiral.

We voted against this resolution not because we are comfortable with the status quo. We voted against it because we know what everyone here knows, as well—peace will come from hard choices and compromises that must be made at the negotiating table. Today's staged confrontation in the UN Security Council will not bring the parties closer to achieving a two-state solution.

We voted against this resolution not because we are indifferent to the daily hardships or the security threats endured by Palestinians and Israelis, but because we know that those hardships will not cease and those threats will not subside until the parties reach a comprehensive settlement achieved through negotiations. This resolution sets the stage for more division—not for compromise. It could well serve to provoke the very confrontation it purports to address.

For decades, the United States has worked to try to help achieve a comprehensive end to the Israeli-Palestinian conflict, and we remain committed to achieving the peace that both Palestinians and Israelis deserve: two states for two peoples, with a sovereign, viable, and independent Palestine living side-by-side in peace and security with a Jewish and democratic Israel.

The United States does not just acknowledge the tremendous frustrations and disappointments on both sides over the years in pursuit of peace; we share them. And we understand the immense challenges the parties need to overcome to make peace a reality. Yet at the same time, we firmly believe the status quo between Israelis and Palestinians is unsustainable.

The United States recognizes the role that this Council has played before in advancing a sustainable end to the Israeli-Palestinian conflict, including through resolutions 242, 338, and 1515, which calls for the creation of a Palestinian state alongside Israel, with both states "living side-by-side within secure and recognized borders." In a May 2011 speech, President Obama elaborated further that "the United States believes that negotiations should result in two states, with permanent Palestinian borders with Israel, Jordan, and Egypt, and permanent Israeli borders with Palestine…based on the 1967 lines with mutually agreed swaps, so that secure and recognized borders are established for both states." He made clear that the "Palestinian people must have the right to govern themselves, and reach their full potential, in a sovereign and contiguous state."

The United States will continue reaching out to the parties in an effort to find a way forward, and we are ready to engage and support them when they are ready to return to the table. And we will continue to oppose actions by both sides that we view as detrimental to the cause of peace, whether those actions come in the form of settlement activity or imbalanced draft resolutions in this Council. The parties have a responsibility to negotiate and to own the hard choices that will be needed if they are to bring real and long-overdue change to their region to benefit their people.

Today's vote should not be interpreted as a victory for an unsustainable status quo. Instead, it should serve as a wake-up call to catalyze all interested parties to take constructive, responsible steps to achieve a two-state solution, which remains the only way to bring an end to the ongoing cycle of violence and suffering. We hope that those who share our vision for peace between two states—Israel and Palestine, both secure, democratic, and prosperous—will join us in redoubling efforts to find a path forward that can rally international consensus, advance future negotiations, and provide a horizon of hope for Palestinians and Israelis alike. Thank you.

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B. PEACEKEEPING AND CONFLICT RESOLUTION

1. Syria

a. Security Council

On February 22, 2014, the UN Security Council adopted resolution 2139 on access for humanitarian assistance to Syria. Ambassador Power delivered the explanation of vote for the United States, available at

http://usun.state.gov/briefing/statements/221922.htm, and excerpted below. Ambassador Power delivered a subsequent, additional statement on the resolution, after it was adopted unanimously, which is available at http://usun.state.gov/briefing/statements/221926.htm.

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… At long last the Security Council has spoken clearly and unanimously about the devastating humanitarian catastrophe unfolding in Syria. For a body that has long been too divided to acknowledge even the basic facts of the horror in Syria, today's resolution is a long overdue and altogether necessary step towards reality.

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It is remarkable to the world that it has taken three years for the Security Council to recognize basic facts and to call for such basic principles of humanity, simply that Syrians in need should not be held under siege, that they should not be bombed by barrel bombs, that they should not be starved. It is a gross understatement to say it should not have taken this long.

This resolution is important for two reasons. It has a clear demand for specific and concrete actions and it is a commitment to act in the event of non-compliance. It was a difficult resolution to obtain, but it should not have been. Many of the issues that come before this body are complicated; this is not.

It is because the United States believes that civilians should not be starved, should not be bombed, and should not be denied access to the most basic things required to sustain life that we welcome today's action by the Security Council. It is now our fervent hope that this Council will show similar courage to ensure that our unanimous demands result in changes to ease the suffering, especially for the hundreds of thousands of civilians who have been encircled by snipers and trapped in besieged communities.

Our goal here today is to ensure that help is received by people who will die without it—and that innocent civilians are not killed while waiting for that assistance to arrive.

It remains to be seen whether our action today will have the beneficial results we intend. Given its track record to date, the Syrian regime can be trusted only to deny what it has done and lie about what it will do. Accordingly, I call upon all Council members, and all members of the international community, to join in pressing Damascus—and any actor who fails to comply—to fulfill the terms of this resolution on a comprehensive and urgent basis. There should be no more broken promises, no more delays, and no more coupling minor concessions with crimes that are so horrific, so systematic, and so recurrent that they have lost some of their power to shock the conscience.

Today, this Council has achieved consensus. Now we must insist upon action. Our common security, our common humanity, and our collective conscience demand nothing less.

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Secretary Kerry also issued a press statement on Security Council resolution 2139 on Syria, available at *www.state.gov/secretary/remarks/2014/02/221925.htm* and excerpted below.

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This could be a hinge-point in the tortured three years of a Syria crisis bereft of hope. This overdue resolution, if fully implemented, will ensure humanitarian aid reaches people in Syria whose very lives depend on it. This is all about saving innocent lives and relieving the burden on Syria's neighboring countries.

After three years of slaughter and savagery, people rightfully will question whether progress is possible, but this resolution holds the promise of something real. The proof is on paper. By naming the areas in Syria where sieges must be lifted, demanding that hospitals, schools and other places where civilians gather must be demilitarized, insisting that aid must be allowed to cross borders and follow the most direct routes to the suffering, and by underscoring that attacks against civilians, including barrel bombing, must end, the international community hasn't minced words. This is a resolution of concrete steps to answer the worst humanitarian crisis in the world today.

But these steps are only first steps. Just as shipments of humanitarian aid mean little without access to beleaguered areas, resolutions demanding access mean little without full implementation. The test is whether the words of the Security Council are matched with the life-saving actions the Syrian people so desperately and urgently need.

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On July 14, 2014, the Security Council adopted another resolution on access for humanitarian assistance in Syria. U.N. Doc. S/RES/2165. In resolution 2165, the Security Council decided that UN humanitarian agencies and their implementing partners are authorized to use certain border crossings and routes across conflict lines without the consent of the Syrian authorities to ensure that humanitarian assistance reaches people throughout Syria. Ambassador Power delivered the U.S. explanation of vote on Resolution 2165, excerpted below and available at *http://usun.state.gov/briefing/statements/229230.htm*. The Security Council renewed this decision and others from resolution 2165 in resolution 2191 in December 2014.

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The Assad regime has, until now, refused to allow United Nations humanitarian assistance to flow through border crossings it does not control, something members of this Security Council address with this resolution. By adopting this resolution, the Council has opened four crossings to UN humanitarian agencies and their implementing partners without the need for approval from the regime. These humanitarian agencies will increase the supply of life-saving aid, including food to eat and medicine to care for the sick and injured. If implemented fully, this

resolution will allow critical aid to reach up to two million Syrians who have been denied adequate assistance for the past year, and suffered immeasurably as a result. This resolution also authorizes the UN to cross conflict lines between regime and opposition forces to deliver aid, and the Syrian regime, which is systematically denying cross line humanitarian assistance, must heed this obligation.

In addition, the resolution adopted today establishes a UN monitoring mechanism under the authority of the Secretary-General, and with the consent of Syria's neighbors, to monitor the UN's aid consignments in order to confirm that they indeed contain humanitarian aid. This mechanism conforms with the Secretary General's proposal, and the resolution stipulates that inspections will occur at the facilities in neighboring countries. We are grateful to Syria's neighbors for their crucial cooperation in this effort, and their tremendous generosity in helping respond to this massive humanitarian crisis.

Yet even as we recognize the promise this resolution holds for reaching more people in need, we must not forget that it should have never required a Security Council resolution for a government to allow food and medicine to reach millions of families whose lives have been hanging in the balance. Yet when the UN requested such permission over the last year, their letters went unanswered, their requests rejected. The Assad regime has seized every opportunity to make it more—and not less—difficult to provide such crucial assistance to civilians in dire need. Instead of opening paths for aid, it has deliberately closed them. Rather than providing free and unfettered humanitarian access to all Syrians, it has used the denial of aid—and the starvation, sickness, and misery it imposes—as yet another weapon in its cruel and devastating arsenal against opposition-held areas.

The effectiveness of today's resolution will depend on the efforts and cooperation of many parties. Those parties include the United Nations and international humanitarian agencies, which have made clear their interest in using these crossings. They also include us as members of the Security Council, who must ensure that this resolution is fully enforced. This Council must be prepared to take decisive action should the parties to the conflict, particularly the Assad regime, fail to comply with it.

To this end, I would remind the Syrian regime that, under article 25 of the UN Charter, Syria is obligated to accept and carry out the decisions made by the Security Council in this resolution.

At a time when many are raising questions about the ability of this Council to fulfill its purpose regarding Syria, we have shown again today that we can come together and take action against the horrific crisis in Syria.

In September of last year, we stood together in demanding that the Assad regime end its use of chemical weapons against the Syrian people. Today, 100 percent of declared chemical weapons in Syria have been removed from the country.

In February, we stood together in calling on the Syrian regime to allow free and unfettered access for humanitarian assistance and to end the systematic besieging of civilian areas, yet this resolution went largely unheeded.

Today, we are taking steps to ensure that our resolution from February has a real impact on the ground unlocking the impediments that stand in the way of cross-border assistance. There is other unfinished work from that resolution including ending the systematic targeting of medical facilities and schools and the monstrous use of barrel bombs against civilian areas.

The Council must now take the cooperation and unity we have shown today and bring it to bear in ensuring the end of the horrors being perpetrated against the Syrian people.

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b. International cooperation outside of the Security Council

On January 31, 2014 senior officials from Egypt, France, Germany, Italy, Jordan, Qatar, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom and the United States ("the London 11") met in Geneva with the Syrian opposition delegation led by the Syrian National Coalition in what is referred to as "Geneva II." The communiqué adopted by the core group at the conference is excerpted below and available at *www.state.gov/r/pa/prs/ps/2014/01/221088.htm*.

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1. We appreciate the efforts of the Joint Special Representative Brahimi and his team to lay the foundations of negotiations between the Syrian regime and the Syrian opposition delegations. The UN [Secretary General] has convened the parties to the Geneva II Conference with the aim of achieving a political transition on the basis of the Geneva Communiqué which will preserve the sovereignty, independence, unity and territorial integrity of Syria. As reiterated by the UNSG at the Montreux Conference, the transition should begin with the formation, by mutual consent, of a transitional governing body with full executive powers, including control over security, intelligence and military apparatuses. The negotiations are to form without delay a transitional governing body with full executive powers in full implementation of the Geneva Communiqué.

2. We welcome the courageous decision taken by the Syrian National Coalition to come to Geneva, and the constructive approach the opposition delegation has adopted throughout the first round of negotiations. We encourage the Coalition to pursue its efforts in this direction and to keep broadening the basis of the opposition delegation as well as to continue actively reaching out to all Syrians. We are fully committed to support this process.

3. The regime must adopt a clear position by endorsing the Geneva Communiqué and commit to the objective of the Conference as stated in the invitation letter of the UN Secretary General and as requested by the countries present in Montreux. The regime is responsible for the lack of real progress in the first round of negotiations. It must not further obstruct substantial negotiations and it must engage constructively in the second round of negotiations. We ask all those who have influence on it to engage to create the conditions for the process to succeed.

4. We express outrage at the maintaining, by the regime, of its "starve or surrender" strategy which in particular deprives hundreds of thousands of people in the suburbs of Damascus, in the old city of Homs and elsewhere, from receiving food and medicine, and at the arbitrary detention of tens of thousands of civilians. It is all the more important that the Geneva II process lead to tangible and immediate benefits to the Syrian people. We call on the international community to use all its influence to secure full humanitarian access throughout Syria without delay. The regime must let UN convoys have access to the old city of Homs, as proposed by the UN and accepted by the opposition.

5. We condemn in the strongest terms the continued use of "barrel bombs", ballistic missiles and heavy artillery by the regime against the Syrian people, in full contradiction with the Geneva process as well as basic human rights principles.

6. We reiterate the right of the Syrian people to defend itself. In this vein, we commit to support the opposition groups respecting democratic and pluralistic values, as stated in the national covenant adopted by the opposition in July 2012, recognizing the political authority of the Syrian National Coalition and accepting the prospect of a democratic transition. We fully back the opposition groups in their action against Al-Qaeda affiliated groups. We condemn the presence of foreign fighters in Syria, both those fighting with the regime such as Hezbollah and other Iranian backed forces, and those fighting within other extremist groups. We call on the international community to do their part to ensure that the extremists don't deny the Syrian people the opportunity to realize their democratic aspirations.

7. The Geneva II Conference aims to allow the Syrian people to control its future through a genuine political transition. It is of utmost importance that these goals should be reached. *http://www.state.gov/r/pa/prs/ps/2014/01/221121.htm*

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On February 16, 2014 as the Geneva talks came to an end, Secretary Kerry issued a press statement, criticizing the Assad regime for obstructing progress in the talks. The Secretary's statement is excerpted below and available at *www.state.gov/secretary/remarks/2014/02/221702.htm*.

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There's no recess in the suffering of the Syrian people, and the parties and the international community must use the recess in the Geneva talks to determine how best to use this time and its resumption to find a political solution to this horrific civil war.

None of us are surprised that the talks have been hard, and that we are at a difficult moment, but we should all agree that the Assad regime's obstruction has made progress even tougher. It was an example to all the world that while the regime obstructed and filibustered, the opposition demonstrated a courageous and mature seriousness of purpose and willingness to discuss all aspects of the conflict. They put forward a viable and well-reasoned roadmap for the creation of a transitional governing body and a viable path by which to move the negotiations forward. That's precisely the spirit of the Geneva I Communique, and we commend the opposition for responsibly meeting its spirit.

The opposition delegation has regularly demonstrated that they are willing to engage constructively in the interests of all the Syrian people. In sharp contrast, we have seen a refusal to engage on the part of the regime. While it stalled in Geneva, the regime intensified its barbaric assault on its civilian population with barrel bombs and starvation. It has even gone as far as to add some of the opposition delegates at Geneva to a terrorist list and seize their assets. This is reprehensible.

The international community understands that the primary purpose of our diplomacy is to discuss the full implementation of the Geneva communique, including the creation of a transitional governing body. The Syrian people deserve no less. We call on the regime's supporters to press the regime. In the end, they will bear responsibility if the regime continues with its intransigence in the talks and its brutal tactics on the ground.

The United States deeply appreciates the efforts of Joint Special Representative Brahimi to secure a negotiated political transition. We remain committed to the Geneva process and to all diplomatic efforts to find a political solution as the only way to a lasting and sustainable end to the conflict.

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On April 3, 2014, the London 11 Countries issued another joint statement on Syria, available at *www.state.gov/r/pa/prs/ps/2014/04/224358.htm* and set forth below.

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The core group of the Friends of Syrian People—including Egypt, France, Germany, Italy, Jordan, Qatar, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom, and the United States—continues to support the efforts of Joint Special Representative Brahimi to mediate a political solution between both sides and calls upon the Syrian regime to cease its obstruction of the Geneva process by clearly endorsing all elements of the Geneva Communique, which was enshrined in Security Council Resolutions 2118 and 2139 and reaffirmed by the United Nations and the international community at the Montreux conference.

As previously stated by the core group of the Friends of the Syrian People in January 2014 and recently by Joint Special Representative Brahimi, any unilateral decision by the Syrian regime to hold presidential elections would be entirely inconsistent with the Geneva Communique's call for the establishment of a transitional governing body to oversee constitutional reforms leading to free and fair elections in a neutral environment. Elections organized by the Assad regime would be a parody of democracy, would reveal the regime's rejection of the basis of the Geneva talks, and would deepen the division of Syria.

Recent actions by the Assad regime to pave the way for presidential elections in the coming months, including the promulgation of a new electoral law, have no credibility. Bashar al-Assad intends these elections to sustain his dictatorship. They would be conducted in the midst of a conflict, only in regime-controlled areas, and with millions of Syrians disenfranchised, displaced from their homes, or in refugee camps. An electoral process led by Assad, who the United Nations considers to have committed war crimes and crimes against humanity, mocks the innocent lives lost in the conflict.

The best way out of Syria's crisis is a political solution based on the full implementation of the Geneva Communique. This requires the Syrian regime to accept the agenda and sequencing laid out by Joint Special Representative Brahimi as a condition for the resumption of talks: (i) violence and terrorism; (ii) transitional governing body; (iii) national institutions; and (iv) national reconciliation. As Joint Special Representative Brahimi has stated, items (i) and (ii) must be discussed in parallel, and there must be genuine engagement on the creation of a transitional governing body.

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c. U.S. Assistance

On January 17, 2014, the State Department issued a fact sheet, available at *www.state.gov/r/pa/prs/ps/2014/01/220029.htm*, describing U.S. assistance and support for a transition in Syria. On September 29, 2014, the State Department issued an updated fact sheet on U.S. assistance and support for the transition in Syria. The September 29 fact sheet is available at *www.state.gov/r/pa/prs/ps/2014/09/232266.htm* and is excerpted below.

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The United States supports the Syrian people's struggle for a democratic, inclusive, and unified Syria. The regime of Bashar al-Assad violently suppressed what began as a peaceful protest movement in Dar'a in March 2011, and Assad has proven through his brutal and repressive tactics that he has lost all legitimacy. His continued tenure only fuels extremism and inflames tensions throughout the region.

The United Nations estimates that more than 191,000 people have been killed since the unrest and violence began three years ago. The number of civilians fleeing Syria and seeking refuge in neighboring countries has increased sharply as violence has escalated. More than 3 million people are now refugees in neighboring countries while, inside Syria, nearly 6.5 million people are displaced and nearly 11 million people are in need of humanitarian assistance. Despite the improved UN access following adoption of UN Security Council Resolution 2165, the UN and others in the humanitarian community continue to face significant challenges reaching many people in need in Syria. Obstruction and ongoing violence by the regime, opposition, and terrorist groups are continuing to hinder the delivery of urgent, life-saving assistance to those in need inside Syria. All parties to the conflict in Syria must allow safe, unfettered access to all in need.

To help those affected by the crisis in Syria, the United States has contributed more than $2.9 billion in humanitarian assistance—the most from any single donor. These resources support international and non-governmental organizations assisting those affected by the conflict both inside Syria and across the region.

The United States is also providing $330 million in non-lethal support to the moderate Syrian opposition. This non-lethal assistance is helping the Syrian Opposition Coalition (SOC), local opposition councils, and civil society groups provide essential services to their communities, extend the rule of law, and enhance stability inside liberated areas of Syria. These funds are also being used to provide non-lethal assistance to vetted, moderate opposition units, which are fighting both the Assad regime and violent extremist groups, notably the Islamic State of Iraq and the Levant (ISIL), on behalf of the Syrian people.

Diplomatic Support

The United States continues to work vigorously to advance a political transition in Syria. Efforts to reach a diplomatic solution to the Syrian crisis are based on the Final Communiqué of the 30 June 2012 Action Group meeting in Geneva. The process set forth by the Communiqué is supported by the United States and the broad partnership of nations known as the "London 11," which are pressing for a negotiated political solution to the Syria conflict. After two rounds of

UN-sponsored negotiations in Geneva, the Assad regime's refusal to engage meaningfully in talks stalled progress towards reaching a political settlement to the Syrian crisis.

Simultaneous diplomatic efforts are helping coordinate the provision of assistance with other partners and allies in support of the moderate Syrian opposition. Diplomatic efforts also seek to isolate the regime further, both politically and economically through comprehensive sanctions; to support the Syrian people's calls for an end to the conflict; and to reinforce the moderate Syrian opposition's ability to act as a counterweight to the regime and ISIL.

The United States remains firmly committed to the elimination of Syria's chemical weapons arsenal, a grave danger to the Syrian people and their neighbors. Since September 2013, as outlined in UN Security Council Resolution 2118, the international community cooperated to remove and destroy Syria's declared chemical weapons stockpiles. Less than one year later, in August 2014, under the leadership of the Organization for the Prohibition of Chemical Weapons (OPCW)-UN Joint Mission, the deadliest chemical weapons in the Assad regime's declared stockpile have been destroyed. The United States contributed tens of millions of dollars in assistance to the OPCW-UN Joint Mission, including outfitting a U.S. ship with hydrolysis technology to neutralize safely at sea the most dangerous of Syria's chemical agents and precursors. We are grateful for the OPCW-UN Joint Mission's leadership and for the contributions of the entire international coalition in reaching this unprecedented achievement. Although this advances our collective goal to ensure that the Assad regime cannot use its declared chemical arsenal against the Syrian people or Syria's neighbors, serious questions remain with respect to the omissions and discrepancies in Syria's declaration to the OPCW and reports of continued use of chlorine as a weapon by the Assad regime. These concerns must be addressed, and we will work closely with the OPCW and the international community to ensure these open issues are fully resolved and that the Assad regime is held accountable for any failure to meet its obligations.

Humanitarian Assistance

The United States and the international community are working tirelessly to provide humanitarian assistance to those affected by the brutal conflict in Syria. One-half of our $2.9 billion in humanitarian assistance is being distributed to organizations working inside Syria; the balance is going to assist refugees and to the communities that host them.

For those affected by the crisis inside Syria and in neighboring countries, the United States is providing medical care and supplies, shelter, childhood immunizations, food, clean water, relief supplies, and access to education and protection—including activities to prevent and respond to gender-based violence . U.S. assistance supports the activities of UN agencies—including the United Nations High Commissioner for Refugees (UNHCR), the World Food Program (WFP), the United Nations Children's Fund (UNICEF), and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) – and numerous non-governmental organizations, in Syria and neighboring countries.

In response to growing incidents of gender-based violence during the conflict, the United States is also providing psychological and social support for women and children from Syria through women's health centers, mobile clinics, and outreach workers.

Within Syria, U.S. humanitarian assistance is reaching more than 4.5 million people across all 14 of the country's governorates through the United Nations, international and non-governmental organizations, and local Syrian organizations, as well as in coordination with the Syrian Opposition Coalition's Assistance Coordination Unit (ACU) and Interim Government. To ensure the safety of recipients and humanitarian workers and to facilitate passage while en route

to beneficiaries, U.S. humanitarian assistance is often not branded or marked. The United States supports approximately 260 field hospitals and clinics across Syria. These facilities have treated nearly 1.9 million patients and performed more than 358,240 surgeries. To meet the need for more medical staff capable of saving lives, the United States trained nearly 3,000 health care providers and community health workers inside Syria.

The United States continues to work closely with countries in the region hosting refugees fleeing Syria, supporting communities that have generously opened their schools, hospitals, and homes. For more details on the U.S. humanitarian response to the Syria crisis and what U.S. humanitarian assistance is being provided, please visit: www.usaid.gov/crisis/syria.

Non-lethal Transition Assistance to the Syrian Opposition

The United States is working in partnership with the international community to support the Syrian opposition and is providing $330 million in non-lethal transition assistance to help the moderate opposition meet daily needs, provide essential services, and support a transition. U.S. support includes $15 million provided to the multi-donor Syria Recovery Trust Fund, designed to help with Syria's recovery effort in areas controlled by the moderate opposition, as well as its reconstruction and economic needs after the formation of a transitional governing body.

Non-lethal assistance is being provided to a range of civilian opposition groups, including local councils, civil society organizations, and SOC-affiliated entities to bolster their institutional capacity, create linkages among opposition groups inside and outside Syria, and help counter violent extremism. These efforts enable the Coalition, including its interim governance structures, to deliver basic goods and essential services to liberated communities as they step in to fill the void left by the regime. In addition to civil administration training programs, these entities are provided with a wide array of critical equipment, including generators, ambulances, cranes, dump trucks, fire trucks, water storage units, search and rescue equipment, education kits for schools, winterization materials, and commodity baskets for needy families.

The United States is also helping to strengthen grassroots organizations and local administrative bodies—a foundation of democratic governance—as they step in to fill the void left by the regime and provide basic services, including emergency power, sanitation, water, and educational services to their communities. U.S. assistance also is being directed to maintaining public safety, extending rule of law and mitigating sectarian violence.

U.S. non-lethal assistance includes training and equipment to build the capacity of a network of more than 3,000 grassroots activists, including women and youth, from more than 400 opposition councils and organizations from around the country to link Syrian citizens with the national- and local-level Syrian opposition. This support enhances the linkages between Syrian activists, human rights organizations, and independent media outlets and empowers women leaders to play a more active role in transition planning.

Support to independent media includes assistance to both television and radio stations; mentoring from Arab media experts to broadcast professionals inside Syria; training for networks of citizen journalists, bloggers, and cyber-activists to support their documentation and dissemination of information on developments in Syria; and technical assistance and equipment to enhance the information and communications security of Syrian activists within Syria. U.S. technical and financial assistance is also supporting the Coalition's outreach to Syrians through the internet, local, independent radio stations, and satellite television.

The United States continues to assist in laying the groundwork for accountability by supporting the Syria Justice and Accountability Center's efforts to document violations and abuses of international human rights law committed by all sides of the conflict, and by bolstering

the capacity of civil society organizations to build the foundations for lasting peace. The United States also works at the grassroots levels with groups and individuals across a broad spectrum of Syria's diverse religious and ethnic communities to empower women, religious leaders, youth, and civil society to advocate for their communities, build trust and tolerance, and mitigate conflict.

In addition to this transition assistance to local communities, the United States has been providing direct non-lethal assistance to the moderate, armed opposition. We have delivered to moderate armed elements 550,000 MREs, 4,500 medical kits, more than117,000 food baskets, more than three tons of surgical and triage medical supplies, vehicles, heavy machinery, communications and computer equipment, generators, and other basic supplies.

Train and Equip Program

The United States will train and equip appropriately vetted elements of the Syrian armed opposition. The program, through the Department of Defense, will help moderate Syrian fighters defend the Syrian people from attacks by ISIL and the Syrian regime; stabilize areas under opposition control; and empower a subset of the trainees to go on the offensive against ISIL.

Additional Support for the Syrian People

To help Syrians begin to rebuild, the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) issued a Statement of Licensing Policy inviting U.S. persons to apply for specific licenses to participate in certain economic activities in Syria. The OFAC Statement focused on applications to engage in oil-related transactions that benefit the Syrian Opposition Coalition, or its supporters, and transactions involving Syria's agricultural and telecommunications sectors. OFAC also amended Syria General License 11 to authorize the exportation of services and funds transfers in support of not-for-profit activities to preserve and protect cultural heritage sites in Syria.

The U.S. Department of Commerce has waived certain restrictions, accepting license applications for the export and re-export of certain commodities, software, and technology for the benefit of the Syrian people, including but not limited to: water supply and sanitation; agricultural production and food processing; power generation; oil and gas production; construction and engineering; transportation; and educational infrastructure.

To support educational opportunities for Syrians during the conflict, the United States continues to engage Syrians directly, offering academic advice to young people hoping to study in the United States and opportunities to participate in State Department exchanges and other outreach programs. The State Department is also contributing to the Syrian Scholar Rescue program, which supports higher education in Syria by offering outstanding professors, researchers, and intellectuals fellowship grants and temporary academic appointments at partnering academic institutions. Additionally, the State Department remains focused on supporting the preservation of Syria's rich cultural heritage and continues to work with a range of Syrian, American, and international partners to protect Syrian antiquities. For more information, please visit: http://damascus.usembassy.gov/resources/cultural-events.html

The State Department maintains an active dialogue to coordinate policy and assistance for Syria with a broad cross-section of Syrian opposition groups, including with the Syrian Opposition Coalition. The American people, including Syrian-Americans, have contributed generously and have organized to provide assistance to Syrians in need.

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2. Ukraine

See Chapter 9 for U.S. statements regarding the territorial integrity of Ukraine in light of Russian intervention and the illegal referendum on Crimea in March 2014. See also Chapter 16 for a discussion of U.S. and international sanctions imposed on Russia in response to its actions in Ukraine.

3. Lord's Resistance Army

On March 24, 2014, the State Department issued a fact sheet on U.S. support for regional efforts to counter the Lord's Resistance Army. The March 24 fact sheet, excerpted below, is available in full at *www.state.gov/r/pa/prs/ps/2014/03/223844.htm*.

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In May 2010, President Obama signed into law the Lord's Resistance Army (LRA) Disarmament and Northern Uganda Recovery Act, which reaffirmed the U.S. commitment to support regional partners' efforts to end the atrocities of the LRA in central Africa. For nearly three decades, the LRA has murdered, raped, and kidnapped tens of thousands of innocent men, women, and children. As of December 2013, the United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA) estimated that approximately 326,000 people were displaced or living as refugees across the Central African Republic (CAR), the Democratic Republic of the Congo (DRC), and South Sudan as a result of the LRA threat.

The United States' comprehensive, multi-year strategy seeks to help the Governments of Uganda, the CAR, the DRC, and South Sudan as well as the African Union and United Nations to mitigate and end the threat posed to civilians and regional stability by the LRA. The strategy outlines four key objectives for U.S. support: (1) the increased protection of civilians; (2) the apprehension or removal of Joseph Kony and senior LRA commanders from the battlefield; (3) the promotion of defections and support of disarmament, demobilization, and reintegration of remaining LRA fighters; and (4) the provision of continued humanitarian relief to affected communities.

There are significant challenges in pursuing small groups of LRA and protecting local populations across this vast, densely-forested area that lacks basic road and telecommunications infrastructure. The United States—through the Department of Defense, Department of State, and U.S. Agency for International Development—has pursued innovative, multi-faceted efforts to help regional partners overcome those challenges.

Over recent years, the national military forces working as part of the African Union Regional Task Force (AU-RTF) and affected communities have significantly reduced the LRA's capacity to attack civilians and wreak havoc. Between 2010 and 2013, based on reporting from UN OCHA, there was a 50 percent decrease in the number of people abducted by the LRA and a 75 percent decrease in the number of people killed by the LRA. Since 2012, the African Union-led forces have removed two of the LRA's top five commanders from the battlefield, and we have credible reporting that a third, Okot Odhiambo—who was the LRA's second-in-command

and an International Criminal Court indictee—was killed late last year. During that time, the number of defections and releases from the LRA has also dramatically increased, further reducing the LRA's capacity. According to UN reporting, as of December 2013, the number of people displaced by the LRA threat had decreased by over 25 percent from a year ago.

The lines of effort in which the United States is engaged include:

Increasing Civilian Protection: The protection of civilians is a priority for the U.S. strategy. National governments bear responsibility for civilian protection, and the United States is working to enhance their capacity to fulfill this responsibility. The United States also strongly supports the United Nations peacekeeping missions in the DRC and South Sudan. We continue to work with the United Nations to help augment its efforts in the LRA-affected region. At the same time, we are working with other partners on projects to help reduce the vulnerability of LRA-affected communities and increase their capacity to make decisions related to their own safety. To promote the protection of civilians, the Department of State and USAID are funding communication networks, including high-frequency radios and cell phone towers, to enhance community-based protection in the CAR and the DRC. Under a USAID-funded public private partnership with Vodacom Congo, cell phone towers are now operational in LRA-affected areas northeastern DRC. The USAID-funded Secure, Empowered, Connected Communities Program in LRA-affected areas of the CAR is getting underway with community mapping, media training and community radio activities.

Enhancing Regional Efforts to Apprehend LRA Top Commanders: On November 14, 2011, the United Nations Security Council commended ongoing efforts by national militaries in the region to address the threat posed by the LRA, and welcomed international efforts to enhance their capacity in this respect. The Council noted the efforts of the United States, which, since 2008, has provided critical logistical support, equipment and training to enhance counter-LRA operations by regional militaries. In October 2011, the United States also deployed a small number of U.S. military forces to serve as advisors to the national military forces working as part of the AU-RTF to pursue senior LRA commanders and to protect civilians. The U.S. military advisors are working to facilitate coordination, information sharing, and tactical coordination amongst regional forces; enhance the capacity of the regional militaries to fuse intelligence with effective operational planning; promote defections from LRA ranks, and support efforts to improve civil-military relations through increased coordination and communication with local populations and NGOs. The State Department has deployed a field officer to work alongside U.S. military advisors. In addition, to augment ongoing efforts to bring the LRA's top leaders to justice, the Secretary of State authorized rewards for up to $5 million for information leading to the arrests and/or conviction of top LRA leaders Joseph Kony, Okot Odhiambo, and Dominic Ongwen.

Encouraging and Facilitating LRA Defections: Working with regional forces, local partners and non-governmental organizations, U.S. military advisors and diplomats have significantly expanded efforts to promote defections from the LRA's ranks – using leaflet drops, radio broadcasts, aerial loudspeakers, and the establishment of reporting sites where LRA fighters can safely surrender. For example, U.S. military advisors have helped to airdrop more than one million leaflets encouraging defections at seventeen locations across LRA-affected areas of the CAR, the DRC, and South Sudan. In early December 2013, 19 individuals, including nine Ugandan males, defected from the LRA in the CAR. This was the largest LRA defection since 2008 and signals that ongoing efforts to promote defections are working. The United States also continues to support efforts across the affected countries to demobilize and reintegrate

former LRA fighters and all those victimized by this conflict back into normal life. In Fiscal Year 2010 through 2013, USAID provided approximately $8.5 million in assistance to UNICEF to support the rehabilitation and reintegration of former abducted youth in CAR and the DRC and other youth affected by LRA atrocities.

Providing Humanitarian Assistance: The United States is the largest bilateral donor of humanitarian assistance to LRA-affected populations in the CAR, the DRC, and South Sudan. Since 2010, the United States has provided more than $87.2 million to support the food assistance and food security, humanitarian protection, health and livelihoods initiatives, and other relief activities for internally displaced persons, refugees, host community members, and other populations affected by the LRA. The United States also continues to provide development assistance to support the return of displaced people, reconstruction, and recovery in northern Uganda, where the LRA carried out its brutal campaign for nearly two decades until it fled Uganda in 2006. With the LRA's departure and Ugandan and international recovery and development efforts, northern Uganda has undergone a significant post-conflict reconstruction and recovery in just a few years.

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4. Central African Republic

On January 28, 2014, the UN Security Council adopted resolution 2134 on the crisis in the Central African Republic. U.N. Doc. S/RES/2134. Ambassador Power delivered remarks on the resolution, excerpted below and available at *http://usun.state.gov/briefing/statements/220717.htm*.

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The situation in the Central African Republic (CAR) is dangerous and it is deadly. The United States reaffirms its commitment to the people of CAR, many of whom are living in mortal fear of attack, and to bringing relief to the nearly 2.6 million people in desperate need of humanitarian assistance.

The Security Council's adoption today of a renewed and more robust mandate for the UN Integrated Peacebuilding Office in the Central African Republic (BINUCA) will allow the UN's political mission to work directly with the CAR's transitional authorities to strengthen government institutions. It is now imperative that the UN Secretariat increase the resources available to BINUCA so that it can fulfill this important mandate.

The resolution also creates a framework for the imposition of targeted sanctions, including travel bans and asset freezes on individuals who threaten the country's political process and who have committed atrocities. To break the cycle of violent retribution underway, the people of CAR—those who have fled their homes, who have seen their loved ones murdered, and who are in dire need of food and shelter—need to see that political spoilers and instigators of atrocities will be held to account. Accountability is essential if the people of CAR are to engage in an urgently-needed reconciliation process.

Crucially, the resolution provides a Chapter VII mandate for the European Union (EU) troops who are urgently needed on the ground to help reinforce African Union (AU) and French military efforts to enhance security.

The challenges in CAR are great, and BINUCA and the AU, French, and EU forces will need to cooperate closely in order to improve security, foster political dialogue, and facilitate humanitarian assistance. In all of these efforts, the United States will remain a committed partner.

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On April 10, 2014, the UN Security Council adopted resolution 2149 authorizing a UN peacekeeping operation for the Central African Republic. The State Department issued a press statement confirming United States support for the resolution and the mission, excerpted below and available at *www.state.gov/r/pa/prs/ps/2014/04/224657.htm*.

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The United States commends the United Nations Security Council for its leadership in adopting a forward looking resolution today to address the crisis in C.A.R. Today's resolution authorizes establishment of a UN peacekeeping operation in September 2014, which will build on the strong work and sacrifices made by the African Union-led International Support Mission in C.A.R. (MISCA) and French forces, as well as the EU forces that will soon join them. The new UN integrated mission in C.A.R. (MINUSCA) will have the responsibility not only to protect civilians and establish a safe environment for delivery of humanitarian assistance, but also to help support the reestablishment of governance, assist in election preparations, facilitate the disarmament and demobilization of combatants, assist in reconciliation, promote and protect human rights, and support the formation of accountability mechanisms for those responsible for human rights abuses.

We will continue to work tirelessly with our international partners to hold accountable all individuals responsible for atrocities committed in C.A.R. We look forward to working within the Security Council to ensure appropriate targeted sanctions are levied against political spoilers and those individuals perpetrating human rights abuses.

The United States is committed to working with the United Nations and the international community to support the efforts of the C.A.R. transitional government to end the violence and build a transitional political process leading to democratic elections by February 2015. The United States has committed up to $100 million to transport, equip, and train MISCA troops and to assist French forces supporting MISCA. We recently announced an additional $22 million in humanitarian aid for the people of C.A.R., bringing our total in FY 2014 to nearly $67 million, and $7.5 million for conflict mitigation, peace messaging, and human rights programs in C.A.R.

5. Sudan

On June 20, 2014, the State Department issued a press statement condemning the Sudanese Armed Forces' bombing of civilians in Sudan's Southern Kordofan area. The statement follows and is also available at *www.state.gov/r/pa/prs/ps/2014/06/228163.htm*.

> The United States strongly condemns the Sudanese Armed Forces (SAF) aerial bombardment in Southern Kordofan and reiterates its call upon the Government of Sudan to halt this three-year campaign of armed violence against its own citizens.
>
> Increased military activity in Southern Korodfan since May has killed, wounded, and displaced civilians and damaged public and humanitarian infrastructure, including schools and medical facilities. Of specific concern is the June 16 bombing of the Medecins Sans Frontieres hospital in Farandalla, Southern Kordofan, which damaged the facility and wounded several civilians including hospital staff.
>
> The location of the hospital—a clearly marked humanitarian facility—was widely known. Sudan appears to have deliberately targeted the hospital, exacerbating an already critical humanitarian situation in the area. Targeting of humanitarian facilities represents a willful effort to harm civilians by removing their access to basic, life-saving services. Such attacks call into question the Government of Sudan's sincerity in calling for a National Dialogue to address issues of peace and political and economic reform.

The "Troika"—governments of the United States, the United Kingdom, and Norway—continued efforts to help end the conflicts in Sudan in 2014. On December 23, 2014, the Troika issued a joint statement on peace talks in Sudan, excerpted below and available at *www.state.gov/r/pa/prs/ps/2014/12/235501.htm*.

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The members of the Troika (the United Kingdom, Norway, and the United States) welcome the ongoing efforts of President Thabo Mbeki and the African Union High Level Implementation Panel (AUHIP) to help bring an end to the conflicts in Sudan, and to help initiate a process of genuine national dialogue.

The AUHIP's "one process, two tracks" mediation presents the best opportunity to secure synchronized Cessations of Hostilities agreements in Darfur and the Two Areas. This would open the way to a fuller discussion of the root causes of Sudan's conflicts, of political and economic reform, and of national identity, through an inclusive and comprehensive National Dialogue.

It is therefore deeply disappointing that the recent peace talks in Addis Ababa ended without agreement. We call on all parties to return to the talks in January 2015 with a mandate to achieve peace. In the absence of progress, the situation in Darfur and the Two Areas continues to deteriorate. Over 430,000 people have been displaced by conflict in Darfur and more than 100,000 in the Two Areas since the start of the year. We call on all parties to the conflict to stop all acts of violence, immediately provide unfettered humanitarian access, and take the steps necessary to advance the peace process.

We are also deeply concerned by the arrest of opposition and civil society members following their recent return to Khartoum. These actions run counter to the aims of a comprehensive and inclusive National Dialogue. We call on the Government of Sudan to immediately release those that have been detained and create a climate conducive to a genuine National Dialogue.

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6. South Sudan

On January 23, 2014, the Government of South Sudan and the opposition forces in South Sudan signed a ceasefire agreement that was welcomed by the United States. The State Department's January 23 press statement on the signing of the cessation of hostilities, available at *www.state.gov/r/pa/prs/ps/2014/01/220558.htm*, is excerpted below.

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…This agreement is a critical first step toward building a lasting peace in South Sudan, but it is only the beginning of a much longer process to resolve the underlying causes of the conflict, to foster reconciliation, and to hold accountable those who committed horrific abuses against the South Sudanese people.

We call on all of South Sudan's leaders to honor their commitments to the people of South Sudan by working quickly and earnestly toward an inclusive and comprehensive political dialogue. With the Intergovernmental Authority on Development (IGAD) and other friends of South Sudan, we will continue our efforts to expedite the release of the detainees and ensure their meaningful participation in a political dialogue.

It is also important to ensure that assistance can reach the hundreds of thousands of people who have been affected by this conflict. To this end, we call on all parties to facilitate the immediate and unfettered provision of humanitarian assistance to all those in need in South Sudan, regardless of where they are located.

We congratulate the IGAD mediation team for its crucial work in realizing this critical step in resolving the conflict in South Sudan. The United States continues to stand with the people of South Sudan, the United Nations Mission in South Sudan, humanitarian actors, and all those that continue to work under difficult and dangerous circumstances to alleviate the suffering and protect innocent civilians affected by this crisis.

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Ambassador Samantha Power also issued a statement on January 23 welcoming the signing of a cessation of hostilities in South Sudan. Her statement, available at *http://usun.state.gov/briefing/statements/220575.htm*, appears below.

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Today's signing of a cessation of hostilities between the Government of Sudan and the opposition forces is a first step in the right direction. More innocent lives are being lost every day this conflict goes on. We call on both parties to abide by the cessation of hostilities agreement, cooperate on addressing root causes of the conflict, and create a safe space for the kind of political dialogue needed to bring about stability for the people of South Sudan.

The UN has a long history of supporting the well-bring of the people of South Sudan. It is for that reason that the United States strongly condemns recent attacks on and threats against the UN Mission in South Sudan (UNMISS), including the attempt by Sudan People's Liberation Army forces and senior South Sudanese government officials to forcibly enter the UN compound in Bor.

Attacks on and threats against the United Nations are unacceptable and must cease immediately. All parties must cooperate fully with UNMISS and allow it to carry out its mandate without obstruction, and South Sudan must meet its obligations under the Status of Forces Agreement with UNMISS. Those who have fired on UN peacekeeping bases, raided UN and NGO offices and warehouses, and killed those delivering humanitarian assistance must be held to account.

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The January ceasefire agreement had little effect in stopping the violence in South Sudan. The remainder of 2014 in South Sudan was marked by attacks on civilians and UN mission sites, as well as ongoing fighting between the Government of South Sudan and opposition forces. The United States responded by imposing targeted sanctions on those threatening the peace in South Sudan, as discussed in Chapter 16. Ambassador Power repeatedly condemned those fueling the violence in South Sudan at the UN, as she did on February 21, 2014 in the statement excerpted below and available at *http://usun.state.gov/briefing/statements/221885.htm*.

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The United States condemns in the strongest possible terms the fighting between the Government of South Sudan and opposition forces outside the UN Mission in South Sudan (UNMISS) compound in Malakal, where approximately 21,000 internally displaced persons are currently sheltered.

Threats and attacks against UNMISS sites, and the civilians protected therein, are unacceptable and must cease immediately. All parties should regard UNMISS sites as inviolable: the civilians sheltering at such locations must be afforded every protection and the delivery of humanitarian assistance to those sites must not be obstructed. The United States will work within the Security Council and with other regional partners to hold accountable those individuals who have fired on UNMISS bases, looted UN and NGO offices, and killed humanitarian workers delivering assistance to innocent civilians in South Sudan.

The violence in Malakal is the latest violation of the January 23 Cessation of Hostilities agreement. We call on both sides to abide by the terms of that agreement and engage constructively in negotiations led by the Intergovernmental Authority on Development (IGAD). The continuing conflict threatens regional stability and denies the people of South Sudan the security and economic stability that is their due. IGAD's effort to mediate a solution to the crisis, which the United States supports, offers both sides an opportunity to give priority to the future wellbeing of South Sudan.

The United States fully supports the critical work of UNMISS in helping lay the ground work for a stable future, especially in its efforts to protect civilians in Malakal and throughout South Sudan. The Government of South Sudan has an obligation to ensure UNMISS is able to carry out its mission to protect civilians and should cooperate with UN and NGO personnel working to provide humanitarian assistance to those in need.

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Ambassador Power again condemned the ongoing violations of the ceasefire agreement in a statement at the UN on April 3, 2014, available at *http://usun.state.gov/briefing/statements/224389.htm*. On April 17, 2014, Ambassador Power delivered another statement condemning attacks against civilians and the UN Mission in South Sudan. Her April 17 statement is available at *http://usun.state.gov/briefing/statements/224969.htm*. And on April 24, Ambassador Power spoke again on South Sudan at the UN, condemning the ongoing targeting of civilians based on their ethnicity. Her April 24 statement is available at *http://usun.state.gov/briefing/statements/225121.htm*. On May 2, 2014, at a Security Council briefing on South Sudan, Ambassador Power delivered another statement condemning the targeting of civilians and interference with the UN mission. Her May 2 statement is excerpted below and available at *http://usun.state.gov/briefing/statements/225563.htm*.

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… Instead of ceasing hostilities, as pledged three months ago, the parties have chosen to intensify fighting and to do so in ways that have shredded humanitarian norms. In April, forces loyal to former Vice President Machar attacked civilians in Bentiu, pursuing them into a hospital, a church and a mosque, killing at least 200 and likely many, many more, and leaving the dead laying in the streets. In Bor, against a backdrop of hostile rhetoric against the United Nations by senior South Sudanese government officials, several hundred armed youths entered the UNMISS camp by force and fired on displaced civilians in an ethnically-motivated assault that was as cowardly as it was ruthless. The death toll in the clash exceeded 110, including 48 civilians who were fleeing for their lives.

Violence against civilians has also taken place in Juba, Malakal, and Wau, accompanied by sexual abuse and the recruitment of child soldiers. We have also heard the ominous appearance of radio broadcasts that foment ethnic hate and incite further violence. And as we all know, more fighting means more displaced civilians in need of safe haven and sustenance, more lives disrupted, more schools closed, and an even larger burden for the increasingly hard-pressed UN, relief agencies, and donors.

We recall the jubilation less than three years ago when South Sudan achieved its independence. Amid honking horns and vivid expressions of national pride, cheering citizens raised their new flag and newly-appointed diplomats took their seats in the UN General Assembly. Friends of South Sudan who were familiar with the many sacrifices that preceded that day celebrated. Exiles returned home to help the new nation get on its feet. The international community lent ample support, including a UN mission that pledged to work hand in hand with the government and the Sudanese people to help build this new state. Civil society pitched in. And the vast majority of South Sudan's citizens focused on the hard work of bolstering their economy and building stronger communities. But a country requires effective leadership and in South Sudan—after a promising start—the leaders in office and in the opposition have chosen to place personal rivalries and suspicions above the best interests of their country. Those fueling this conflict—many of the very same individuals instrumental in bringing about South Sudan's independence—have chosen coercion over cooperation, and violence over the democratic process. The result is catastrophe.

…[I]t is unconscionable that South Sudan's leaders have failed to take the steps necessary to restore peace and end the needless suffering of their people. The continuation of this failure could very well push the country further into a cycle of retaliatory ethnic killing, a deepening civil war, and an even more devastating humanitarian disaster that will worsen further with the full onset of seasonal rains and the looming prospect of famine.

To prevent this, we call on all sides to do right by the people of South Sudan, who placed their trust in you, and by the international community, who stood by you for decades and promised to roll up our sleeves and help you build your new country. Cease offensive military actions as you promised to do when you signed the Cessation of Hostilities. Allow UNMISS to carry out its mandate without harassment, threats, or fear of assault, to protect the people of South Sudan. Respect the rights and dignity of every citizen, regardless of their ethnicity. Enable the unfettered delivery of humanitarian supplies. Stop the warlike rhetoric and the incitement to violence, and publicly condemn any and all attacks on civilians. Return in good faith to the peace process moderated by the Intergovernmental Authority on Development. Cooperate with UN and AU human rights investigators and monitors. Resolve your differences by peaceful means. And don't just promise to do all of this as you have before—mean it and do it—and do it now.

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I emphasize that the United States strongly supports the critical work of the UN Mission in South Sudan, as well as the relief agencies doing their best, under difficult conditions, to meet the needs of men, women and children in dire straits. I remind the government of South Sudan that it has an obligation to the international community to prevent attacks on the UN and these agencies. That means the government itself … must cease intimidation, harassment, and slander about the UN Mission and its personnel. In the coming days, my government will join in circulating a resolution that will revise the mandate of UNMISS to focus more fully on civilian protection, human rights monitoring and investigation, and the delivery of food and other emergency supplies. Given the key role UNMISS plays, this Council should take up that resolution with the urgency that this crisis demands.

Those who choose the path of further violence and hate have been given fair notice: No one has license to attack UN peacekeepers, international monitors, or civilian noncombatants of any nationality or ethnicity. No one has the right to target others because of their ethnicity, to incite violence, or to breach the protective walls of a UN base. Those who ignore this warning should have no doubt that the international community will do all within its power to hold those individuals accountable. The culture of impunity must end.

My colleagues, it is imperative that we remain determined and united in pressing the government and leading opposition figures in South Sudan to reverse their dangerous course, and genuinely—actually—pursue peace. Last month, the world stopped for a moment to remember the genocide that took place in Rwanda twenty years ago. President Kiir attended that ceremony to pay his respects. Now President Kiir, former vice-president Machar, and other rebel leaders have a duty to themselves and to their fellow citizens to pull their country back from the abyss. It is not too late. But the window is closing. Thank you.

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On May 27, 2014, the Security Council adopted resolution 2155, extending the mandate of the UN Mission to South Sudan ("UNMISS"). Ambassador Power delivered a statement for the United States on resolution 2155, excerpted below and available at *http://usun.state.gov/briefing/statements/226572.htm*.

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Today, the Security Council unanimously adopted a resolution that not only renews the mandate for the UN peacekeeping mission in South Sudan (UNMISS), but focuses the mission on the core activities of protecting of civilians; monitoring and investigating human rights abuses; and facilitating the delivery of humanitarian assistance. Today's resolution also locks in the increased troop levels that the Council authorized as a temporary measure for UNMISS in December.

We welcome the willingness of countries from the East African regional organization, the Intergovernmental Authority on Development (IGAD), to contribute a regional force to UNMISS as part of the new troop complement, as well as its continued leadership as mediators of the political process, including through Ethiopian Prime Minister Hailemariam Desalegn's work as

IGAD Chair. This troop contribution will be vital to supporting the new UNMISS mandate and to providing protection to the personnel from IGAD's Monitoring and Verification Mission who are monitoring the Cessation of Hostilities agreement signed on January 23.

Streamlining UNMISS's activities means focusing the mission on the needs of the people of South Sudan. The escalating ethnic violence that broke out in December and gave rise to horrible attacks like those last month in Bentiu and Bor, along with the absence of a credible peace agreement, demanded that this Council prioritize the safety and well-being of the South Sudanese people first and foremost, and that UNMISS no longer provide direct support to the government. However, the UN's commitment to the people of South Sudan remains steadfast, and UNMISS remains a force for security and accountability in the country.

South Sudan teeters on the verge of total chaos. A possible famine looms on the horizon. As a result of the violence, more than 1.3 million people have been displaced from their homes, including over 370,000 refugees who have fled to neighboring countries. Farmers have been unable to plant and tend their crops. For South Sudan, which was already a food-insecure country, the missed planting season promises only a bitter harvest of severe malnutrition and starvation. The United States has provided over $433 million this fiscal year in humanitarian assistance, including a new assistance package of nearly $300 million the United States announced at the pledging conference in Oslo on May 20. We urge everyone who promised assistance in Oslo to fulfill their pledges as quickly as possible.

No amount of humanitarian assistance, however, will bring lasting peace to South Sudan. The desperately needed political solution to this man-made crisis must begin with the country's political leaders. President Salva Kiir and former vice president Riek Machar have continually failed to implement the Cessation of Hostilities Agreement they signed in January, and recommitted to personally in Addis Ababa on May 9. They bear the greatest responsibility for the surge of violence and economic instability. It is up to them to look beyond their narrow political interests and embrace a fully inclusive national dialogue aimed at building a lasting peace. The people of South Sudan deserve nothing less.

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Violence continued in August, including attacks on civilians and aid workers. Ambassador Power's August 6, 2014 statement at the UN condemned ethnically motivated killings and called on the Government to protect humanitarian workers. That statement is available at *http://usun.state.gov/briefing/statements/230349.htm*.

On September 25, 2014, the UN General Assembly held a high-level meeting on South Sudan. Counselor to the U.S. Department of State, Thomas A. Shannon, Jr., attended on behalf of Secretary Kerry. His statement is excerpted below and available at *http://usun.state.gov/briefing/statements/232178.htm*.

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I recently traveled to Nairobi and Addis Ababa to discuss with our African friends a great many issues of mutual interest, including the events taking place in South Sudan. As many of you know, the political and humanitarian crisis is sure to worsen if fighting continues between the Government of South Sudan and opposition forces. The two are inextricably linked. As a result

of the fighting, more than 40 percent of the population requires emergency humanitarian assistance. 1.7 million people have been forced from their homes, including nearly 100,000 individuals who are seeking refuge at UN Mission in South Sudan (UNMISS) compounds in fear for their safety should they leave. The thousands of deaths in South Sudan that have occurred since the parties signed the Cessation of Hostilities agreement in January are deeply troubling, and unnecessary.

Resolving the conflict will require serious negotiations toward a political solution that honors the commitments made on May 9 and June 10 to implement the Cessation of Hostilities agreement and establish a transitional government of national unity. Despite IGAD's efforts, we have yet to see the two factions come to an agreement on the substantive political issues.

If the talks in Bahir Dar do not result in the parties moving from finger pointing to real negotiations and concessions needed for peace, it is evident that greater external pressure will be needed. South Sudan's neighbors and the international community need to speak with one voice and should not hesitate to use tools that will increase pressure on both parties. The purpose of these tools is to compel the government and opposition forces to shape and outline the tasks of a transitional government. Punitive measures, including multilateral targeted sanctions on individuals who have undermined peace and security in South Sudan, is one such instrument. The United States has acted accordingly by sanctioning on September 18 two South Sudanese individuals.

The humanitarian situation that we are witness to is a man-made catastrophe and a direct outgrowth of the intransigence of the Government of South Sudan and opposition forces. If security issues are not properly addressed, if the violence continues, and if humanitarian access remains hindered, a large-scale food insecurity crisis is unavoidable in 2015. The Government of South Sudan and opposition forces must cooperate fully with the humanitarian relief effort. They should stop arbitrary and needless obstruction and delays of humanitarian relief activities. We strongly condemn the attacks on IDPs and aid workers. Forced military recruitment of refugees, IDPs, humanitarian staff and especially of children must end immediately. While we welcome the reversal of policies that would have limited foreign aid workers and humanitarian access to critical infrastructure at Juba airport, these policies should never have been contemplated in the first place, especially not in the midst of the ongoing humanitarian disaster.

UNMISS has an important role to play on the ground, including in addressing the humanitarian crisis. It will be essential for the mission to be proactive in implementing the revised UN Security Council mandate as it relates to protecting civilians while building conditions to allow internally displaced persons (IDPs) to return home. The United States supports SRSG Løj's efforts to manage and resource the mission in accordance with the mandate and to maintain active coordination with and force protection to the IGAD Monitoring and Verification Mechanism.

The United States is committed to the people of South Sudan and is the leading humanitarian assistance donor, having allocated more than $636 million in humanitarian assistance this fiscal year. We are grateful to our international partners, including members of the NGO community, for their contributions and efforts to address the crisis. Despite these combined efforts, additional resources will be needed to continue life-saving aid operations that are desperately needed. To date, the international community has contributed only about half of the $2.5 billion the United Nations is calling for to meet critical humanitarian needs of both South Sudanese who have been affected and those who have fled as refugees. We urge other donors to join us in seizing the moment and responding robustly to prevent the worst possible

consequences. Our call also extends to the Government of South Sudan since the ultimate price is now being paid for by the South Sudanese people. It is high time the Government of South Sudan and opposition forces heed the call of neighbors and the international community to prevent needless suffering and to make peace. Such actions are emblematic of leadership and responsible governance that the people of South Sudan so desperately need.

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On December 15, 2014, Ambassador Power issued a final statement at the UN for 2014 on South Sudan, summarizing the year of violent conflict. Her statement is excerpted below and available at *http://usun.state.gov/briefing/statements/235127.htm*.

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On September 23, 2011, only months after South Sudan gained its independence and joined the United Nations, President Salva Kiir climbed the dais at the UN to address the General Assembly for the first time. He spoke of South Sudan's commitment to political pluralism and "to fostering world peace and prosperity for the benefit of all humankind." A year later, in his first speech before the UN General Assembly, then-Vice President Riek Machar reiterated that promise, and asked that South Sudan's friends around the world continue supporting the country's political and economic goals. The world stood with South Sudan from the outset. In 2011, the UN Security Council established the UN Mission in the Republic of South Sudan (UNMISS) to help the young nation consolidate peace and security and to assist laying the groundwork for future development in the years following its independence.

Despite the international community's support for South Sudan's independence, the nation's political and military leaders have unleashed a conflict that has devastated the country. One year ago today, internal political fighting turned bloody on the streets of Juba in clashes between Dinka and Nuer soldiers. That event quickly metastasized into a broader ethnic and armed conflict, unleashing a wave of targeted attacks on civilians that has produced a political, economic and humanitarian crisis of colossal proportions and that threatens regional stability. In one year of violence, it's estimated that tens of thousands of people have been killed. There are 1.9 million internally displaced people and nearly 500,000 refugees in neighboring countries. Civilians have been murdered as they sought shelter in churches and mosques, and have been forcibly recruited to fight in militias. The risk of a man-made famine once again hangs over the country.

The United States again condemns in the strongest possible terms the ongoing violence in South Sudan, and we remain deeply concerned by the government and opposition's persistent failure to negotiate a peaceful resolution to the crisis. When the UN Security Council visited Juba in August of this year, I made very clear during our conversations with both leaders that the United States and the United Nations expected both sides to uphold their previous agreements to end hostilities and negotiate earnestly both peace and a transitional government framework.

The United States urges South Sudan's leaders to engage more urgently and more seriously in the Inter-governmental Authority on Development-led peace talks in Addis Ababa. We stand ready to work with South Sudan's leaders if they take concrete steps toward peace. We

are equally prepared to work with the international community, including the UN Security Council, to hold political spoilers and human rights abusers accountable.

The United States reaffirms its support for UNMISS and urges those countries that have committed troops and equipment to the mission to deploy them quickly. UNMISS must operate at full strength, and it must protect civilians. With over 102,000 people seeking refuge at UNMISS facilities, we remind all parties that UN sites, facilities, personnel and all sheltering civilians must be protected, and that attacks on those facilities, the forces guarding them, and the civilians sheltering inside could constitute war crimes. We further stress that UN and other humanitarian agencies must have safe, unfettered access to those in need of assistance throughout the country.

The commitment of the United Sates to the people of South Sudan is unwavering. But all the good will and humanitarian assistance in the world are no substitute for the difficult compromises necessary to end man-made violence and begin the process of accountability and reconciliation needed to build a sustainable future. Today, the country is at a crossroads. Its political and military leaders must demonstrate courage and lead the nation out of this horrific, self-inflicted, and pointless cycle of violence. If they do not take the necessary steps for peace, they will own the responsibility for war and mass atrocity—just what they fought to erase when they secured independence for South Sudan.

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Also on December 15, 2014, the Washington Post published an editorial by Secretary Kerry and National Security Adviser Susan E. Rice urging South Sudan's leaders to end the fighting. The Washington Post article appears below and is also available at *http://www.state.gov/secretary/remarks/2014/12/235128.htm*.

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In 2011, the world's newest nation was born amid joyous celebrations. The international community welcomed South Sudan not just with cheers but also with promises of help. The hope and promise of that day are now at grave risk of being squandered if the nation's leaders don't at long last provide leadership.

Violence that erupted in the capital city of Juba last December spread quickly, claiming the lives of thousands of men, women, and children and reopening bitter ethnic divisions. In the time since, almost 2 million people have been displaced from their homes, while residents in some parts of the country face the risk of famine. In a country that has so much potential and that has endured decades of conflict, the suffering and violence have had a devastating effect.

The tragedy is especially hard to accept because the violence was not imposed on South Sudan by outside forces; instead it was unleashed by a political dispute among the country's leaders. Now, the responsibility is on their shoulders to halt the bloodshed and bring their country together. After months of delay and false pledges, both sides must return to negotiations, make necessary compromises and finally end this conflict without further delay. Barren vows

and rosy words are not enough; too many people have died while too many promises have been broken. It is past time for South Sudan's leaders to take responsibility and end the fighting.

To move forward, a transitional government with a mandate to create security agencies that protect all of South Sudan's people—regardless of ethnicity or political alignment—is imperative. That government must develop a transparent system for managing the country's resources and agree on an inclusive constitutional drafting process that focuses on improved governance. Given the level of past violence, a reconciliation plan must also be established, accompanied by efforts to investigate atrocities and ensure that those involved are held accountable for their crimes.

The South Sudanese people have many friends throughout the world, and none is more committed to their future than the United States. But the full value of those friendships cannot be realized unless and until the country's leaders put the interests of their people above their own grievances. The United States and our international partners have organized a massive humanitarian aid effort, supported a U.N. peacekeeping force whose members have risked their lives to save civilians and made repeated efforts to encourage reconciliation and a return to peace. We have worked with local and regional partners to document human rights abuses and support religious leaders as they work for reconciliation. All this is helpful, but none of it will be enough in the absence of effective leadership.

Working in close cooperation with our regional and international partners, we will continue to increase pressure on the parties until the violence ends. But we must also be clear that those who choose the path of continued conflict and destruction will face greater consequences.

We do not have the luxury of time. In South Sudan, hunger is often a threat, but when the cycle of planting and harvesting is disrupted, when grazing lands are turned into battlegrounds and when humanitarian convoys are subject to attack, the threat becomes a crisis and the lives of millions hang in the balance. With each passing day, the ranks of the hungry and malnourished grow. This suffering will end only when the guns fall silent.

On this sad anniversary, we salute the men and women of South Sudan who still strive each day on behalf of peace. Our thoughts are with the leaders of the faith communities and civil society groups who have rejected hatred and embraced compassion and with the neighbors who have sheltered and safeguarded one another. South Sudan's leaders would be wise to follow their people's example.

The two of us have traveled to South Sudan many times. We know the country's promise and have seen firsthand the dedication, courage and incredible resilience of its people. We have witnessed the costs of conflict and shared in the exhilaration when it appeared that the years of fighting had given way to a new era of freedom and peace. We remember the long lines of voters standing and waiting with patient exuberance to vote in their country's referendum and joined with the crowds on independence day to celebrate the realization of peaceful self-determination.

Now, the whole world is watching to see what the leaders of South Sudan will do. Will they continue on the path of conflict and condemn their country to another year of suffering? Or will they make the hard choices, work together and restore to their country the hope that its citizens so richly deserve? For the sake of all the people of South Sudan, the choice must be for peace.

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7. Peacekeeping Reform

On November 7, 2014, Ambassador Power delivered a speech at the American Enterprise Institute on UN peacekeeping reform. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/233866.htm*.

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Even if the United States has an interest in seeing conflict abate or civilians protected, that does not mean that U.S. forces should be doing all of the abating or the protecting. … Just because we have far and away the most capable military in the world, does not mean we should assume risks and burdens that should be shared by the broader international community.

This is where peacekeeping comes in. When conflicts in Congo, Mali, or South Sudan require boots on the ground to defuse conflict—peacekeeping is often the best instrument we have. Peacekeeping operations ensure that other countries help shoulder the burden, both by contributing troops and sharing the financial costs of operations. Provided that peacekeepers actually deliver on their mandates, multilateral peacekeeping also brings a degree of legitimacy in the eyes of the local population: because missions are made up of troops from multiple countries, with strong representation from the Global South, spoilers and militants have a harder time cynically branding them as having imperialist designs.

Even in places where the United States has decided to deploy troops, we've benefitted from being able to hand off to the United Nations—as we did in Haiti—allowing the peacekeeping operation, then, to provide longer-term support for security, rule of law, and political transition.

The multilateral nature of peacekeeping helps address the free-rider problem we see today in so many matters of international security—from the spread of Ebola, to the rise of ISIL, to the recruitment of foreign terrorist fighters—whereby countries with vested interests in addressing threats rely on the United States to do the lion's share of the work. Peacekeeping gets other countries to stand up, rather than stand by.

So, we start from the premise that—in a world where we have a vested interest in seeing violent conflicts curbed and seeing suffering prevented—America needs peacekeeping to work. But precisely at this moment, when we recognize this crucial role that peacekeeping can play in shoring up U.S. interests, our demands on peacekeeping are outstripping what it can deliver.

Today, we are asking peacekeepers to do more, in more places, and in more complex conflicts than at any time in history.

There are currently sixteen UN peacekeeping missions worldwide, made up of nearly 130,000 personnel, at least 100,000 of them are uniformed military and police, compared to just 75,000 total personnel a decade ago. That's not to mention the more than 20,000 peacekeepers fighting in the African Union's mission in Somalia. To stress, this is by far the most peacekeepers that have ever been active in history. And yet the numbers only tell a small part of the story.

The strain on the system would be challenging enough if we were asking peacekeepers simply to do what they used to do—to monitor ceasefires between two consenting states. But we're giving peacekeepers broad and increasingly demanding responsibilities in increasingly inhospitable domains. We are asking them to contain—and at times, even disarm—violent groups, like the countless rebel groups in the Democratic Republic of Congo. We're asking them to ensure safe delivery of life-saving humanitarian assistance, such as by escorting emergency shipments of food and medicine to civilians, as peacekeepers have done in South Sudan. We are asking them to protect civilians from atrocities, such as those being carried out in the Central African Republic. And we are asking them to help provide stability in countries emerging from brutal civil wars, as in Liberia. And in virtually all of these missions, we are asking them to carry out these duties in countries where governments are extremely weak, and often unable to meet the basic needs of their citizens.

Today, two-thirds of UN peacekeepers are operating in active conflict areas, the highest percentage ever. Peacekeepers often deploy to areas where myriad rebel groups and militias have made clear that they intend to keep fighting. And the warring parties in modern conflicts increasingly include violent extremist groups, who terrorize civilians and view peacekeepers—openly treat peacekeepers as legitimate targets.

But precisely at this moment—when we're asking more of peacekeeping than ever before, and as we recognize the crucial role that it can play—we see both the promise and the pitfalls of contemporary peacekeeping. We see life-saving impact when peacekeepers are willing and able to fulfill their mandates, and we see the devastating consequences when they are not. A few examples:

In South Sudan, where a new civil war has displaced over a million people and killed more than 10,000 just since last December, the UN peacekeeping mission has arguably played a critical role in preventing even more bloodshed. On December 15th, the day that infighting between President Kiir and former Vice-President Machar sent the country spiraling into horrific violence, government soldiers went house-to-house searching for ethnic Nuer men and executing them in the streets. In one incident, soldiers crammed between two and three hundred Nuer men into a small building and then opened fire on them through the windows, killing nearly all of them. In the city of Bor, rebel forces repeatedly targeted the homes of ethnic Dinka, executing the unarmed inhabitants and looting their cattle and other possessions.

In response to the onset of violence, the UN opened the gates of its bases to civilians fleeing the violence, eventually taking in more than 100,000 displaced persons. On a Security Council trip to South Sudan I took in August, I visited the UN base in Malakal, where more than 17,000 people were taking shelter. Rough as the conditions were for the people on the base—and they were rough, many of them were living in foot-deep, filthy water—they told me that at least they had access to food and clean drinking water and protection from deadly attacks, which was more than could be said for the South Sudanese outside of the gates. Two decades earlier, recall, when civilians sought refuge under the UN flag, peacekeepers made a different choice. In April 1994, some 2,000 Rwandan Tutsi had sought refuge in the Don Bosco School in Kigali, which UN peacekeepers were using as a base. Hutu militia had surrounded the school, chanting "Hutu power! Hutu power!" drinking banana beer, and brandishing machetes. Yet when orders came for the peacekeepers to evacuate, they followed orders. They had to shoot over the heads of Tutsi in order to get out—so resistant were the people to letting them go. And not long after the peacekeepers walked out of the school, militia members walked in, butchering virtually everyone inside.

That was then, now we have the UN mission in South Sudan opening its gates and staying with the people at a time of great need. At the same time, South Sudan today demonstrates the continuing challenge of rapidly deploying peacekeepers and the equipment that they need. At the outset of this December conflict, which continues to this day, the Security Council swiftly authorized an emergency surge of 5,500 troops, nearly doubling the number of troops there on the ground in South Sudan. Yet almost one year later, the mission today is still more than 2,000 troops short, severely restricting the mission's ability to project force and provide security for civilians outside the camps. It has also suffered from a chronic shortage of helicopters. And in fact, as some of you may know, there is a shortfall of more than 30 helicopters across UN missions, consistently restricting mobility and effectiveness, often in life-or-death situations.

In the Democratic Republic of Congo, there is similar good news-bad news. After years of stagnancy, the UN mission there has played a really important role in the last year—year-and-a-half—in disarming and defeating powerful rebel groups. Alongside Congolese forces, this effort has been led by a special unit of the mission known as the Force Intervention Brigade. The Brazilian UN force commander, Lieutenant General Carlos Alberto dos Santos Cruz—who has been absolutely critical to a heightened emphasis on preventing atrocities—he told fellow peacekeeping commanders at a recent Security Council meeting to change their mindset, and to stop reporting "just what happened yesterday" and instead start reporting "what we did yesterday," so the accountability is for what we did in the face of what is happening. And the brigade under dos Santos Cruz has put these convictions into action, neutralizing a number of powerful rebel groups, including the M23, which had committed unspeakable atrocities against Congolese civilians. General Santos Cruz has set an example by putting himself on the front lines of this aggressive effort, participating in patrols with his troops, and even traveling personally to the headquarters of one rebel group to tell its leaders to lay down their arms or face a frontal assault. This is not your mother or your grandmother's peacekeeping.

And yet even with this singular leadership we still see UN peacekeepers in Congo fairly routinely failing to protect civilians. On the evening of June 6th, armed assailants attacked civilians at an outdoor church service in the Congolese town of Mutarule. Many people called the nearby UN base—which was only five miles away—they were begging for help, in some instances they were using the free phones that peacekeepers had provided them for just such an emergency. Yet the peacekeepers sat at their base, later claiming that they thought that local Congolese military commanders would intervene. More than 30 people were massacred, eight of them kids. One victim was a four-year-old boy with mental and physical disabilities, who was burned to death.

These are the stakes of what gets done right and what gets done wrong—or not done, in this case. This incident in Congo is unfortunately not an isolated case—even though the protection of civilians has moved to the heart of contemporary mission mandates. A report by the UN's internal oversight office in March found that in 507 attacks against civilians from 2010 to 2013, peacekeepers virtually never used force to protect civilians under attack. Thousands of civilians may have lost their lives as a result. And this is unacceptable.

In Mali, during the nine months in 2012 and 2013 that extremist groups controlled towns in the North, a teenage girl was whipped 60 times in the streets of Timbuktu for daring to talk to young boys. Music was banned, major mausoleums demolished, and libraries burned. Today, peacekeepers are playing a critical role, alongside the French, to help root out extremists. UN peacekeepers have helped to provide Malians with the security and assurance they needed to

return to their communities, reducing the number of internally displaced persons in Mali by more the sixty percent in the past year. And the peacekeepers' presence has prevented extremists from retaking key cities and towns, such as Timbuktu, where the community is reconstituting its long tradition of religious tolerance and rebuilding its ravaged holy sites.

At the same time though, the peacekeeping mission in Mali faces serious challenges in projecting force over the vast territory north of the Niger River. The mission has struggled to move troops, to establish base camps and sustain them in an austere environment with unusable roads. The mission has had to spend millions of dollars just to transport water to its troops in that environment. Worst of all, UN troops are also facing unprecedented attacks by extremists. Just to give a few examples: on August 16th, a suicide bomber drove a pick-up truck laden with explosives into the heart of a UN camp in the town of Ber and detonated its load. Two Burkinabe peacekeepers were killed, and seven others were wounded. On September 18th, five Chadian peacekeepers were killed when their truck drove over an IED. And on October 3rd, men armed with RPGs on motorbikes ambushed a UN logistics convoy traveling to resupply troops in the field, killing 9 peacekeepers from Niger. Suffice it to say, when the UN created peacekeeping six decades ago, it did not have suicide bombers or IEDs in mind.

Now when we deploy peacekeepers into some of the most complex conflicts of our time, and deploy a rather low number of troops proportional to the tasks that they are being assigned, some of these problems would likely be evident even if the world's most advanced militaries were the ones wearing blue helmets.

Regardless, the problems I've described—slow troop deployment, limited mobility, the challenge of keeping units fed and hydrated in remote areas, and the failure to confront aggressors and protect civilians—are problems that are in the U.S. interest to see addressed. I would like to share four ways that the United States and our partners can strengthen peacekeeping so it can better meet the demands of 21st century conflicts.

First, the pool of countries that deploy troops, police, and military enablers has to expand. UN peacekeeping is increasingly funded by developed countries and manned by developing countries. This is unsustainable and unfair. It will not produce the peacekeeping forces that today's conflicts and our national security demand. And it perpetuates divisions between the two camps, when in reality we have a shared interest in seeing peacekeeping succeed.

That is why Vice President Biden convened world leaders at the UN General Assembly in September for a Peacekeeping Summit, to press for more commitments from capable militaries and to demonstrate our common cause with those who are performing this dangerous task. We are encouraging European militaries, many of which are drawing down from Afghanistan, to return to UN peacekeeping where they played a very active role in the 1990's. We're urging Latin American militaries to deploy outside the Western Hemisphere. And we're asking East Asian militaries to contribute more substantially to peacekeeping, some for the first time. These countries will not only bring more troops to UN peacekeeping operations, but also potentially niche capabilities—such as the surveillance and reconnaissance capabilities that the Dutch and Nordic troops are now bringing to the UN mission in Mali, which should help prevent deadly attacks on peacekeepers and civilians, like the ones that have taken the lives of more than 30 peacekeepers in Mali in the last year.

At the September summit, many of our partners answered the U.S. and the UN call. Colombia announced its intent to deploy its highly capable troops, which have benefitted over the years from U.S. training, to UN peacekeeping. Japan announced that it will change its domestic legislation to permit greater participation in peacekeeping. Indonesia announced that it

will more than double its deployment of troops to UN peacekeeping operations and create a standby force to permit rapid deployment. More than two dozen other countries, from Sweden to Chile to China, made new commitments. We will continue to urge new contributions over the coming year, and world leaders will reconvene in September 2015 to make new pledges to peacekeeping.

As for our own military, in addition to our high profile military efforts in Afghanistan, against ISIL, and against Ebola, the United States also contributes about 1,400 troops to the multinational peacekeeping force in Sinai and the NATO mission in Bosnia. But as Vice President Biden announced at the summit, we are reviewing whether there are gaps that the United States is uniquely positioned to fill. That includes providing critical airlift for UN or AU peacekeepers and building base camps, as we currently are doing for the mission in the Central African Republic. We are also doing more to share our unique knowledge of confronting asymmetric threats, like the ones that peacekeepers are confronting in Mali and Somalia, lessons we learned through more than a decade of war in Afghanistan. And we are doing more to help peacekeeping missions make better use of advanced technology, such as counter-IED equipment, which can improve peacekeepers' ability to project force and to save lives.

Our second goal in this effort is to ensure that countries with the will to perform 21st century peacekeeping have the capacity they need to do so. Because African leaders see first-hand the consequences of unchecked conflicts, several have been at the forefront of embracing a new approach to peacekeeping: seeking to aggressively execute the tasks assigned to peacekeepers and, in particular, the responsibility to protect civilians. The African Union has demonstrated a commitment to building rapid response capability on the continent and the United States is leading a coalition of international partners in support.

To this end, in August, President Obama announced a new initiative at the U.S.-Africa Leaders' Summit: the African Peacekeeping Rapid Response Partnership, A-Prep. The United States will invest $110 million each year for the next three to five years to build the capacity of a core group of six countries—Ethiopia, Ghana, Rwanda, Senegal, Tanzania, and Uganda. And we are hopeful that our allies in NATO and elsewhere will join this partnership to increase and deepen these capabilities.

The idea is to deepen our investment in those militaries that have a track record of deploying troops to peacekeeping operations and that make a commitment to protecting civilians from violence. To give just one example, Rwanda's troops were among the first boots on the ground when conflict erupted in the Central African Republic. Rwandans understand the importance of getting peacekeeping right, having experienced the catastrophic consequences of it going terribly wrong twenty years ago. And because Rwandans robustly enforce their mission mandates, the people in countries where they serve trust them; troops from other countries who serve alongside them in UN peacekeeping see what robust peacekeeping looks like; and aggressors who would attack civilians fear them.

The United States has trained hundreds of thousands of peacekeepers in the past decade through the Global Peace Operations Initiative, launched under President Bush. A-Prep is an important supplement to that effort. Our military experts will work alongside partners like Rwanda to strengthen their institutions and capabilities so they can rapidly deploy troops when crises emerge, and so that they can supply and sustain their forces in hostile and inhospitable environments. In exchange for this support, these countries have committed to maintain the forces and the equipment necessary to undertake rapid deployment.

Third, we need to build a global consensus in support of the mandates peacekeepers are being asked to undertake. The Security Council first tasked a peacekeeping mission with the responsibility to protect civilians in Sierra Leone in 1999—in the face of that brutal civil war in their country. Today, 10 missions—constituting almost 98 percent of UN troops across the world—are charged with protecting civilians. However, a number of large troop-contributors openly express skepticism at the scope of responsibilities that the Security Council has assigned their troops. These countries cite the traditional principles of peacekeeping—operating with the consent of the parties, remaining impartial between the parties, and using limited force. This approach is understandable. Many of the countries that subscribe to this view served in some of the earliest peacekeeping missions—in which blue helmets were deployed at the invitation of warring parties to observe a ceasefire along a demarcated line, such as one between Israel and Syria, or India and Pakistan. In that context, it was absolutely vital that peacekeepers had the state parties' consent, that they behaved impartially, and that they observed and reported infractions.

But for more than twenty years, peacekeeping has steadily evolved, and we must question how relevant these principles remain to places like Mali and South Sudan, where peacekeepers are called on to defend peace and protect civilians. As Ethiopia's Prime Minister recently argued, we cannot ask extremist groups for their "consent," remain "impartial" between legitimate governments and brutal militias, or restrict peacekeepers to using force in self-defense while mass atrocities are taking place around them.

If peacekeeping is to be effective in the 21st century, we have to close the gap between the mandates the international community asks peacekeepers to undertake, and their willingness to successfully execute those mandates. If we don't, it not only puts the lives of civilians and peacekeepers at risk, but undermines the credibility and legitimacy of peacekeeping everywhere.

Recently, some of the largest and longest-serving troop contributors have demonstrated a willingness to tackle this issue head-on. Over the last year, Bangladesh has conducted a comprehensive internal review to craft a new peacekeeping strategy, aimed at adapting to the demands of contemporary peacekeeping. It has recognized the evolution of peacekeeping and pledged to make the protection of civilians an essential component of its troops' training. Meanwhile, earlier this year, Pakistan swiftly removed a sector commander who failed to deploy his troops to protect civilians under attack, and that sent a message to Pakistan's some 8,000 peacekeepers worldwide that such inaction was not condoned. Just last week, Pakistan declared at the UN that it was committed to "robust peacekeeping to protect civilians."

Translating these shifts in posture into unity of purpose will take time, but these are promising steps, and we will work with our partners and the UN to encourage more like them. In turn, we must take seriously and seek to remedy the troop-contributing countries' understandable frustration that they lack sufficient opportunity to share with the Security Council the practical experience of their troops on the ground to taking on complex and robust mandates which put in harm's way their men and women in uniform.

Fourth, we need to press the UN to make bold institutional reforms. It is easy to criticize the UN for all the problems we see on the ground. But at the same time we create much needed accountability for failures, and for abuses, we should take note of some profound changes that the UN Secretariat has made to peacekeeping since the catastrophic failures of Rwanda and Srebrenica. From doctrinal changes that recognize the new responsibilities of peacekeepers; to better systems for the recruitment and deployment of a vast number of military, police, and civilian personnel; to improved logistics and procurement—the United Nations has made some

advances. Last year, we spearheaded the effort to enact further reforms, including longer troop rotations to preserve institutional memory, financial penalties for troops who show up without the necessary equipment to perform their duties, and financial premiums for troops who are willing to accept higher risks. Incentives and disincentives have to be better leveraged in the service of our shared aims.

Secretary-General Ban Ki-moon has just launched a new strategic review of peacekeeping, the first in nearly 15 years. While we don't expect a mere review to remedy deficiencies in capabilities and shortages in political will, the review should address those shortcomings in peacekeeping that the UN itself, the UN Secretariat as distinct from the UN member states, has the ability itself to fix: inadequate planning, slow troop deployment, uneven mission leadership, unclear and unenforced standards for troop performance, inadequate measures to prevent sexual exploitation and abuse, insufficient accountability for failures to protect civilians, and an inefficient division of labor between peacekeeping operations and other UN agencies.

Most of the issues that I've just described, the UN Secretariat can take a strong leadership role. Member states then in turn have to step up, you have to have both for the reforms that are needed to kick in and make a difference. These four lines of effort are all critical to ensuring peacekeeping better addresses 21st century challenges. They demonstrate the need for U.S. leadership, and to exercise that leadership, the United States must pay our UN dues in full.

I understand the frustration that many Americans feel with the United States paying a substantial share of the peacekeeping budget, and with the U.S. share rising over the past decade due to the formula that the United States negotiated back in the year 2000, which allowed our regular budget contribution share to be capped. We agree that the formula should be changed to reflect the realities of today's world. Until that happens, we also insist on paying our full dues at this critical moment—if we do not, we will dramatically undercut our power to achieve the reforms needed, we will undermine our leadership, and we will potentially underfund important African-led missions, such as the ones in Mali and the Central African Republic.

This does not mean we simply sign over a large check and look the other way. On the contrary, as stewards of taxpayer funds, over the last six years we have pressed hard to improve the cost-efficiency of peacekeeping and to prevent significant new costs. Through U.S.-led reform efforts, the UN has cut the per-peacekeeper costs by roughly 16 percent—that's one-sixth of the cost reduced through efficiencies and streamlining. We've also aggressively fought cost increases, saving hundreds of millions of dollars per year by prevailing on other countries for a more modest increase in the long-frozen reimbursement rates for UN peacekeepers. And we've pressed to streamline and right-size missions, where warranted, by changing conditions on the ground. In the Ivory Coast, we've cut the number of mandated troops in half, from 10,000 to around 5,000. In Haiti, we have reduced the number of mandated troops from nearly 9,000 after the 2010 earthquake to just over 2,000 today. And we were on course to do the same in Liberia prior to the outbreak of Ebola. These efforts ensure that governments do not use peacekeepers as an excuse not to take responsibility for their own citizens' security. And streamlining missions in this manner frees up troops and resources that are needed elsewhere.

We will continue to work relentlessly to make peacekeeping as efficient as possible without undermining its effectiveness, in close coordination with Congress. As Congress reconvenes next week to consider a spending bill, I plan to continue working with a bipartisan group of lawmakers to find a path forward on this critically important issue.

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We see the many many ways that peacekeepers come up short: the slowness to deploy, the failures to protect civilians, the abuses, the list goes on. But what we cannot see …is the counterfactual. What would any of the more than a dozen countries where UN peacekeepers are deployed today look like without a peacekeeping presence?

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Yet this "what if" question is one we must ask ourselves with every mission. What would have happened in South Sudan if no UN peacekeepers had been present when Dinka and Nuer began going door-to-door and killing people on the basis of their ethnicity; or if the UN had not opened its gates to those 100,000 people fleeing this violence? What would the Central African Republic look like today if no African Union or European Union peacekeepers, now UN peacekeepers, had come to try to prevent attacks by the anti-Balaka and Seleka militias, who were massacring civilians with abandon?

In all of these instances, the answer is a simple: without peacekeeping, the violence and the suffering would likely have been much, much worse.

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Just because places like Sierra Leone, South Sudan, and the Central African Republic are better off than they would have been without peacekeeping, does not mean the institution is where it needs to be. It is not.

Nor does it mean that we are satisfied with peacekeepers fulfilling parts, but not all, of their mandates; or with peacekeepers standing up to protect civilians some of the time, rather than all of the time. We are not.

When the stakes are as high as they are though in these conflicts …getting it right some of the time is certainly not good enough. Peacekeeping must be consistently performing and meeting our expectations. And we will keep working with our partners to bring about the kinds of reforms upon which the security of millions of people around the world may well depend.

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8. GAO Determination Regarding U.S. Contributions to UN Peacekeeping

On April 30, 2014, the United States Government Accountability Office ("GAO") provided its legal opinion to the U.S. House of Representatives that the Department of State's obligation of amounts in the Contributions for International Peacekeeping Activities appropriation for fiscal year 2013 ("FY 2013 CIPA") complies with a limitation contained in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, as carried forward by the Consolidated and Further Continuing Appropriations Act, 2013 ("FY 2013 CR"). The opinion letter is excerpted below (with footnotes omitted) and available at *http://gao.gov/assets/670/662938.pdf*.

In arriving at its opinion, the GAO consulted with the Department of State. The Department of State's letter to the GAO, referenced below, is available at *www.state.gov/s/l/c8183.htm*, along with State's detailed answers to specific questions posed by GAO.

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BACKGROUND

The United Nations (UN) is an international organization, of which the United States is a member. State Letter, Enclosure, at 1. In accordance with the UN Charter, as a UN member state, the United States is responsible for paying its share of the UN's expenses, as apportioned by the UN General Assembly. *Id*. For peacekeeping missions, the UN General Assembly has approved assessments for each member state to apportion the expenses for peacekeeping missions. *Id*., at 2. These assessments are due from each member state each calendar year and the percentage represents the United States' share of the total assessment for the UN peacekeeping operations for an applicable year. *Id*. For calendar year 2012, the assessment rate for the United States was 27.1415 percent. For calendar year 2013, the assessment rate for the United States was 28.3835 percent. *Id*., at 2. Congress appropriates amounts in State's CIPA appropriation to pay the United States' obligation for peacekeeping assessments.

The Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 contains the following limiting proviso in the FY 2012 CIPA appropriation:

> "Provided further, That notwithstanding any other provision of law, funds appropriated or otherwise made available under this heading shall be available for United States assessed contributions up to the amount specified in Annex IV accompanying United Nations General Assembly Resolution 64/220."

The proviso prevented State from obligating amounts in the FY 2012 CIPA appropriation in excess of the 2012 assessment rate of 27.1415 percent. This proviso was carried forward by the FY 2013 CR.As a result, State could not obligate amounts in the FY 2013 CIPA appropriation in excess of the 2012 assessment rate of 27.1415 percent. The UN provided new assessment rates for peacekeeping to each member state in calendar year 2013, and the new assessment rate for the United States was 28.3835 percent. Given the proviso prohibiting State from obligating amounts in the FY 2013 CIPA appropriation in excess of the 2012 assessment rate of 27.1415 percent, the United States was unable to pay in full its assessed calendar year 2013 peacekeeping contribution to the UN from the FY 2013 CIPA appropriation. *Id*., at 6.

State informed us that it has not obligated funds for international peacekeeping missions from the FY 2013 CIPA appropriation in excess of the 27.1415 percent limitation on its use of its appropriation. *Id*., at 5. State advised us, however, that the United States would meet its full calendar year 2013 assessed rate of 28.3835 percent after the UN applies "credits" to the United States assessment. *Id*., at 5–6. Credits result because the annual amounts assessed by the UN are based on UN estimates. At times, the assessed peacekeeping contributions from the member states exceed a peacekeeping mission's actual expenditures in a given calendar year. The UN generally applies the difference as a "credit" to the member state. *Id*., at 6.

DISCUSSION

At issue here is whether UN peacekeeping credits factor into the amount limitation set out in the proviso on State's use of its CIPA appropriation. If so, State would have to reduce its obligations so that the total United States contribution, consisting of FY 2013 CIPA funds combined with peacekeeping credits, does not exceed the limitation of 27.1415 percent contained in the proviso. As explained below, the proviso, by its very terms, applies to "funds appropriated . . . under this heading." Because the peacekeeping credits are not funds provided in the FY 2013 CIPA appropriation, we conclude that the proviso does not apply.

When the United States pays its assessed contribution to the UN for peacekeeping expenses, these funds become the moneys of the UN and are no longer subject to limitations in federal law. For example, we noted in a prior decision that the United States contribution to the United Nations Relief and Rehabilitation Administration would lose its status as federal funds. 23 Comp. Gen. 744, 745 (1944). The funds are expended by State for the purpose for which they were appropriated when they are transmitted to the UN. It is the UN, through its governing body, that determines and controls the further disposition of these funds. Thus, the peacekeeping credits applied by the UN to the United States' outstanding balance are UN funds and do not constitute funds provided in the FY 2013 CIPA appropriation that are subject to the limiting proviso.

State's legal position is consistent with our conclusion. As noted, we asked State for its legal views on its compliance with the limitation in the FY 2013 CIPA appropriation. State explained that, under the United Nations Charter, each UN member state, including the United States, has agreed to make contributions to cover the expenses of the UN, including those expenses incurred in carrying out peacekeeping missions. State Letter, Enclosure, at 1. As such, once State has properly obligated and expended amounts in the CIPA appropriation to cover the United States' share of those expenses, those amounts become funds of the UN and would not be subject to the limitation in the CIPA appropriation. State Letter, at 1.

We also considered whether the miscellaneous receipts statute, 31 U.S.C. § 3302(b), would require State to deposit UN peacekeeping credits to the general fund of the United States Treasury or return them to the relevant CIPA appropriation as a refund. The miscellaneous receipts statute requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." One exception to this rule is that an agency may return amounts that qualify as refunds to the appropriation from which the original payment was made. Refunds include amounts returned to agencies for overpayments. B-257905, Dec. 26, 1995. The UN, however, does not return any funds to the member states, including the United States. Rather, the UN retains control over these funds and directs their application to peacekeeping missions as credits. In this regard, the peacekeeping credits are not returned to State as "money for the Government" and are not subject to the miscellaneous receipts statute.

CONCLUSION

The proviso applies to funds appropriated in the FY 2013 CIPA appropriation. However, UN peacekeeping credits are not funds provided in the FY 2013 CIPA appropriation. Therefore, State may obligate amounts in the FY 2013 CIPA appropriation for an assessed UN peacekeeping contribution rate up to the 27.1415 percent statutory limitation without regard to the UN's issuance of peacekeeping credits.

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9. Protecting Civilians During Peacekeeping Operations

On February 12, 2014, Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative to the United Nations, addressed the Security Council at a debate on the protection of civilians during UN peacekeeping operations. His remarks, available at *http://usun.state.gov/briefing/statements/221616.htm*, are excerpted below.

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…[A]rmed conflicts today are rarely fought between opposing military forces lined up against each other on an isolated battlefield. Instead, they tend to involve, on one side or perhaps both, irregular forces that live in close proximity to civilian populations. The result is that, when fighting takes place, civilians are often at grave risk either because they are intentionally targeted, or because they otherwise find themselves in the line of fire. Even when civilians do survive, the conflict may quickly drive them from their homes, exposing them to a new set of risks. The responsibility for protecting civilians in conflict, therefore, is both an important and a highly complicated one—a job we are still learning how to do effectively.

In recent years, this Council has regularly directed UN peace missions to protect civilians under imminent threat. Establishing a mandate, however, is a profoundly simple task compared to fulfilling one. The challenge we face goes beyond establishing goals to actually save and secure the lives of civilians in conflict. This challenge can be broken down into three core elements: prioritization, planning, and prevention.

The first of these elements is straightforward. The protection of civilians must be identified as a key priority in any peacekeeping mission from the very earliest stages. No one is helped, and the credibility of the UN is seriously damaged, when UN troops stand by while civilians are wounded or killed.

A second imperative is planning, a process that should begin as soon as the evidence of a potential crisis comes to the Council's attention. The best way to protect civilians is to act in time to keep conflicts from breaking out. With effective and early planning, peacekeeping missions can be designed with civilian protection uppermost in mind, with the right equipment and the best mix of military, police, and civilian personnel pre-positioned to respond to potential crises.

Part of planning is to learn from the past while acknowledging that no two situations are exactly alike. In Haiti, civilian protection has centered on efforts to return displaced families to their homes and to train an effective national police. In the Democratic Republic of the Congo, we are finally seeing the benefits of a mission that has emphasized civilian protection and that is backed by a strong political and diplomatic strategy. It is worth noting in this context that the UN mission in the DRC has developed a comprehensive plan for protecting civilians, which includes mapping specific threats and integrating that information into overall planning. Making such data available to mission commanders can spell the difference between success and failure.

All elements of the UN hierarchy have a role to play in planning for civilian protection. The Department of Peacekeeping Operations can facilitate the sharing of knowledge and best practices across missions, helping to disseminate lessons learned. But mission-specific planning remains critical and DPKO has a duty to assist each mission in developing a plan that fits the unique circumstances it will face. Meanwhile, the members of this Council have a responsibility,

through the questions we ask and the wording of the resolutions we adopt, to make clear the importance we attach to this issue.

This brings me to the third element in our discussion today—prevention. While we can make civilian protection a priority and devote ample resources to planning, we can still find ourselves trying to save lives in ways that were not foreseen. In Cote d'Ivoire in 2010, a political crisis required rapid adjustments to enable a democratic transition and contain civilian violence. Just recently, in South Sudan, UN Mission outposts served as emergency gathering points for more than 80,000 internally-displaced persons. Inside those overcrowded compounds, desperate families received security, food, water, and health care—babies were born, children studied, and the sick and wounded were treated.

Nothing is more predictable in international peacekeeping than the likelihood that unpredictable events will occur. The more flexibility we build into our preparations and deployments, the better off we will be. We have made progress, but we can do more to pre-position equipment and to consider in advance how we might transport peacekeepers to remote locations with relatively little notice and shift resources from one area to another. And we must do the best job we can in integrating information about changing political dynamics into our peacekeeping strategies. We cannot do everything; but we can at least act with wisdom and determination in response to what we have learned.

We should also continue to explore the promise of new technology. The deployment of unmanned aerial vehicles in MONUSCO has been useful in identifying hostile troop movements and locating civilian populations in need, helping better protect civilians and peacekeepers. Early warning networks should be part of any plan for protecting civilians, and the UN should strive to be connected, where appropriate, to all such networks.

Madam President, the protection of civilians is an integral part of the UN peacekeeping mission, and must therefore be given a top priority in the planning we do, the preparations we make, and the operations we implement on the ground. We must keep learning, and continually review our efforts to identify what we should be doing better. In the UN, the DPKO Best Practices Unit is driving this effort. We all have a responsibility to do our part—as UN officials, Security Council members, troop contributing nations, and members of the world community. Our credibility is at stake, but far more important, so are the lives of our neighbors. …

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C. CONFLICT AVOIDANCE

1. Gender-Based Violence Emergency Response and Protection Initiative

See Chapter 6.B.2.b.

2. Atrocities Prevention

On April 16, 2014, Ambassador Power addressed a Security Council briefing on the prevention of genocide. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/224887.htm*.

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Nine days ago, I had the privilege to join representatives from across the globe in Kigali to mark the twentieth anniversary of the Rwandan genocide, we bowed our heads in remembrance of the more than 800,000 men, women and children who were so ruthlessly deprived of life. We rededicated ourselves to assisting in the still unfinished tasks of recovery, reconciliation, and reintegration. And we joined with President Kagame in saluting "the unbreakable Rwandan spirit" as he put it, which has enabled the people of that beautiful land to build a better future without forgetting the past.

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Today we consider again the paramount question of lessons learned…In so doing, we benefit from instruments that did not exist two decades ago. These include the UN's Special Adviser on the Prevention of Genocide; the High Commissioner for Human Rights; the International Criminal Court; the Responsibility to Protect doctrine; improvements in regional peacekeeping capabilities—and here I would note particularly, with the addition of Rwandan peacekeepers who perform exceptionally, admirably, in the cause of the atrocity prevention in the Central African Republic and elsewhere—more nimble deployment of accountability mechanisms; and a welcome surge within civil society of anti-genocide awareness and activism.

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As a global community, we recognize that mass atrocities may emerge from a variety of scenarios. We've begun to identify telltale patterns and indicators. We've agreed on the value of vigilance to prevent unstable situations from unraveling. We have affirmed, all of us, the duty of each government to protect its citizens from mass atrocities. And we have stated our preparedness, under the UN Charter, to respond when states require help in fulfilling that duty.

In some cases—from Timor-Leste and Liberia to Sierra Leone, Libya, Kenya, and Ivory Coast—we have joined with local partners to end or deter violence. Recently, we've made progress in assisting the Democratic Republic of Congo and strengthening the UN in their fight against those militia who continue to attack and rape civilians. We have intensified diplomatic efforts to restore peace in South Sudan and the UN there has not only provided emergency supplies to populations displaced by the recent fighting, but it has importantly opened its doors in an unprecedented way allowing its bases to become islands of protection. The Africans and French deployed to try to prevent mass atrocities in the Central African Republic. We have quickly authorized a Commission of Inquiry and now we have authorized a UN peace operation to address the unfolding catastrophe. We must get African, European and UN forces deployed urgently.

Overall, however, it is both fair and profoundly unsatisfying to admit that our successes have been partial and the crimes against humanity that persist are devastating. Yesterday, many of us attended an Arria session, in which we saw graphic photographs taken in Syrian prisons showing the systematic, industrial-style slaughter and forced starvation killings of approximately 11,000 detainees. And those photos were taken in just three of the 50 Syrian-run detention centers, in Syria. And to that we can add the Syrian victims of chemical weapons attacks, the

children felled by barrel bombs and those being starved to death in besieged towns and villages, or those executed by terrorist groups. Twenty years from now, how will we reflect on this Council's failure to help those people? How will we explain Council disunity on Syria twenty years after Rwanda?

Too often, we have done too little, waited too long, or been caught unprepared by events that should not have surprised us. Moving forward, we have to do a better job confronting and defeating the practitioners of hate. Part of protecting against mass atrocities is preventing the conditions that allow them: rampant discrimination, the denial of human dignity, and the codification of bigotry. No one should be targeted for violence simply because of who they are or what they believe.

In our collective effort to prevent mass atrocities, we must make creative use of every tool we have: human rights monitoring; diplomatic missions; technical assistance; arms embargos; smart sanctions; peace operations; judicial inquiries; truth commissions; courts; and other measures designed to influence the calculations of perpetrators who every day are deciding how far they are going to go—every day they are doing a cost benefit analysis in their head about whether the cost of moving forward exceeds the benefits from their often warped perspective.

We must also be innovative in taking advantage of new technology like the UAV's now being deployed in the Democratic Republic of Congo—even text messaging which is being used to raise alarms, track the movement of outlaw groups, gather evidence of criminal violations, and we of course must always deliver aid to those in desperate need.

We must remember, as well, that preventing mass atrocities is a global responsibility requiring robust contributions from all. In particular, we need to train and equip peacekeepers who head into harm's way. And more countries should do their share—whether through soldiers, civilians, enablers, or other contributions. I echo my Rwandan colleague's point that twenty years after … the Rwandan genocide…we should have moved further beyond what he called, 'crisis improvisation."

Further, we must enhance the bonds of trust between ourselves. Historic differences within or between regional groups must neither lessen our capabilities nor diminish our willingness to act as one.

Finally, we must ask every state to consider whether there is more it can do to remove the political roadblocks that impede effective action. Again, with thousands of lives at stake in Syria and elsewhere, obstruction is untenable and cooperation is a moral and strategic imperative. Tomorrow afternoon, we will also have the chance to shine a spotlight on the horrors going on in the darkness of North Korea.

Madame President, and colleagues, our task is as straightforward as it is vital: to ensure that when our successors gather in this chamber two decades from now; they will not speak of more lost opportunities and failures. Instead, their words will be of …respect for the comprehensive anti-atrocity steps we took together. Let them say in their time that we, in our time, moved beyond deadlock to unity, beyond remembrance to mobilization, and beyond mere promises to the kind of bold and concrete actions that end wars and stop genocide before the searing pain it causes can be heard in the cries of those left behind.

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Ambassador Power again addressed the issue of preventing mass atrocities and genocide at a High Level Meeting on Mass Atrocities, held on September 25, 2014 at the UN in New York. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/232215.htm*.

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It is difficult to imagine a more important objective than preventing mass atrocities and genocide. The horrific atrocities of the Second World War galvanized the international community to create the United Nations.

If we are to prevent these atrocities, we must respond earlier, we must respond systematically, and we must respond together. States must do more than endorse statements about the responsibility to protect. States must take real action to prevent mass atrocities.

President Obama has declared that the prevention of mass atrocities and genocide is a "core national security interest and a core moral responsibility of the United States."

To translate those words into deeds, President Obama has taken unprecedented steps to ensure that our government can anticipate mass atrocities – because we know that the sooner we act, the more options we have.

He has established a standing body - the Atrocities Prevention Board - to focus our government on the risk of mass atrocities, and develop options for responding to potential mass atrocities before they metastasize and slaughter begins.

We are constantly considering what tools can best be deployed to prevent them, or to stop them from occurring. Our diplomats have exerted pressure on capitals, regional bodies, and here at the UN. Our Treasury Department has applied targeted sanctions on perpetrators, and blocked the flow of money to abusive regimes. And in certain circumstances, our military has intervened to stop atrocities from occurring, as it recently did to halt the mass killing of those trapped on Mt. Sinjar.

At the international level, the Security Council has a special responsibility for the preservation of international peace and security, and none of us should take this responsibility lightly.

In recent months, the Council has shown that it can act responsibly, mobilizing attention, resources, and support to end horrific cycles of violence. In South Sudan, we have surged forces to enable UNMISS to respond to a deadly civil war that has already claimed over 10,000 lives. And in the Central African Republic, we have authorized a new peacekeeping mission to support French forces in curbing a wave of sectarian violence that has caused thousands of deaths and displaced hundreds of thousands of people.

I would single out France for its leadership in helping prevent mass atrocities in Libya and helping halt them in Cote d'Ivoire, Mali, and the Central African Republic. And I would applaud Mexico for its announcement this week that it will deploy military personnel to UN peacekeeping operations for the first time in 60 years. Over time, this will prove a decision that helps prevent atrocities.

We have all seen how the irresponsible use of the veto by Security Council members can deprive this body, and the international community, of some of its most effective tools for preventing and responding to atrocities. In Syria, the Assad regime has committed widespread

and systematic violations against its own people. Yet – in the face of some of the worst horrors in modern history – four vetoes by members of this Council stood in the way of holding its leaders accountable.

We can ask ourselves whether some 200,000 lives would have been lost in Syria if the Security Council had been able to come together. We can even ask whether ISIL – the monstrous terrorist movement the international community is uniting against – would have gained the foothold it has if we had been united.

The Security Council has the power to play a critical role in stopping atrocities. That power carries with it great responsibility. All five permanent members have a responsibility to respond with acute urgency in the face of mass atrocities that take the lives of innocents and that threaten international peace and security.

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Cross References

Temporary Protected Status for South Sudan and Sudan, **Chapter 1.D.1.b.**
Resettling Syrian refugees, **Chapter 1.D.3.**
International tribunals, **Chapter 3.C.**
Syria: UN Security Council vote on referral to ICC, **Chapter 3.C.2.b.**
Palestinian Authority efforts to accede to treaties, **Chapter 4.A.1.**
Actions at the Human Rights Council regarding Syria, **Chapter 6.A.3.c.**
Sexual violence in conflict, **Chapter 6.B.2.**
Israel's participation at the UN, **Chapter 7.A.3.**
*Recording Israel as place of birth on passport (*Zivotofsky*)*, **Chapter 9.C.**
Syria-related sanctions, **Chapter 16.A.2.**
Sanctions relating to restoration of peace and security, **Chapter 16.A.7.**

CHAPTER 18

Use of Force

A. GENERAL

1. Use of Force Issues Related to Counterterrorism Efforts

a. Testimony on the Authorization for Use of Military Force

On May 21, 2014, State Department Principal Deputy Legal Adviser Mary E. McLeod testified before the Senate Committee on Foreign Relations on the 2001 Authorization for Use of Military Force ("AUMF"). Ms. McLeod's testimony appears below and is also available at *www.state.gov/s/l/releases/remarks/226395.htm*.

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Thank you very much Chairman Menendez, Ranking Member Corker, and members of the committee, for the invitation to speak at this hearing. The Administration looks forward to engaging with this Committee and the Congress on this important topic.

I will begin with some introductory remarks before discussing briefly a few international law aspects of the Administration's legal framework for conducting operations pursuant to the 2001 Authorization for Use of Military Force (AUMF). I will conclude by laying out a few relevant considerations for establishing our legal framework beyond 2014. My colleague Stephen Preston, General Counsel of the Department of Defense, will then address the current framework under U.S. law for military counterterrorism operations.

As an initial matter, the President has made clear his desire to engage with Congress about the future of the AUMF. The President expressed his commitment to "move [America] off a permanent war footing" one year ago in his speech at the National Defense University (NDU), and reaffirmed this commitment in this year's State of the Union address. And the President

made clear in his NDU speech that his goal is to engage with Congress and the American people to "refine, and ultimately repeal" the AUMF.

As we begin our dialogue on this issue, it will be critical to assess our legal authorities not only within the context of our current military operations, but also in light of future needs, which as of today's hearing may not be fully apparent. At the same time, as the President has said, we must keep in mind going forward that not every collection of thugs that label themselves al Qaeda will pose a threat to the United States that requires the use of military force in response.

International Legal Considerations

Turning now to international legal considerations, as we consider the future of the AUMF, it will be critical to ensure that U.S. actions continue to be grounded firmly in international law. Under international law, the United States has an inherent right of self-defense to use force to respond to an armed attack, or the imminent threat of an armed attack. And, when in an armed conflict, the United States may use force, in accordance with the law of war, to prosecute that conflict. Our use of military force must comply with international law's requirements of necessity, proportionality, distinction, and humanity.

United States use of force abroad is carried out in furtherance of these international law rights and requirements, and the law of war specifically has and will continue to provide the legal framework for U.S. military actions taken in the armed conflict against al Qaeda, Taliban, and associated forces. Going forward, the Office of the Legal Adviser at the State Department will continue to work to ensure that we exercise our rights consistent with these and other applicable international law principles.

I also want to note that there is a firm basis in international law to support our friends and partners facing the threat of terrorism within their own borders. Even where violent extremists pose a greater threat to these countries than they do to the United States, we can draw from all elements of national power—including military force, in appropriate cases—to help them counter these threats. In Mali, for example, we have been providing military aid to French forces to push back terrorists and other extremists. As the President stated in his speech one year ago, "we must define our effort not as a boundless global war on terror, but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America." Indeed, targeted efforts undertaken in partnership with other countries can be highly effective in countering terrorist threats, without keeping the United States on a permanent wartime footing.

Post-2014 Legal Framework

With these principles in mind, let me now outline a few considerations regarding a future legal framework. We are currently working to identify an appropriate U.S. military presence in Afghanistan after 2014. We are also working toward the closure of the detention facility at Guantanamo Bay, which the President has reaffirmed will further our national security, our international standing, and our ability to cooperate with allies in counterterrorism efforts. We also continue to work with our allies and partners to provide assistance and training to increase their capacity to take effective measures against terrorist organizations.

The State Department is joined by many other U.S. agencies in implementing this comprehensive strategy, which includes a broad range of military and other foreign assistance, law enforcement cooperation, intelligence sharing, and diplomatic engagement. All of these efforts are vital to countering threats. This is true even at times—such as the present—when we are using military force as part of our response to the terrorist threat. In the long term, the success of our efforts will depend not exclusively on the use of military force, but also on sustained

attention to achieving effective governance and the rule of law in countries where terrorist threats proliferate.

We also bear in mind what Department of Homeland Security Secretary Jeh Johnson, then in his capacity as General Counsel of the Department of Defense, stated in his November 2012 speech at the Oxford Union. He noted that there will come a "tipping point" when our efforts to disrupt, dismantle, and defeat al Qaeda have succeeded to such an extent that we will no longer describe ourselves as being in an "armed conflict" with al Qaeda to which the law of war applies. At that point, we will rely primarily on law enforcement, intelligence, foreign assistance, and diplomatic means—in cooperation with the international community—to counter any remaining threat posed by al Qaeda and its affiliates. And as we do so, we will retain the authority, under both international and domestic law, to act in national or collective self-defense against armed attacks or imminent threats thereof posed by terrorist groups.

Based on all of these considerations, we would suggest that our efforts to identify a future legal framework be guided by the following principles:

- First, any domestic authority that we rely on to use military force should reflect the President's clear direction that we must move America off a permanent wartime footing. As the President stated, this means that we will engage with Congress and the American people to "refine, and ultimately repeal" the AUMF, and that the President will not sign a law designed to expand the AUMF's mandate further.
- Second, any authorization to use military force, including any detention operations, must be consistent with international law.
- Third, we must continue to enhance our cooperation with partner nations to take action within their own borders, including law enforcement action and other forms of engagement, where those methods provide the most effective and sustainable means of countering terrorist threats.
- Fourth, the President has made clear that now is the time to close the detention facility at Guantanamo Bay, and any future legislation should lift all remaining restrictions on the Commander in Chief's authority to transfer detainees held under the law of war.
- Finally, we must keep in mind that the President's authority to defend the United States would remain part of any framework that emerges.

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As mentioned in Ms. McLeod's testimony, the Senate Foreign Relations Committee also heard from Stephen Preston, general counsel for the Department of Defense. Mr. Preston's testimony follows.

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I'd like to open with a brief discussion of the current legal framework for U.S. military operations, focusing on how the 2001 Authorization for the Use of Military Force is being applied by the Department of Defense.

Although the AUMF makes no express mention of specific nations or groups, it was clearly intended to authorize the president to use force against al-Qaida, the organization that perpetrated the 9/11 attacks, and the Taliban, which harbored al-Qaida. In addition, based on the well-established concept of co-belligerency in the laws of war, the AUMF has been interpreted to authorize the use of force against associated forces of al-Qaida and the Taliban.

As the administration has stated publicly on numerous occasions, to be an associated force a group must be both an organized, armed group that has entered the fight alongside al-Qaida or the Taliban, and a co-belligerent with al-Qaida or the Taliban in hostilities against the United States or its coalition partners.

The Department of Defense relies on the AUMF in three contexts: ongoing U.S. military operations in Afghanistan, our ongoing military operations against al-Qaida and associated forces outside the United States in the theater of Afghanistan and detention operations in Afghanistan and at the Guantanamo Bay, Cuba, facility.

In Afghanistan, the U.S. military currently conducts operations pursuant to the AUMF against al-Qaida, the Taliban and other terrorist or insurgent groups that are engaged alongside al-Qaida and the Taliban in hostilities against the United States and its coalition …partners. In addition, the ISAF and U.S. rules of engagement permit the targeting of hostile personnel in Afghanistan based on the threat they pose to U.S., coalition and Afghan forces or to civilians.

Outside the United States in areas of active hostilities, the U.S. military currently takes direct action under the AUMF—that is, capture and lethal operations—in the following circumstances: First, in Yemen, the U.S. military has conducted direct action targeting members of al-Qaida in the Arabian Peninsula. AQAP is an organized, armed group that is part of al-Qaida, or at least an associated force of al-Qaida for purposes of the AUMF.

Second, the U.S. military has also conducted capture or lethal operations under the AUMF outside Afghanistan against individuals who are part of al-Qaida and targeted as such. For example, in Somalia, the U.S. military has conducted direct action against a limited number of targets who have been determined to be part of al-Qaida. And in Libya, in October 2013, in reliance on the AUMF, U.S. forces captured long-time al-Qaida member Abu Anas al-Libi.

Now, the fact that an al-Qaida-affiliated group has not to date been identified as an associated force for purposes of the AUMF does not mean that the United States has made a final determination that the group is not an associated force. We are prepared to review this question whenever a situation arises in which it may be necessary to take direct action against a terrorist group in order to protect our country.

Lastly, in our ongoing armed conflict against al-Qaida, the Taliban and associated forces, the U.S. military relies on the authority of the AUMF to hold enemy belligerents in military detention in Afghanistan and at the detention facility at Guantanamo Bay.

The AUMF is not the only authority the president has to use force to keep us safe. For example, the president has authority under the United States Constitution to use military force as needed to defend the nation against armed attacks or imminent threats of armed attack. This inherent right of self-defense is also recognized in international law.

Looking forward, a central question is what future legal framework will provide the authorities necessary in order for our government to meet the terrorist threat to our country, but will not greatly exceed what is needed to meet the threat.

As was made clear in the president's NDU speech last year, the answer is not legislation granting the executive unbound powers more suited for traditional armed conflicts between nation-states. Rather, the objective is a framework that will support a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America. The challenge is to ensure that the authorities for U.S. military operations are both adequate and appropriately tailored to the threat.

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b. Notification to UN of Action Taken in Libya

On June 17, 2014, U.S. Permanent Representative to the United Nations Samantha Power reported to the UN Security Council, in accordance with Article 51 of the UN Charter, that the United States had taken action in Libya to capture Ahmed Abu Khattalah, who was involved in the attacks on the U.S. mission in Benghazi, Libya in 2012. U.N. Doc. S/2014/417. Ambassador Power's letter to Vitaly Churkin, then-president of the Security Council, appears below.

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On behalf of my Government, I wish to report that the United States has taken action in Libya to capture Ahmed Abu Khattalah, a senior leader of the Libyan militant group Ansar al-Sharia-Benghazi in Libya. Abu Khattalah will be presented to a United States Federal Court for criminal prosecution.

As is well known, the U.S. Temporary Mission Facility and Annex in Benghazi, Libya were attacked in September 2012, and the U.S. Ambassador to Libya and three other Americans were killed. Following a painstaking investigation, the U.S. Government ascertained that Ahmed Abu Khattalah was a key figure in those armed attacks. The investigation also determined that he continued to plan further armed attacks against U.S. persons.

The rneasures we have taken to capture Abu Khattalah in Libya were therefore necessary to prevent such armed attacks, and were taken in accordance with the United States' inherent right of self-defense. We are reporting these measures to the Security Council in accordance with Article 51 of the Charter of the United Nations.

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c. Notification to UN of Actions Against ISIL

On September 23, 2014, Ambassador Power provided another notification to the UN in accordance with Article 51 regarding U.S. actions to counter threats presented by the armed group known as the Islamic State in Iraq and the Levant ("ISIL"). U.N. Doc. S/2014/695. Ambassador Power's September 23 letter follows.

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In the letter dated 20 September 2014 from the Minister for Foreign Affairs of Iraq addressed to the President of the Security Council (S/2014/691, annex) and other statements made by Iraq, including the letter dated 25 June 2014 from the Minister for Foreign Affairs of Iraq addressed to the Secretary-General (S/2014/440, annex), Iraq has made clear that it is facing a serious threat of continuing attacks from the Islamic State in Iraq and the Levant (ISIL) coming out of safe havens in Syria. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq's people. For these reasons, the Government of Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders. In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.

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d. War Powers Resolution Report Regarding Iraq

Also on September 23, 2013, President Obama reported to the Speaker of the House of Representatives and the President Pro Tempore of the Senate regarding actions taken in Iraq to counter ISIL. The text of the letter follows, and is available on the White House website at *www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq*.

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In my reports of August 8 and 17 and September 1 and 8, 2014, I described a series of discrete military operations in Iraq to stop the advance on Erbil by the Islamic State of Iraq and the Levant (ISIL), support civilians trapped on Mount Sinjar, support operations by Iraqi forces to recapture the Mosul Dam, support an operation to deliver humanitarian assistance to civilians in the town of Amirli, Iraq, and conduct airstrikes in the vicinity of Haditha Dam.

As I noted in my address to the Nation on September 10, with a new Iraqi government in place, and following consultations with allies abroad and the Congress at home, I have ordered implementation of a new comprehensive and sustained counterterrorism strategy to degrade, and ultimately defeat, ISIL. As part of this strategy, I have directed the deployment of 475 additional U.S. Armed Forces personnel to Iraq, and I have determined that it is necessary and appropriate to use the U.S. Armed Forces to conduct coordination with Iraqi forces and to provide training, communications support, intelligence support, and other support, to select elements of the Iraqi security forces, including Kurdish Peshmerga forces. I have also ordered the U.S. Armed Forces to conduct a systematic campaign of airstrikes and other necessary actions against these terrorists in Iraq and Syria. These actions are being undertaken in coordination with and at the request of the Government of Iraq and in conjunction with coalition partners.

It is not possible to know the duration of these deployments and operations. I will continue to direct such additional measures as necessary to protect and secure U.S. citizens and our interests against the threat posed by ISIL.

I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40 and Public Law 107-243) and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States.

I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in this action.

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e. War Powers Resolution Report Regarding Syria

On September 23, 2013, President Obama sent a letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate reporting on actions taken in Syria, consistent with the War Powers Resolution (Pub. L. No. 93-148). The text of the letter follows, and is available on the White House website at *www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria*.

> As I have repeatedly reported to the Congress, U.S. Armed Forces continue to conduct operations in a variety of locations against al-Qa'ida and associated forces. In furtherance of these U.S. counterterrorism efforts, on September 22, 2014, at my direction, U.S. military forces began a series of strikes in Syria against elements of al-Qa'ida known as the Khorasan Group. These strikes are necessary to defend the United States and our partners and allies against the threat posed by these elements.
>
> I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40) and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States. I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in this action.

2. Bilateral Agreements and Arrangements

Bilateral Security Agreement and NATO Status of Forces Agreement with Afghanistan

On September 30, 2014, the Government of Afghanistan and the Government of the United States signed a bilateral security agreement ("BSA"). The BSA provides the legal framework for members of the U.S. armed services to continue to work in Afghanistan post-2014 to target remnants of al-Qaida and to train, advise, and assist the Afghan National Security Forces. Signing the BSA implements the Strategic Partnership Agreement signed in May 2012. See *Digest 2012* at 592-93. On the same day as the BSA was signed, NATO and Afghanistan signed a status of forces agreement ("SOFA"). Both the BSA and the NATO SOFA are available at *www.state.gov/s/l/c8183.htm*. President Obama's statement on the signing appears below. Daily Comp. Pres. Docs., 2014 DCPD No. 00722 (Sept. 30, 2014).

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Today we mark an historic day in the U.S.-Afghan partnership that will help advance our shared interests and the long-term security of Afghanistan. After nearly 2 years of hard work by negotiating teams on both sides, earlier today in Kabul the United States and the new Afghan Government of national unity signed a bilateral security agreement (BSA). This agreement represents an invitation from the Afghan Government to strengthen the relationship we have built over the past 13 years and provides our military servicemembers the necessary legal framework to carry out two critical missions after 2014: targeting the remnants of Al Qaida and training, advising, and assisting Afghan national security forces. The signing of the BSA also reflects the implementation of the strategic partnership agreement our two governments signed in May 2012.

Today Afghan and NATO officials also signed the NATO status of forces agreement, giving forces from allied and partner countries the legal protections necessary to carry out the NATO Resolute Support mission when ISAF comes to an end later this year.

These agreements follow an historic Afghan election in which the Afghan people exercised their right to vote and ushered in the first peaceful democratic transfer of power in their nation's history. The BSA reflects our continued commitment to support the new Afghan unity Government, and we look forward to working with this new Government to cement an enduring partnership that strengthens Afghan sovereignty, stability, unity, and prosperity and that contributes to our shared goal of defeating Al Qaida and its extremist affiliates.

This day was only possible because of the extraordinary service of our men and woman in uniform who continue to sacrifice so much in Afghanistan on behalf of our security and the Afghan people. The American people are eternally grateful for their efforts.

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Secretary of State John Kerry issued a statement on the signing of the BSA and NATO SOFA on September 30, 2014. Secretary Kerry's statement appears below and is available at *www.state.gov/secretary/remarks/2014/09/232329.htm*.

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The signing of the Bilateral Security Agreement sends a long-awaited and unequivocal message that the United States and Afghanistan are determined not just to sustain, but to build on more than a decade of progress.

This is a milestone moment for so many who, for over a decade, put their lives on the line every single day for reason and peace and fairness.

The signing of the Bilateral Security Agreement and the NATO Status of Forces Agreement earlier today puts an exclamation point on our enduring commitment to the security and stability of Afghanistan, the region, and the world. This is a bond that will continue for the United States, our NATO allies, and Afghanistan.

Our job now is to support Afghanistan for the Afghans. As envisioned in the Enduring Strategic Partnership Agreement, the Bilateral Security Agreement will allow the United States to continue to train, advise, and assist Afghan National Security Forces (ANSF), so that terrorists can never again threaten the world from Afghan soil. The NATO SOFA agreement will ensure that international efforts to train, advise, and assist the ANSF continue full speed ahead after the International Security Assistance Force mission concludes at the end of this year.

The gains of the past decade have been won with blood and treasure. They must not be lost, and we all have a stake in ensuring they're a foundation upon which to build.

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3. International Humanitarian Law

a. U.S. Remarks at the ICRC Meeting and the UN General Assembly

Mary McLeod addressed the third meeting of States on enhancing compliance with international humanitarian law, held in Geneva June 30-July 1, 2014. Her opening remarks are excerpted below and available at *https://geneva.usmission.gov/2014/07/01/u-s-opening-remarks-at-international-humanitarian-law-meeting/*.

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The number of delegations represented in this room is a testament to the importance of the work before us. Although the United States recognizes the progress States have made in improving the implementation of IHL over the past decades, more can and should be done. Establishing a dedicated forum in which States can engage with each other in substantive, non-politicized discussions on IHL issues would mark an important step forward. Indeed, we continue to believe that the most effective way to achieve our shared humanitarian objectives is by creating a forum that is conducive to serious, non-politicized engagement on important issues of IHL implementation. That is critical to ensuring compliance in the long-term.

In the meetings that have been held since the 2011 International Conference, we have begun to craft a mechanism that would advance this cause. For that, we recognize in particular the role that the Swiss and the ICRC have played in facilitating this discussion among States, as well as the sense of purpose that States have brought to bear.

However, more work lies ahead. As the Background Document helpfully prepared by the Swiss and the ICRC reflects, there are core areas of agreement as well as areas—both large and small—on which States have yet to achieve consensus. In addition, there are issues that have yet to be explored fully, most notably how to address non-State actors, which we know are responsible for some of the most horrific IHL violations.

As the form of a potential new IHL compliance mechanism takes shape, we must continue to be guided by the core principles that are reflected in the Background Document. We must remember that the purpose of any new mechanism should be actually to enhance implementation and compliance by both States and non-State actors. Politicization must be avoided, as it would undermine the very atmosphere of constructive engagement we have sought to foster.

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On October 21, 2014, Stephen Townley, Deputy Legal Adviser for the U.S. Mission to the UN, addressed the 79th UN General Assembly Sixth Committee (Legal) session on the status of the Protocols Additional to the Geneva Conventions of 1949. Mr. Townley discussed U.S. efforts to ratify Additional Protocol II as well as other actions taken by the United States to uphold and strengthen principles of international humanitarian law. His remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/234022.htm*.

* * * *

Thank you Mr. Chairman. The United States has long been a strong proponent of the development and implementation of international humanitarian law, which we often also refer to as the law of war or the law of armed conflict, and we recognize the vital importance of compliance with its requirements during armed conflict. President Obama has consistently reaffirmed the need for nations to work together within a rule of law framework in addressing the numerous security challenges currently confronting States; as he stated in his address to the U.N. General Assembly in September, "all of us—big nations and small—must meet our responsibility to observe and enforce international norms." Accordingly, the United States continues to ensure that all of our military operations that are conducted in connection with armed conflict comply with international humanitarian law, and all other applicable international and domestic law.

As we reported in the last discussion of this agenda item in this Committee two years ago, the United States announced its intent to seek the U.S. Senate's advice and consent to ratification of Additional Protocol II, and this treaty is pending on the calendar of the Senate. An extensive interagency review found that U.S. military practice was consistent with the Protocol's provisions, and we believe it remains so today. Although the United States continues to have significant concerns with many aspects of Additional Protocol I, Article 75 of that Protocol sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. The U.S. Government has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and we expect all other nations to adhere to these principles as well. Indeed, in the recently updated Department of Defense Directive on its Detainee Program, specific reference is made to the principles in Article 75 of Additional Protocol I.

We have also been pleased to see further discussion of weapons review in the context of the informal expert meeting on Lethal Autonomous Weapons Systems, held last spring under the auspices of the Convention on Certain Conventional Weapons. The United States believes that the importance of conducting the legal reviews of weapons to determine their consistency with the State's international obligations, which for Parties to Additional Protocol I is reflected in parts of Article 36, warrants the international community's renewed attention, and not just as it relates to Lethal Autonomous Weapons Systems. The U.S. Department of Defense has long-standing policies and processes for conducting the legal review of weapons when acquiring new weapons. Moreover, under a Department of Defense policy with respect to the use of autonomy in weapon systems, two reviews, including both legal and policy considerations, are conducted of certain types of autonomous weapon systems—once prior to making the decision to enter into formal development of a weapon, and again before a weapon is fielded. The United States supports continued informal discussions on Lethal Autonomous Weapon Systems within meetings of States Parties to CCW and we hope that such discussions will continue to address the importance of conducting such reviews when developing or acquiring new weapons. We also hope the CCW will serve as a useful vehicle for a broader exchange of good practices in this area, while recognizing States' needs to protect certain national security and proprietary information.

I'd like to take this opportunity to discuss two recent, broader initiatives. The first is the Swiss-ICRC initiative on strengthening compliance with IHL, to which the Swiss and ICRC Presidents referred in a recent published statement on the 150th anniversary of the 1864 Geneva Convention. Although the United States recognizes the progress States have made in improving the implementation of IHL over the past decades, more can and should be done. We therefore support efforts to establish a dedicated forum in which States can engage with each other in substantive, non-politicized discussions about the ways they have implemented IHL. Such a forum would foster serious engagement on how States address their most pressing issues. The United States supports the concept of States reporting on their own practice, as well as discussions of particularly timely topics. We fully support the idea, also recently suggested by Presidents Burkhalter and Maurer, that such a forum could be a vehicle to facilitate capacity-building. We look forward to the further development of this initiative in advance of the 32nd International Conference of the Red Cross and Red Crescent.

The second initiative I'd like to discuss is the multi-year ICRC project related to the legal protections for persons deprived of their liberty in relation to non-international armed conflicts. The United States supports this continuing effort to ensure that IHL remains practical and relevant in providing legal protection to detainees and internees, and to inform the ICRC's presentation of a range of options and recommendations to the 32nd International Conference. We were pleased to participate in the first of two consultations with government experts, which addressed the conditions of detention and the protection of particularly vulnerable groups. We look forward to participating in the next round of discussions this month, which will consider the grounds and procedures for deprivation of liberty in non-international armed conflict, as well as transfers from one authority to another. We would emphasize that the situations in non-international armed conflict that may warrant detention can be quite varied, operationally complex, and logistically challenging. As we continue these discussions hosted by the ICRC, we must remain mindful that, apart from legally required baseline protections, detention procedure and processes must remain flexible, practical, and appropriate for the particular situation. We

look forward to extensive discussion among State participants on their practical experiences and views on these issues.

With respect to both of these initiatives, we highlight that nations will need to find the right way to address the conduct of, and frequent violations of IHL by, non-state actors. It is important that international mechanisms not in any way lend legitimacy to non-state actors. On the other hand, in discussing non-international armed conflict, it will be critical to address the conduct of non-state actors. We look forward to exchanging views with others on how this can best be achieved, as the actions of non-state actors undoubtedly will remain an important topic as we work toward a world where IHL is better implemented across the full range of ongoing conflicts.

We would also briefly like to signal our strong support for ongoing work to establish a Montreux Document Forum where issues relating to private security companies can be considered.

In conclusion, let me once again reaffirm our commitment to IHL and to its effective implementation. Thank you, Mr. Chairman.

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b. Applicability of international law to conflicts in cyberspace

As discussed in *Digest 2013* at 560, consensus was achieved in 2013 by the UN Group of Governmental Experts ("UNGGE") on Developments in the Field of Information and Telecommunications in the Context of International Security. On January 9, 2014, the UN General Assembly adopted a resolution (U.N. Doc. A/RES/68/243) requesting the establishment of a further Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security with a mandate to continue to study, among other things, how international law applies to the use of information and communications technologies by States. In October 2014, the United States submitted the following paper to the 2014–15 Group of Governmental Experts.

* * * *

Introduction and Background

… This submission addresses the application of international law to the use of information and communications technologies (ICTs) by States and proposes measures that would promote responsible behavior of States with regard to ICTs. This submission builds upon the 2010 and 2013 consensus reports of prior UNGGEs and the U.S. views articulated in its submissions to these prior UNGGEs.

It is clear from the 2013 UNGGE consensus report reached by Experts that States recognize that existing international law applies to State use of ICTs. Specifically, the 2013 UNGGE report noted that international law "is applicable and is essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ICT environment."[26] The

[26] Report of the 2012–13 UNGGE (June 24, 2013), UN Doc. A/68/98, paragraph 19.

report further affirmed, *inter alia*, the application of the UN Charter and international law principles of sovereignty, human rights and fundamental freedoms, and State responsibility to State use of ICTs.[27] The Experts also noted the need to further study *how* international law applies, and recommended that States should further consider how best to cooperate in implementing norms and principles of responsible behavior in the ICT environment.[28]

To build on the successes of the prior UNGGEs, the UN General Assembly (UNGA) established the present UNGGE to continue to study, *inter alia*, how international law applies to the use of ICTs by States, and the norms, rules, or principles of responsible behavior of States in cyberspace.[29] The United States' submission for the 2014–15 UNGGE focuses on these elements of the mandate and expands on the views presented in its prior submissions (Appendix A and Appendix B), offering a series of considerations that provide an analytical framework for applying existing international law to States' use of ICTs and providing additional ideas on measures that would promote responsible State behavior—and, therefore, security and stability—in cyberspace.

The cornerstone of the U.S. view has been that existing international law applies to State conduct in cyberspace, in particular to armed conflict, the use of proxy actors, human rights, and State responsibility. When assessing cyber activities within the framework of existing international law, States should take into account the distinctive characteristics of such activities. As noted in the 2012–13 U.S. submission to the UNGGE, applying international law to the context of cyberspace can present certain challenges. This is not unusual: similar challenges have been confronted when applying existing international law to other new technologies and situations. But the challenge is not whether existing international law applies to State behavior in cyberspace. As the 2012–13 GGE affirmed, international law does apply, and such law is essential to regulating State conduct in this domain. The challenge is providing decision-makers with considerations that may be taken into account when determining how existing international law applies to cyber activities. Despite this challenge, history has shown that States, through consultation and cooperation, have repeatedly and successfully applied existing bodies of law to new technologies. It continues to be the U.S. view that all States will benefit from a stable international ICT environment in which existing international law is the foundation for responsible State behavior in cyberspace.

I. The Application of International Law to Cyber Activities in the Context of Hostilities

As noted in the U.S. submissions for the prior UNGGEs, there are two related bodies of international law that are relevant to the question of how existing international law applies to ICTs and the use of force in and through cyberspace: the *jus ad bellum* (the body of law that addresses, *inter alia*, uses of force triggering a State's right to use force in self-defense) and the *jus in bello* (the body of law governing the conduct of hostilities in the context of armed conflict). In this section and those that follow, we set out in bold-face type some basic principles of international law that apply to State behavior in cyberspace and provide, where applicable, some considerations that States may take into account when determining how such principles apply to State use of ICTs in specific situations they confront.

It is important to note here that this UNGGE need not reach consensus on exactly how existing principles of international law apply to all conceivable cyber situations. It would suffice

[27] *Id.* at paragraphs 19–21, 23.
[28] *Id.* at paragraphs 16 and 25.
[29] UNGA Resolution 68/243 (January 9, 2014), paragraph 4.

to identify the basic legal principles that apply and then reach a consensus on some of the relevant considerations States should take into account when they confront real-world situations. Such considerations about how international law applies to actions in cyberspace will necessarily be taken into account on a case-by-case basis and will depend on the particular circumstances of the situation at hand. We need not spell out how international law applies to all hypothetical scenarios—we have not done so with respect to other types of operations, and in any case there will undoubtedly be situations that arise that we are unable to predict given the speed of change in ICTs. But reaching a consensus on some of the relevant considerations for States in determining how existing international law applies to the use of ICTs will assist all States in meeting the challenge of applying, and abiding by, existing international law when real-world situations involving the use of ICTs present themselves.

A. Cyber activities and the *jus ad bellum*

Cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law.

A State's inherent right of self-defense, recognized in Article 51 of the UN Charter, may in certain circumstances be triggered by cyber activities that amount to an actual or imminent armed attack.[30] This inherent right of self-defense[31] against an actual or imminent armed attack in or through cyberspace applies whether the attacker is a State actor or a non-State actor.

In determining whether a cyber activity constitutes a use of force prohibited by Article 2(4) of the UN Charter and customary international law or an armed attack sufficient to trigger a State's inherent right of self-defense, States should consider the nature and extent of injury or death to persons and the destruction of, or damage to, property. Although this is necessarily a case-by-case, fact-specific inquiry, cyber activities that proximately result in death, injury, or significant destruction, or represent an imminent threat thereof, would likely be viewed as a use of force / armed attack. If the physical consequences of a cyber activity work the kind of damage that dropping a bomb or firing a missile would, that cyber activity should equally be considered a use of force / armed attack.

Some of the factors States should evaluate in assessing whether an event constitutes an actual or imminent use of force / armed attack in or through cyberspace include the context of the event, the actor perpetrating the action (recognizing the challenge of attribution in cyberspace, including the ability of an attacker to masquerade as another person/entity or manipulate transmission data to make it appear as if the cyber activity was launched from a different location or by a different person), the target and its location, the effects of the cyber activity, and the intent of the actor (recognizing that intent, like the identity of the attacker, may be difficult to discern, but that hostile intent may be inferred from the particular circumstances of a cyber activity), among other factors.

Determining whether the right to use force in self-defense against an imminent armed attack in or through cyberspace has been triggered is difficult given the ability of actors to cloak their behavior—including preparations for an armed attack—in cyberspace, and the speed with which a cyber activity may be launched and its effects felt. Additionally, it may be difficult to

[30] In this document, the term "attack" refers to activity that qualifies as an attack under the relevant provisions of the *jus ad bellum* or the *jus in bello*, and not to cyber activities that are colloquially called "attacks" that do not meet the relevant threshold.

[31] In this document, the term "self-defense" is used in the *jus ad bellum* sense of activity undertaken in response to an armed attack; the term is not to be conflated with cyber activities that constitute "network defense."

determine whether a particular cyber activity, such as the placement of malware on a system, was undertaken because the actor has actually decided to conduct an armed attack using that malware, is merely acquiring the capability to undertake an armed attack in the future, or is using or intends to use the malware in a manner that would not constitute an armed attack. Just as in the kinetic context, States should consider all available information before using force in self-defense against an imminent armed attack in or through cyberspace. Such consideration may be especially necessary when the threat of an imminent armed attack in or through cyberspace is not associated with a corresponding threat of imminent armed attack through kinetic means.

States may employ cyber capabilities that rise to the level of a use of force as a means of self-defense against a kinetic armed attack (*i.e.*, one that was not launched in or through cyberspace). Additionally, States may in certain circumstances use kinetic military force in self-defense against an armed attack in or through cyberspace.

The use of force in self-defense must be limited to what is necessary and proportionate to address the imminent or actual armed attack in or through cyberspace.

Before resorting to forcible measures in self-defense against an actual or imminent armed attack in or through cyberspace, States should consider whether passive cyber defenses or active defenses below the threshold of the use of force would be sufficient to neutralize the armed attack or imminent threat thereof.

The widespread availability of both the means and knowledge to undertake cyber activities and the relatively low costs of such activities make cyber activities an attractive option for non-State actors. When determining whether the use of force in self-defense is necessary to address an imminent or actual armed attack in or through cyberspace by a non-State actor, States should consider whether it is feasible to secure the cooperation of the territorial State in preventing or ending the cyber activity. A State facing an imminent or actual armed attack by a non-State actor in or through cyberspace generally must make a reasonable, good faith effort to seek the territorial State's consent before using force on its territory against the non-State actor to prevent or end the armed attack. When seeking consent, the requesting State should give the territorial State a reasonable opportunity to respond, recognizing that the reasonableness of a timeframe in a particular context may be determined in relation to the nature of the actual or imminent armed attack.

A State may act without consent, however, if the territorial State is unwilling or unable to stop or prevent the actual or imminent armed attack launched in or through cyberspace. In evaluating whether a State is unwilling or unable to stop or prevent an actual or imminent armed attack, relevant considerations may include whether the territorial State is actively supporting the non-State actor, whether the State is tacitly accepting the activities of the non-State actor on its territory, and whether the State previously acted on its own or with others to suppress the non-State actor's activities in its territory. Additionally, the question whether to proceed with the use of force in self-defense without the consent of the territorial State should be evaluated based on the articulated reasons, if any, for withholding consent. If the territorial State does not consent to the use of force on its territory because it proposes to take a reasonable alternative course of action to respond to the actual or imminent armed attack or to allow others to do so, it generally should not be treated as "unwilling."

In circumstances in which a victim State must use force in self-defense against an actual or imminent armed attack by non-State actors in or through cyberspace, the victim State must take reasonable measures to ensure that its defensive actions are directed exclusively at the non-State actors when the territorial State is not also responsible for the armed attack.

B. Cyber activities and the *jus in bello*

Cyber activities in the context of an armed conflict may in certain circumstances constitute an "attack" for purposes of the application of the *jus in bello* rules that govern the conduct of hostilities.

In the context of an armed conflict, a cyber activity directed against a civilian computer network, for example, would not violate the *jus in bello* prohibition on attacking civilian objects unless the activity qualifies as an "attack"; however, a civilian computer network is not immune from attack if it is being used by a belligerent for military purposes. When determining whether a cyber activity constitutes an "attack" for *jus in bello* purposes, States should consider, *inter alia*, whether a cyber activity results in kinetic and irreversible effects on civilians, civilian objects, or civilian cyber infrastructure, or non-kinetic and reversible effects on the same, as well as the nature of the connection, if any, between the cyber activity and the particular armed conflict in question.

The *jus in bello* principle of distinction applies to cyber attacks undertaken in the context of an armed conflict. In the context of cyber capabilities used in armed conflict, the principle of distinction requires that only legitimate military objectives be made the object of attack.

A legitimate military objective is an object that, by its nature, location, purpose, or use, makes an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Military computers and military cyber infrastructure may be understood to qualify as military objectives by their nature. Additionally, civilian computers and civilian cyber infrastructure may qualify as military objectives if used for military purposes by a party to the armed conflict. The often dual-use nature of ICT infrastructure—the fact that it is often shared by State militaries and civilian communities, as well as by non-State actors who may seek to launch an armed attack in or through cyberspace—is a relevant consideration in applying the principle of distinction. Although an attack on civilian cyber objects being used for military ends may be permissible in certain circumstances, such objects may be part of a larger network of civilian cyber objects that are not being used in that way. As a result, States must consider the principle of proportionality when targeting legitimate military objectives that are networked to purely civilian objects or otherwise part of dual-use cyber infrastructure.

The *jus in bello* principle of distinction also affects what weapons may be used in the context of an armed conflict. Weapons that are incapable of being used in accordance with the principles of distinction and proportionality would be inherently indiscriminate and *per se* unlawful under the law of armed conflict. Certain cyber tools could, in light of the interconnected nature of computer networks, be inherently indiscriminate in the sense that their effects cannot be predicted or controlled. For example, use of a worm that could spread uncontrollably within civilian networks might be prohibited by the law of war if such use would constitute an "attack" for *jus in bello* purposes. States should consider the principle of proportionality before undertaking any cyber attacks in armed conflict that reasonably might be expected to cause unpredictable or unintended effects beyond the intended target.

The *jus in bello* principle of proportionality applies to cyber activities undertaken in the context of an armed conflict. The principle of proportionality prohibits attacks that may be expected to cause incidental loss to civilian life, injury to civilians, or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated.

In the cyber context, this rule would require parties to a conflict to assess the potential effects of cyber activities on both military and civilian infrastructure and users, including shared physical infrastructure (such as a dam or a power grid) that would affect civilians. In addition to the potential physical damage that a cyber activity may cause, such as death or injury that may result from effects on critical infrastructure, parties must assess the potential effects of a cyber attack on civilian objects that are not military objectives, such as private, civilian computers that hold no military significance but may be networked to military objectives.

Given the interconnectivity of ICTs, there is a serious risk that any given cyber activity might cause unintended or cascading effects on civilians and civilian objects. When undertaking a proportionality evaluation, parties to an armed conflict should consider the risk of unintended or cascading effects on civilians and civilian objects in launching a particular cyber attack, as well as the harm to civilian uses of dual-use infrastructure that may be the target of an attack.

Additionally, in the context of conducting cyber activities that amount to attacks during armed conflict, parties to a conflict should take feasible precautions to reduce the risk of incidental harm of such cyber activities on civilian infrastructure and users.

States should undertake a legal review of weapons, including those that employ a cyber capability.

Such a review should entail an analysis, for example, of whether a particular capability would be inherently indiscriminate, *i.e.*, that it could not be used consistent with the principles of distinction and proportionality.

II. The Application of International Law to Cyber Activities that Occur Outside the Context of Armed Conflict

Most cyber activities undertaken by States and other actors fall below the threshold of the use of force and outside of the context of armed conflict. Such activities, however, do not take place in a legal vacuum. Instead, they are governed by, *inter alia*, international legal principles that pertain to State sovereignty, human rights, and State responsibility. The following sections discuss certain of these legal principles and considerations that may be taken into account when applying them to State behavior in cyberspace.

A. Sovereignty principles and cyberspace

State sovereignty, among other long-standing international legal principles, must be taken into account in the conduct of activities in cyberspace, including outside of the context of armed conflict. Because of the interconnected, interoperable nature of cyberspace, operations targeting networked information infrastructures in one country can have effects in many countries around the world. Whenever a State contemplates conducting activities in cyberspace, the sovereignty of other States needs to be considered.

The implications of sovereignty for cyber activities are complex, but we can start by acknowledging the relevance of territorial jurisdiction. The physical infrastructure that supports the Internet and cyber activities is generally located in sovereign territory and is subject to the jurisdiction of the territorial State. The exercise of jurisdiction by the territorial State, however, is not unlimited; it must be consistent with applicable

international law, including international human rights obligations.

As we have noted before, the 1948 Universal Declaration of Human Rights (UDHR) was remarkably forward-looking in anticipating these trends. It says: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas *through any media and regardless of frontiers*." All human beings hold certain rights, whether they choose to exercise them in a city square or an Internet chat room. The right to freedom of expression is well-established internationally in both the UDHR and the International Covenant on Civil and Political Rights. Both of these instruments clearly state that this right can be exercised through any media and regardless of frontiers. Both of these instruments set forth the right of individuals to publish, to create art, to practice their religions, and to gather together and discuss issues of the day. Regardless of whether these activities occur online or offline, they are governed by the same principles.

B. State responsibility, including the responsibility for the conduct of proxy actors

A State is responsible for an internationally wrongful act when there is an act or omission that is attributable to it under international law that constitutes a breach of an international obligation of the State. Cyber activities may constitute internationally wrongful acts if they are inconsistent with a primary rule of international law and are attributed to a State under the secondary rules on State responsibility.

A State is legally responsible for cyber activities undertaken through "proxy actors" who act on the State's instructions or under its direction or control. If a State exercises a sufficient degree of control over a person or group of persons committing an internationally wrongful act, the State assumes responsibility for the act just as if the State had committed the act itself. These rules apply to conduct online just as they do offline, and they ensure that States cannot hide behind putatively private actors in engaging in internationally wrongful conduct.

The ability to cloak one's identity and geography in cyberspace, as well as the ease with which computers can be remotely controlled and identities spoofed, may create attribution challenges. The mere fact that a cyber activity was launched from, or otherwise originates from, another State's territory or from the cyber infrastructure of another State is insufficient, without more, to attribute the activity to that State. Additionally, the mere fact that a cyber activity has been routed through the cyber infrastructure of another State is insufficient, without more, to attribute a cyber activity to a State.

C. Non-forcible countermeasures

In certain circumstances, a State injured by cyber activities that are attributable to another State and that constitute an internationally wrongful act, but do not amount to an armed attack, may respond with acts of retorsion[32] or non-forcible countermeasures.[33]

[32] Acts of retorsion are unfriendly acts not inconsistent with any international obligations.

[33] Countermeasures are acts that would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State if they were not taken in response to an internationally wrongful act by the latter in order to procure cessation.

Countermeasures undertaken in response to an internationally wrongful act in or through cyberspace that is attributable to a State must be directed only at the State responsible for the wrongful act, must meet the requirements of necessity and proportionality, must be designed to induce the State to return to compliance with its international obligations, and must cease no later than when the State begins complying with its international obligations.

Countermeasures taken in response to cyber activities attributable to States that constitute internationally wrongful acts may take the form of cyber-based countermeasures or non-cyber-based countermeasures, depending on the circumstances. Just as in non-cyber contexts, before an injured State can undertake countermeasures in response to a cyber-based internationally wrongful act attributable to a State, it generally must call upon the responsible State to cease its wrongful conduct, unless urgent countermeasures are necessary to preserve the injured State's rights. Countermeasures must, moreover, be directed only against the State responsible for the initial wrongful act, and they must be proportional to the initial wrongful act.

D. Measures To Promote Responsible State Behavior with regard to ICTs Outside the Context of Armed Conflict

As the international community moves toward a better understanding of how existing international law applies to cyber activities, many States agree that steps must be taken to address certain State-sponsored cyber activities that occur outside the context of an armed conflict that are potentially destabilizing. Of particular concern are cyber activities intended to damage or impair the use of infrastructure that provides essential services to the public and cyber activities intended to prevent national computer security incident response teams (CSIRTs) from responding to cyber incidents. Preventing such malicious activities should be of universal interest and of benefit to all States. Calling on States to refrain from such malicious cyber activities would promote the responsible behavior of States. Additionally, implementing these measures would enhance the stability of the ICT environment and lay the groundwork for further understanding of what constitutes responsible State conduct applicable to peaceful use of cyberspace.

A State should not conduct or knowingly support online activity that intentionally damages critical infrastructure or otherwise impairs the use of critical infrastructure to provide services to the public. As noted in UNGA Resolution 58/199, although each country will determine its own "critical infrastructure," the phrase generally refers to the networks and infrastructure that support the operations of systems used for, *inter alia*, the generation, transmission, and distribution of energy; air and maritime transport; banking and financial services; e-commerce; water supply; food distribution; and public health.

A State should not conduct or knowingly support activity intended to prevent national CSIRTs from responding to cyber incidents. A State should also not use CSIRTs to enable online activity that is intended to do harm. A CSIRT is an organization that protects ICT networks by identifying and responding to cybersecurity incidents. A national CSIRT receives, reviews, and responds to cybersecurity incident reports for a State. These organizations play a vital role in the safe and secure functioning of networks, not only for the networks for which they are responsible, but for the entire ICT environment.

A State should cooperate, in a manner consistent with its domestic law and international obligations, with requests for assistance from other States in investigating cyber crimes, collecting electronic evidence, and mitigating malicious cyber activity emanating from its territory. States must take robust and cooperative action to investigate

criminal activity by non-State actors. This measure recognizes that States, in line with the parameters set forth above, should seek to cooperate in criminal matters when criminal conduct originates in one State and has an effect in another State. Enhancing cooperation in criminal matters will increase confidence and build trust among States, and reduce the likelihood of destabilizing misperceptions.

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c. Private military and security companies

See Chapter 5 for a discussion of litigation involving private military and security companies.

B. CONVENTIONAL WEAPONS

1. Ottawa Convention (Anti-Personnel Landmines)

On June 27, 2014, the United States announced a new policy on anti-personnel landmines at the Third Review Conference of States Parties to the Ottawa Convention, hosted by Mozambique. The U.S. policy provides that:

> The United States will not produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention in the future, including to replace such munitions as they expire in the coming years. Meanwhile, we are diligently pursuing other solutions that would be compliant with the Convention and that would ultimately allow us to accede to the Convention. We are also conducting a high fidelity modeling and simulation effort to ascertain how to mitigate the risks associated with the loss of anti-personnel landmines. Other aspects of our landmine policy remain under consideration, and we will share outcomes from that process as we are in a position to do so.

Statement by National Security Council Spokesperson Caitlyn Hayden, available at *www.whitehouse.gov/the-press-office/2014/06/27/statement-nsc-spokesperson-caitlin-hayden-us-anti-personnel-landmine-pol*. At the Review Conference in Maputo, Mozambique, the U.S. Ambassador to Mozambique delivered a statement likewise announcing the U.S. policy not to produce or acquire any anti-personnel munitions and to replace such munitions as they expire.

On September 23, 2014, the United States announced further commitments to the aims of the Ottawa Convention, prohibiting the use, stockpiling, and transfer of anti-personnel landmines ("APLs"). The United States is moving toward accession to the Ottawa Convention, which includes over 160 states, international organizations, and non-governmental organizations. Specifically, on September 23, 2014:

> the United States announced that we will not use these mines outside of the Korean Peninsula, where our actions are governed by the unique situation there. This policy change announced today builds on our prior commitments, including our announcement in June, in which we stated we will no longer produce or acquire anti-personnel landmines.
>
> Today's announcement also means that we will not assist, encourage, or induce others to use, stockpile, produce or transfer anti-personnel landmines outside of the Korean Peninsula. And we will diligently undertake to destroy stockpiles of these landmines that are not required for the defense of the Republic of Korea.

Department of State press statement on landmine policy, available at *www.state.gov/r/pa/prs/ps/2014/09/231995.htm*. See also, White House Fact Sheet on Changes to U.S. Anti-Personnel Landmine Policy, available at *www.whitehouse.gov/the-press-office/2014/09/23/fact-sheet-changes-us-anti-personnel-landmine-policy*; Statement by NSC Spokesperson Caitlin Hayden on Anti-Personnel Landmine Policy, available at *www.whitehouse.gov/the-press-office/2014/09/23/statement-nsc-spokesperson-caitlin-hayden-anti-personnel-landmine-policy*.

2. Convention on Certain Conventional Weapons

On May 13, 2014, Stephen Townley delivered the opening statement for the U.S. delegation at a CCW informal experts meeting on lethal autonomous weapons systems. Mr. Townley's statement is excerpted below and available at *https://geneva.usmission.gov/2014/05/13/u-s-delegation-opening-statement-at-ccw-informal-experts-meeting-on-lethal-autonomous-weapons-systems/*.

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We will provide specific comments during the sessions to come, but at the outset, we would like to make three framing points and then highlight one issue that is, to us, critical in thinking about autonomous features of weapons systems.

First, this important discussion is just beginning and we believe considerable work still needs to be done to establish a common baseline of understanding among states. Too often, the phrase "lethal autonomous weapons system" appears still to evoke the idea of a humanoid machine independently selecting targets for engagement and operating in a dynamic and complex urban environment. But that is a far cry from what we should be focusing on, which is the likely trajectory of technological development, not images from popular culture.

To move toward a common understanding does not mean that we need to define "lethal autonomous weapons systems" at the outset. Recent discussions in which we have participated, along with other states, and scientists, roboticists, lawyers, and ethicists, have shown that some ideas about lethal autonomous weapons systems are so widely divergent that it would be

imprudent, if not impossible, to precisely define the term now. Much examination and discussion [are] necessary before we try to undertake that task. As we begin our discussions here, though, we must be clear on one point—we are here to discuss future weapons or, in the words of the mandate for this meeting, "emerging technologies." Therefore we need to be clear, in these discussions we are not referring to remotely piloted aircraft, which as their name indicates are not autonomous and therefore, conceptually distinct from LAWS.

Second, it follows from the fact that we are indeed at such an early stage of our discussions that the United States believes it is premature to determine where these discussions might or should lead. In our view, it is enough for now for us collectively to acknowledge the value in discussing lethal autonomous weapons systems in the CCW, a forum focused on international humanitarian law, which is the relevant framework for this discussion.

Third, we must bear in mind the complex and multifaceted nature of this issue. This complexity means we need to carefully think through the full range of possible consequences of different approaches. For instance, our discussion here will necessarily touch on the development of civilian technology, which we expect to continue unrestricted by those discussions.

With that said, the United States would like to highlight one of the key issues we think states should focus on in considering autonomy in weapons systems—and that is risk. We will elaborate on this further in the coming days, but, to give just one example, how does the battlefield—whether cluttered or uncluttered—affect the risk of using a particular weapons system?

In order to assess risk associated with the use of any weapons system, States need a robust domestic legal and policy process and methodology. We think states may also need to tailor those legal and policy processes when considering weapons with autonomous features. For that reason, as you know, after a comprehensive policy review, the United States Department of Defense issued DoD Directive 3000.09, "Autonomy in Weapon Systems," in 2012. The Department developed the directive in order to better understand and identify the risks posed by autonomy, as well as to consider possible ways to mitigate risks that are identified. It established a high-level, detailed process for considering weapons with autonomous features and issued specific guidelines designed to "minimize the probability and consequences of failures that could lead to unintended engagements."

The United States intends to discuss the risks of autonomy, as well as possible benefits, and means of analyzing those risks, over the coming days, using the Directive as an example. We would likewise encourage other states to consider presenting their own ways and means of thinking about the risks of autonomy and whether they have their own domestic processes for evaluating those risks.

* * * *

The 16th Conference of the High Contracting Parties to Amended Protocol II (Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and other Devices) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("CCW") convened on November 12, 2014 in Geneva. The U.S. opening statement at the conference was delivered by Michael W. Meier, attorney-adviser for the U.S. Department of State. The opening statement is excerpted below and available at *https://geneva.usmission.gov/2014/11/12/u-s-opening-statement-at-the-*

conference-of-the-high-contracting-parties-to-amended-protocol-ii-to-the-convention-on-prohibitions-or-restrictions-on-the-use-of-certain-conventional-weapons-which-may-b/.

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The United States continues to demonstrate its commitment to address the humanitarian consequences that can be caused by landmines and other conventional weapons. For more than two decades the United States has committed to a multi-agency effort to mitigate the harmful effects of conventional weapons, including landmines, explosive remnants of war, Man-Portable Air-Defense Systems (MANPADS) and excess small arms and light weapons and ammunition. The Department of State is joined in this multi-agency effort by the Department of Defense, and the U.S. Agency for International Development's Leahy War Victims Fund. In addition, numerous private sector partners contribute to the success of the U.S. Conventional Weapons Destruction program.

Since 1993, the United States has provided more than $2.3 billion in aid to over 90 countries for conventional weapons destruction programs, including clearance of landmines and unexploded munitions and destruction of excess small arms and light weapons and munitions. In addition to supporting the above-mentioned programs, the United States provides a wide variety of assistance to combat the illicit trafficking of conventional weapons, helping states improve their export control practices and providing technical assistance for physical security and stockpile management of at-risk conventional arms and munitions. The United States has been and remains the world's single largest financial supporter of humanitarian mine action, which includes not only clearance of landmines, but also medical rehabilitation and vocational training for those injured by landmines and other explosive remnants of war.

The United States is very proud of the assistance we have provided over the years. Our Conventional Weapons Destruction program is an important investment that is saving lives and fostering stability in every region of the world. The program helps countries recover from conflict and create safe, secure environments to rebuild infrastructure, return displaced citizens to their homes and livelihoods, help those injured by these weapons to recover and provide for their families, and promote peace and security by helping establish conditions conducive to stability, democracy and economic development.

As many of you are aware, in the past year the United States has announced several important changes to our policy with respect to anti-personnel landmines (APL). At the Third Review Conference of States Parties to the Ottawa Convention in Maputo, Mozambique in June, the United States announced that it will not produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention in the future, including to replace such munitions as they expire in the coming years. In September, we further announced that we are aligning our APL policy outside the Korean Peninsula with the key requirements of the Ottawa Convention. This means that United States will:

- not use APL outside the Korean Peninsula;
- not assist, encourage, or induce anyone outside the Korean Peninsula to engage in activity prohibited by the Ottawa Convention; and

- undertake to destroy APL stockpiles not required for the defense of the Republic of Korea.

Although we are not currently changing our landmine policy with respect to the Korean Peninsula, where are our actions are governed by the unique circumstances there, we will continue to work to find ways that would allow us to ultimately comply fully and accede to the Ottawa Convention while ensuring our ability to respond to contingencies on the Korean Peninsula.

As we continue our diligent efforts to pursue solutions that would be compliant with the Ottawa Convention, the U.S. remains committed to implementing APII. To that end:

- The United States maintains no minefields anywhere in the world;
- As of January 1, 2011, the United States ended the use of all persistent mines, which can remain active for years after the end of a conflict, and has since removed all such mines, both APL and MOTAPM [mines other than anti-personnel mines], from its active inventory. Those mines remaining in the active inventory have a highly reliable self-destruct mechanism with a self-deactivation back-up with field-selectable self-destruct settings of 4 hours, 48 hours and 15 days;
- As of 2009, the United States has removed and destroyed all non-detectable mines from our active inventory, except for a small quantity reserved for testing and training purposes. All of our mines are detectable with commonly available mine detection equipment.
- To date, the United States has destroyed over 2M of 2.6M persistent anti-vehicle and anti-personnel mines. The remaining mines, other than a small quantity for countermine/demining testing and training purposes, will be destroyed through our conventional ammunition demilitarization process.

Overall, the United States is comprehensively addressing the humanitarian issues posed by landmines both through our own policies and through our humanitarian assistance efforts in concert with international partners, which have helped 15 countries around the world to become free of the impact of landmines and have helped to dramatically reduce the number of people killed or injured by landmines each year.

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The United States attended the Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("CCW") in November 13, 2014 in Geneva. The opening statement for the U.S. delegation at the meeting was delivered by Michael Meier. Mr. Meier's statement, excerpted below, is available in full at *https://geneva.usmission.gov/2014/11/13/u-s-statement-at-the-meeting-of-high-contracting-parties-to-the-convention-on-certain-conventional-weapons-ccw/*.

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The United States places great value in the CCW as an IHL [International Humanitarian Law] framework that brings together States with diverse security interests to discuss issues related to weapons which may be deemed to be excessively injurious or that have indiscriminate effects. We believe that discussing important issues related to the use of weapons systems and learning from each other's national implementation provides significant, real humanitarian benefit. We appreciate the work done in the experts' meetings over the past year and commend the excellent work done by the various coordinators. We are pleased with the decisions of the High Contracting Parties to Amended Protocol II and Protocol V that will allow us to continue our important work related to IEDs and explosive remnants of war.

The United States places a special emphasis on the need for universalization of the CCW and its protocols. The most obvious way to increase the humanitarian benefits of the convention and its protocols is for the universalization of this important convention. We welcome Iraq's accession to the CCW and its protocols.

The importance of universalization has been brought home by recent events around the world. We have seen the concerning reports that incendiary weapons continue to be used against the civilian population in Syria and reports of use in Ukraine. The United States shares in the international community's concern about the humanitarian impact of the indiscriminate use of all munitions, including incendiary weapons and cluster munitions. These disturbing reports underscore that the universalization and implementation of CCW and its protocols, which represent a fundamental contribution to International Humanitarian Law, is critical if we want to help preclude such activities from taking place in the future. We therefore call on all States not yet party to the CCW to join the 118 States that are High Contracting Parties, and to accede to the CCW and its protocols at the earliest opportunity.

As we look ahead at decisions we will take with respect to next year's work, the United States believes there is value in continuing our discussions on lethal fully autonomous weapons systems in the CCW. We were pleased with the level of participation in the informal meeting of experts in May of this year, which provided an opportunity for us to further identify and discuss the legal, technical, military, and ethical issues raised by this complex subject. It is clear that this discussion is just beginning and further work is required to help shape our understanding of this future technology. The United States believes that that it is important to continue our informal discussions in 2015 that should include no less than 5 days of discussion.

While it is premature to decide where these discussions might or should ultimately lead, it is important that our work move forward and build upon what was accomplished last May. We need to have an in depth discussion of the variety of issues surrounding LAWS. The United States believes that one important area that deserves increased attention next year is how states evaluate new weapons systems such as LAWS. We believe that focusing, in part, on the weapons review process could provide the basis to identify fundamental issues and provide guidance for states that are considering any new weapons system. We believe such a discussion could result in a set of best practices applicable to the future development of lethal autonomous weapons systems. With the possibility that this could be a consensual outcome document in time for the 2016 Review Conference, the United States could support additional time for discussion on this specific topic in 2015. We believe this would be a positive first step for CCW High Contracting Parties to take while continuing to refine the legal, technical, military, and ethical issues surrounding these complex future weapons systems.

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3. Presidential Policy Directive on U.S. Conventional Arms Transfers

On January 15, 2014, President Barack Obama issued Presidential Policy Directive 27 on United States Conventional Arms Transfer Policy. Daily Comp. Pres. Docs., 2014 DCPD No. 00027 (Jan. 15, 2014). The Directive is excerpted below.

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Conventional weapons have continued to play a decisive role in armed conflict in the early 21st century and will remain legitimate instruments for the defense and security policy of responsible nations for the foreseeable future. In the hands of hostile or irresponsible state and non-state actors, however, these weapons can exacerbate international tensions, foster instability, inflict substantial damage, enable transnational organized crime, and be used to violate universal human rights. Therefore, global conventional arms transfer patterns have significant implications for U.S. national security and foreign policy interests, and the U.S. policy for conventional arms transfer has an important role in shaping the international security environment.

United States conventional arms transfer policy supports transfers that meet legitimate security requirements of our allies and partners in support of our national security and foreign policy interests. At the same time, the policy promotes restraint, both by the United States and other suppliers, in transfers of weapons systems that may be destabilizing or dangerous to international peace and security.

Goals of U.S. Conventional Arms Transfer Policy

United States conventional arms transfer policy serves the following U.S. national security and foreign policy goals:

1. Ensuring U.S. military forces, and those of allies and partners, continue to enjoy technological superiority over potential adversaries.
2. Promoting the acquisition of U.S. systems to increase interoperability with allies and partners, lower the unit costs for all, and strengthen the industrial base.
3. Enhancing the ability of allies and partners to deter or defend themselves against aggression.
4. Encouraging the maintenance and expansion of U.S. security partnerships with those who share our interests, and regional access in areas critical to U.S. interests.
5. Promoting regional stability, peaceful conflict resolution, and arms control.
6. Preventing the proliferation of conventional weapons that could be used as delivery systems for weapons of mass destruction.
7. Promoting cooperative counterterrorism, critical infrastructure protection, and other homeland security priorities.
8. Combating transnational organized crime and related threats to national security.
9. Supporting democratic governance and other related U.S. foreign policy objectives.
10. Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law.

Process and Criteria Guiding U.S. Arms Transfer Decisions

Arms transfer decisions will continue to meet the requirements of applicable statutes such as the Arms Export Control Act, the Foreign Assistance Act, the International Emergency Economic Powers Act, and the annual National Defense Authorization Act, as well as the requirements of all applicable export control regulations and of U.S. international commitments.

All arms transfer decisions will be guided by a set of criteria that maintains the appropriate balance between legitimate arms transfers to support U.S. national security and that of our allies and partners, and the need for restraint against the transfer of arms that would enhance the military capabilities of hostile states, serve to facilitate human rights abuses or violations of international humanitarian law, or otherwise undermine international security. This includes decisions involving the transfer of defense articles, related technical data, and defense services through direct commercial sales, government-to-government transfers, transfers of arms pursuant to U.S. assistance programs, approvals for the retransfer of arms, changes of end-use, and upgrades. More specifically, all arms transfer decisions will be consistent with relevant domestic law and international commitments and obligations, and will take into account the following criteria:

- Appropriateness of the transfer in responding to legitimate U.S. and recipient security needs.
- Consistency with U.S. regional stability interests, especially when considering transfers involving power projection capability, anti-access and area denial capability, or introduction of a system that may foster increased tension or contribute to an arms race.
- The impact of the proposed transfer on U.S. capabilities and technological advantage, particularly in protecting sensitive software and hardware design, development, manufacturing, and integration knowledge.
- The degree of protection afforded by the recipient country to sensitive technology and potential for unauthorized third-party transfer, as well as in-country diversion to unauthorized uses.
- The risk of revealing system vulnerabilities and adversely affecting U.S. operational capabilities in the event of compromise.
- The risk that significant change in the political or security situation of the recipient country could lead to inappropriate end-use or transfer of defense articles.
- The degree to which the transfer supports U.S. strategic, foreign policy, and defense interests through increased access and influence, allied burden sharing, and interoperability.
- The human rights, democratization, counterterrorism, counterproliferation, and nonproliferation record of the recipient, and the potential for misuse of the export in question.
- The likelihood that the recipient would use the arms to commit human rights abuses or serious violations of international humanitarian law, retransfer the arms to those who would commit human rights abuses or serious violations of international humanitarian law, or identify the United States with human rights abuses or serious violations of international humanitarian law.

- The impact on U.S. industry and the defense industrial base, whether or not the transfer is approved.
- The availability of comparable systems from foreign suppliers.
- The ability of the recipient to field effectively, support, and appropriately employ the requested system in accordance with its intended end-use.
- The risk of adverse economic, political, or social impact within the recipient nation and the degree to which security needs can be addressed by other means.

Supporting Arms Control and Arms Transfer Restraint

A critical element of U.S. conventional arms transfer policy is to promote control, restraint, and transparency of arms transfers. The United States will continue its participation in the U.N. Register of Conventional Arms and the U.N. Standardized Instrument for Reporting Military Spending, in the absence of an international legally binding treaty that requires such transparency measures. The United States will continue to urge universal participation in the U.N. Register and encourage states reporting to the Register to include military holdings, procurement through national production, and model or type information for transfers, thereby providing a more complete picture of change in a nation's military capabilities each year. The United States will also continue to examine the scope of items covered under the Register to ensure it meets current U.S. national security concerns. Additionally, the United States will support regional initiatives to enhance transparency in conventional arms.

The United States will continue its participation in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, which began operations in 1996 and is designed to prevent destabilizing accumulations of conventional arms and related dual-use goods and technologies. By encouraging transparency, consultation, and, where appropriate, national policies of restraint, the Arrangement fosters greater responsibility and accountability in transfers of arms and dual-use goods and technologies. We will continue to use the Wassenaar Arrangement to promote shared national policies of restraint against the acquisition of armaments and sensitive dual-use goods and technologies for military end-uses by states whose behavior is a cause for serious concern.

The United States will also continue vigorous support for current arms control and confidence-building efforts to constrain the demand for destabilizing weapons and related technology. The United States recognizes that such efforts bolster stability in a variety of ways, ultimately decreasing the demand for arms.

The United States will not authorize any transfer if it has actual knowledge at the time of authorization that the transferred arms will be used to commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949; serious violations of Common Article 3 of the Geneva Conventions of 1949; attacks directed against civilian objects or civilians who are legally protected from attack or other war crimes as defined in 18 U.S.C. 2441.

Also, the United States will exercise unilateral restraint in the export of arms in cases where such restraint will be effective or is necessitated by overriding national interests. Such restraint will be considered on a case-by-case basis in transfers involving states whose behavior is a cause for serious concern, where the United States has a substantial lead in weapon technology, where the United States restricts exports to preserve its military edge or regional stability, where the United States has no fielded countermeasures, or where the transfer of weapons raises concerns about undermining international peace and security, serious violations of human rights law, including serious acts of gender-based violence and serious acts of violence

against women and children, serious violations of international humanitarian law, terrorism, transnational organized crime, or indiscriminate use.

Finally, the United States will work bilaterally and multilaterally to assist other suppliers in developing effective export control mechanisms to support responsible export control policies.

Supporting Responsible U.S. Transfers

The United States Government will provide support for proposed U.S. exports that are consistent with this policy. This support will include, as appropriate, such steps as: tasking our overseas mission personnel to support overseas marketing efforts of U.S. companies bidding on defense contracts; actively involving senior government officials in promoting transfers that are of particular importance to the United States; and supporting official Department of Defense participation in international air and trade exhibitions when the Secretary of Defense, in accordance with existing law, determines such participation to be in the national interest and notifies the Congress. The United States will also continue to pursue efforts to streamline security cooperation with our allies and partners, and in the conduct of conventional arms transfer policy and security cooperation policy, the United States Government will take all available steps to hasten the ultimate provision of conventional arms and security assistance.

This Directive supersedes Presidential Decision Directive/ NSC–34, dated February 10, 1995.

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C. DETAINEES

1. Transfers

The number of detainees remaining at Guantanamo Bay declined significantly in 2014 as part of ongoing U.S. efforts to close the facility. A total of 27 detainees were transferred from the detention facility at Guantanamo Bay in 2014 to governments around the world that support ongoing U.S. efforts to close Guantanamo and that coordinated with the United States to ensure these transfers took place consistent with appropriate security and humane treatment measures.

On March 13, 2014, the Department of Defense announced the transfer of Ahmed Belbacha to the Government of Algeria. In a news release available at *www.defense.gov/releases/release.aspx?releaseid=16578*, the Department of Defense explained that this individual was approved for transfer by consensus of the six departments and agencies comprising the interagency Guantanamo Review Task Force after a comprehensive review that considered security issues, among other factors. At that point, 154 detainees remained at Guantanamo.

On May 31, 2014, the Department of Defense informed Congress of the decision to transfer five detainees from Guantánamo Bay to Qatar. The announcement of the transfer of these detainees was made when the Department announced that U.S. Sargent Bowe Bergdahl had been placed under the care of the U.S. military after being handed over by his captors in Afghanistan. See Defense Department news release, available at *www.defense.gov/Releases/Release.aspx?ReleaseID=16737*. The United

States coordinated with Qatar to ensure that security measures were in place and the national security of the United States would not be compromised.

On November 5, 2014, the Department of Defense announced the transfer of Fouzi Khalid Abdullah Al Awda from the detention facility at Guantanamo Bay to the Government of Kuwait. As explained in the news release available at *www.defense.gov/releases/release.aspx?releaseid=17019*, Al Awda's transfer was approved by a Periodic Review Board, consisting of representatives from the Departments of Defense, Homeland Security, Justice, State; the Joint Staff, and the Office of the Director of National Intelligence.

On November 20, 2014, the Department of Defense announced the transfer of Salah Mohammed Salih Al-Dhabi, Abdel Ghaib Ahmad Hakim, and Abdul Khaled Al-Baydani from the detention facility at Guantanamo Bay to the Government of Georgia. These three men were approved for transfer after a review by the interagency Guantanamo Review Task Force. See news release, available at *www.defense.gov/Releases/Release.aspx?ReleaseID=17042*. On the same day, the Department also announced the transfer of Hashim Bin Ali Bin Amor Sliti and Husayn Salim Muhammad Al-Mutari Yafai from the detention facility at Guantanamo Bay to the Government of Slovakia. Their transfer was also approved after review by the Guantanamo Review Task Force. See news release, available at *www.defense.gov/Releases/Release.aspx?ReleaseID=17043*.

On November 22, 2014, in a news release available at *www.defense.gov/releases/release.aspx?releaseid=17048*, the Department of Defense announced the transfer of Muhammed Murdi Issa Al-Zahrani from the detention facility at Guantanamo Bay to the government of the Kingdom of Saudi Arabia. Al-Zahrani's transfer was recommended by a Periodic Review Board in October. The news release on Al-Zahrani's transfer also quoted Mr. Paul Lewis, Special Envoy for Guantanamo Detention Closure, who summarized transfer activity over the course of 2014 as follows:

> In the past three weeks, the Department of Defense has transferred seven detainees. These transfers include both the first Yemenis since 2010 and two transfers involving detainees made eligible by the Periodic Review Board process. A total of 13 detainees have been transferred this year. This strikes a responsible balance and reflects the careful deliberation the Secretary of Defense brings to the transfer process, and follows a rigorous process in the interagency to review several items including security review prior to any transfer.

On December 7, 2014, the Department of Defense announced the transfer of Ahmed Adnan Ahjam, Ali Hussain Shaabaan, Omar Mahmoud Faraj, Abdul Bin Mohammed Abis Ourgy, Mohammed Tahanmatan, and Jihad Diyab from the detention facility at Guantanamo Bay, Cuba, to the government of Uruguay. These six detainees were approved for transfer as a result of a comprehensive review of their cases by the

interagency Guantanamo Review Task Force. See news release, available at www.defense.gov/news/newsarticle.aspx?id=123782.

On December 20, 2014, the Department of Defense announced the repatriation of Shawali Khan, Khi Ali Gul, Abdul Ghani, and Mohammed Zahir from the detention facility at Guantanamo Bay to the Government of the Islamic Republic of Afghanistan. These four detainees were approved for transfer as a result of a comprehensive review of their cases by the interagency Guantanamo Review Task Force. See news release, available at www.defense.gov/Releases/Release.aspx?ReleaseID=17083.

On December 30, 2014, the Department of Defense announced the transfer of Asim Thabit Abdullah Al-Khalaqi, Muhammad Ali Husayn Khanayna, Sabri Muhammad Ibrahim Al Qurashi, Adel Al-Hakeemy, and Abdullah Bin Ali Al-Lufti from the detention facility at Guantanamo Bay to Kazakhstan. These five were also transferred in accordance with the recommendation of the Guantanamo Review Task Force. With these transfers, the number of detainees remaining at Guantanamo as of the end of the year was 127. See news release, available at www.defense.gov/Releases/Release.aspx?ReleaseID=17093.

2. U.S. court decisions and proceedings

a. Detainees at Guantanamo: Habeas Litigation

(1) Hussain v. Obama

In January 2014, the United States filed its brief in the Supreme Court of the United States in opposition to a petition for certiorari in *Hussain v. Obama*, No. 13-638. Excerpts follow (with footnotes omitted) from the U.S. brief, which is available in full at http://www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2013-0638.resp.pdf.

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The court of appeals correctly concluded that the government had carried its burden of establishing by a preponderance of the evidence that petitioner was part of al Qaeda or Taliban forces at the time of his capture. Most clearly, petitioner admitted to carrying an AK-47 assault rifle during an extended stay with Taliban forces near the front lines of a battlefield in Afghanistan. The court of appeals' case-specific determination does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. As the court of appeals recognized, an individual may be detained under the AUMF if he was part of al Qaeda or Taliban forces at the time of his capture—a point that petitioner does not now dispute. …

The D.C. Circuit has held that the determination whether a person is part of al Qaeda or Taliban forces should be made "on a case-by-case basis * * * using a functional rather than a

formal approach and by focusing upon the actions of the individual in relation to the organization." *Uthman*, 637 F.3d at 403 (citation omitted). Proof that an individual engaged in fighting, see Pet. App. 5a (citing *Khairkhwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012)), or that an individual was part of either organization's formal "command structure," *ibid*. (citing *Awad*, 608 F.3d at 11), is sufficient, but not necessary, to demonstrate an individual is part of enemy forces. As the court of appeals explained, "permitting detention only for those detainees who engaged in active hostilities would be inconsistent with the realities of 'modern warfare,'" in which "commanding officers rarely engage in hand-to-hand combat; supporting troops behind the front lines do not confront enemy combatants face to face; [and] supply-line forces, critical to military operations, may never encounter their opposition." *Id*. at 6a (quoting *Khairkhwa*, 703 F.3d at 550).

Under the D.C. Circuit's functional test, proof that a detainee travelled with or maintained a close association with al Qaeda or Taliban fighters, carried a weapon issued by al Qaeda or the Taliban, or received training by al Qaeda or the Taliban is highly probative of whether the detainee is properly deemed to have been part of one of those groups. See, *e.g.*, *Suleiman v. Obama*, 670 F.3d 1311, 1314, cert. denied, 133 S. Ct. 353 (2012); *Alsabri v. Obama*, 684 F.3d 1298, 1306 (2012); *Al Alwi v. Obama*, 653 F.3d 11, 17 (2011), cert. denied, 132 S. Ct. 2739 (2012); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1075 (2011), cert. denied, 132 S. Ct. 2739 (2012). But the D.C. Circuit has also recognized that not everyone having some association with al Qaeda or Taliban forces is "part of" either organization. "'[T]he purely independent conduct of a freelancer,'" it has explained, "'is not enough' to establish that an individual is 'part of' al-Qaida." *Salahi v. Obama*, 625 F.3d 745, 752 (2010) (quoting *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010)). Similarly, the D.C. Circuit has held that "intention to fight is inadequate by itself to make someone 'part of' al Qaeda." *Awad*, 608 F.3d at 9. Rather, the ultimate question in every case is whether "a particular individual is sufficiently involved with the organization to be deemed part of it," an inherently case-specific inquiry that will turn on the particular evidence presented by the government. *Uthman*, 637 F.3d at 403 (quoting *Bensayah*, 610 F.3d at 725).

In holding that the government had met its burden in this case, the court of appeals correctly applied its established functional test to the evidence considered by the district court. Of particular significance, petitioner admitted that he chose to accompany Taliban guards to an area near the front lines of fighting between the Taliban and the Northern Alliance. See Pet. App. 7a. There, a Taliban fighter provided petitioner with an AK-47 assault rifle and taught him how to use it. *Ibid*. Petitioner stayed in this war-torn area for ten months with Taliban fighters, and he did not leave Afghanistan until after the September 11, 2001 attacks. *Id*. at 7a, 9a. That evidence powerfully demonstrated that petitioner is subject to detention under the AUMF. As the court of appeals observed, "[e]vidence that [petitioner] bore a weapon of war while living side-by-side with enemy forces on the front lines of a battlefield at least invites—and may very well compel—the conclusion that he was loyal to those forces." *Id*. at 7a-8a.2 Especially considered in conjunction with petitioner's non-credible account of the reasons for his travels and his repeated, extended stays in Jama'at al-Tablighi mosques, the court of appeals correctly held that the government had established "by a preponderance of the evidence[] that [petitioner] was part of al Qaeda, the Taliban, or associated forces at the time of his capture." *Id*. at 4a.

2. Petitioner does not argue that the court of appeals articulated the wrong legal standard for determining whether he was properly detained. To the contrary, he apparently agrees with the court of appeals that the government must "show[], by a preponderance of the evidence, that the detainee was part of al Qaeda, the Taliban, or associated forces at the time of his capture." Pet.

App. 4a; see Pet. 7 & n.1. But he contends that the court of appeals "effectively" applied a different standard than it articulated. Pet. 6, 8, 13. His argument lacks merit.

a. Petitioner asserts (Pet. 7-11), that the court of appeals, "[d]espite recognizing preponderance of the evidence as the governing standard * * * effectively applied the less rigorous substantial evidence standard" to the question whether petitioner is detainable. Pet. 8. His principal basis for that assertion is that the court of appeals did not require any "findings that [petitioner] used the gun, engaged in battle, or otherwise supported the activities of al Qaeda or the Taliban." Pet. 10. But as the court of appeals correctly recognized, such findings are not required to demonstrate that an individual is "part of" enemy forces; any other view would be inconsistent with the realities of modern warfare. …

Petitioner also faults (Pet. 10-11) the court of appeals for relying on his repeated visits to mosques associated with Jama'at al-Tablighi, arguing that "nothing in the District Court's findings distinguishes [petitioner] from the thousands of other Muslim travelers who regularly stayed at [Jama'at al-Tablighi] mosques in the relevant time frame." Pet. 11. But the court of appeals was careful to note that his stays were probative, not necessarily dispositive, and to emphasize that it was his "extended affiliation with the group over time" that weighed in favor of his affiliation with al Qaeda or the Taliban. Pet. App. 10a. That holding did not establish a "'categorical rule' that 'any contact with the [Jama'at al-Tablighi] organization suggests an affiliation with al Qaeda.'" Pet. 11 (quoting Pet. App. 11a); see Pet. App. 11a ("[Petitioner] misstates the district court's analysis. As we have just shown, the district court did not rely on such a categorical rule, but engaged in the type of fact-specific inquiry we require."). On the record here—particularly petitioner's admission that he bore a weapon while present with the Taliban near the frontline of a battlefield—his stays at Jama'at al-Tablighi mosques merely fortified the court of appeals' conclusion that he was detainable under the AUMF.

b. Petitioner also contends (Pet. 12-14) that the district court and the court of appeals—again, despite express statements to the contrary—placed the burden on him to prove that he was not detainable. He rests that argument on the lack of specific findings by the district court about petitioner's activities in the period between his departure from near the Taliban front lines in August 2001 and his eventual capture in March 2002.

As an initial matter, petitioner failed to raise that argument before the district court or in his appellate briefs. A question about that period of time was raised for the first time by the panel during oral argument, and the only written argument that petitioner submitted on the question (apart from his petition for rehearing) was a two-page post-argument letter. …Even then, petitioner did not expressly contend that by failing to make a specific finding about his affiliation with al Qaeda or the Taliban after he left the area near the Taliban front lines, the district court had shifted the burden of proof to him. Nor did the court of appeals pass on that argument. Accordingly, this is not a suitable case to consider petitioner's second question presented. …

In any event, neither the district court nor the court of appeals shifted the burden of proof to petitioner. Rather, they found that the evidence demonstrated that petitioner continued to be a part of al Qaeda or Taliban forces at the time of his capture. The court of appeals noted that petitioner was "part of" enemy forces "while living in Northern Afghanistan at least through August 2001." Pet. App. 11a. It then pointed to the district court's finding that petitioner had provided conflicting explanations for his reasons for returning to Pakistan in the period between his departure from near the Taliban front lines and his capture, a period of time when numerous Taliban fighters were fleeing into Pakistan. One was that he wanted to return to Yemen to get married and reunite with his family; another was that he wanted to enroll in a religious

university; and still another was that he wanted to learn about computers—even though he could not speak the native language. … Petitioner also stated that he wished to travel to the Yemeni embassy in Islamabad in order to renew his Pakistani visa, which had expired. ….

Given that petitioner did none of the things he purportedly intended to do despite having ample opportunity, nor made any credible attempt to do them, the district court, which observed petitioner's demeanor during his testimony, did not clearly err in concluding that his story was an elaborate fabrication. And, as the court of appeals correctly observed, such "false cover stories * * * 'are evidence—often strong evidence—of guilt.'" Pet. App. 10a … That evidence substantiated the view that petitioner remained a part of al Qaeda or the Taliban after leaving the area near the front lines. And in opposition to that strong inference, petitioner "ma[de] no argument that he affirmatively cut * * * ties" with enemy forces "before his capture only six months later." *Id*. at 11a. The court of appeals therefore correctly determined that "the evidence points" to the conclusion that he continued to be a part of al Qaeda or Taliban forces after leaving the area near the front lines. …

* * * *

On April 21, 2014, the Supreme Court of the United States denied the petition for certiorari in *Hussain v. Obama*, No. 13-638. Justice Breyer wrote a statement respecting the denial, which appears below.

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* * * *

The Authorization for Use of Military Force (AUMF), passed in September 2001, empowers the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." §2(a), 115 Stat. 224. In *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004), five Members of the Court agreed that the AUMF authorizes the President to detain enemy combatants. *Id*., at 517–518 (plurality opinion); *id*., at 587 (THOMAS, J., dissenting). In her opinion for a plurality of the Court, Justice O'Connor understood enemy combatants to include "an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Id*., at 516 (internal quotation marks omitted). She concluded that the "detention of individuals falling into the *limited category we are considering, for the duration of the particular conflict in which they were captured*," is "an exercise of the 'necessary and appropriate force'" that Congress authorized under the AUMF. *Id*., at 518 (emphasis added). She explained, however, that the President's power to detain under the AUMF may be different when the "practical circumstances" of the relevant conflict are "entirely unlike those of the conflicts that informed the development of the law of war." *Id*., at 521.

In this case, the District Court concluded, and the Court of Appeals agreed, that petitioner Abdul Al Qader Ahmed Hussain could be detained under the AUMF because he was "part of al-Qaeda *or* the Taliban at the time of his apprehension." 821 F. Supp. 2d 67, 76–79 (DDC 2011) (internal quotation marks omitted; emphasis added); accord, 718 F. 3d 964, 966–967 (CADC

2013). But even assuming this is correct, in either case—that is, irrespective of whether Hussain was part of al Qaeda or the Taliban—it is possible that Hussain was not an "individual who . . . was part of or supporting forces hostile to the United States or coalition partners *in Afghanistan* and *who engaged in an armed conflict against the United States there*." 542 U. S., at 516 (emphasis added).

The Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not "engaged in an armed conflict against the United States" in Afghanistan prior to his capture. Nor have we considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention.

The circumstances of Hussain's detention may involve these unanswered questions, but his petition does not ask us to answer them. See Pet. for Cert. i. Therefore, I agree with the Court's decision to deny certiorari.

* * * *

(2) Al Warafi v. Obama

As discussed in *Digest 2013* at 609-11, the U.S. Court of Appeals for the D.C. Circuit affirmed a district court's denial of a petition for habeas brought by Yemeni citizen Mukhtar Al Warafi. 716 F.3d 627 (D.C. Cir. 2013). Al Warafi claimed that he should have been afforded protection as "medical personnel" pursuant to the First Geneva Convention, and thus should have been entitled to be repatriated under the provisions of that Convention. He filed a petition for certiorari after the Court of Appeals affirmed the district court. On March 28, 2014, the United States filed its brief in opposition to the petition, addressing the criteria and standards for determining whether Al Warafi qualified as a "permanent and exclusive medical personnel" pursuant to Article 24 of the First Geneva Convention. Excerpts follow (with footnotes and record citations omitted) from the U.S. brief, which is available in full at *www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2013-0768.resp.pdf*. The U.S. Supreme Court denied the petition on May 5, 2014.

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* * * *

Petitioner challenges the authority of the President to detain him under the AUMF. The court of appeals, however, correctly held that petitioner was detainable because he was part of Taliban forces when he was captured in Afghanistan. That conclusion rested on petitioner's admissions that he traveled to Afghanistan to fight with Taliban forces, received weapons training and was assigned to a fighting unit at the front line of the battle with the Northern Alliance, and was captured, while armed, along with other Taliban fighters while surrendering at his Taliban commander's direction. Petitioner contends that he was a permanent and exclusive medic within the meaning of Article 24 of the First Geneva Convention. But he has not claimed that he was issued the armband or special identity card that the Convention requires parties to provide their

Article 24 medical personnel. In any event, petitioner does not challenge in his certiorari petition the district court's factual findings demonstrating that he was not exclusively employed as a medic. The decision below does not conflict with a decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's finding that petitioner "more likely than not was part of the Taliban" at the time of his capture.

a. As the court of appeals recognized, an individual may be detained under the AUMF if he was part of al Qaeda, the Taliban, or associated forces at the time of his capture. …

The D.C. Circuit has held that the determination whether a person is part of al Qaeda or Taliban forces should be made "on a case-by-case basis * * * using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization." *Uthman*, 637 F.3d at 403 (citation omitted). …

… But the D.C. Circuit has also recognized that not everyone having some interaction with al Qaeda or Taliban forces is "part of" either organization. "[T]he purely independent conduct of a freelancer," it has explained, "is not enough to establish that an individual is 'part of' al-Qaida." *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010) (internal quotation marks and citation omitted). Similarly, the D.C. Circuit has held that "intention to fight is inadequate by itself to make someone 'part of' al Qaeda." *Awad*, 608 F.3d at 9. Rather, the ultimate question in every case is whether "a particular individual is sufficiently involved with the organization to be deemed part of it," an inherently case-specific inquiry that will turn on the particular evidence presented by the government. *Uthman*, 637 F.3d at 403 (citation omitted).

In holding that the government had met its burden in this case, the court of appeals correctly applied its established functional test to the evidence considered by the district court. The court concluded that petitioner was part of Taliban forces when captured based on the district court's detailed findings, none of which petitioner contends were clearly erroneous. Specifically, the district court found that "the reliable evidence in the record shows that petitioner more likely than not * * * went to Afghanistan to fight with the Taliban; received weapons training while stationed at the Khoja Khar line; volunteered to serve as a medic when the need arose; and surrendered on his commander's orders," at which time petitioner was carrying a weapon. Although petitioner states that he served as a "full-time medical worker" in clinics not "owned or operated by the Taliban" after October 7, 2001, the district court expressly found that "like a soldier volunteering for a special duty, petitioner remained in the command structure of the Taliban and served as a medic only on an as needed basis." Given those findings, the court of appeals correctly concluded that petitioner "was more likely than not a part of the Taliban."

b. Petitioner argues that because he did not actually engage in combat against the United States, his detention exceeds the authorization provided by the AUMF as construed by the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). According to petitioner, the *Hamdi* plurality interpreted the AUMF as permitting detention only of "individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'" … Petitioner misunderstands both the AUMF and the *Hamdi* plurality opinion.

Neither the AUMF nor the NDAA requires proof that a detainee personally took part in combat against the United States. To the contrary, the NDAA specifically affirms that the President's detention authority encompasses any person "who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners" and is not limited merely to those committing "a

belligerent act." § 1021(b)(2), 125 Stat. 1562.

Nor does the law of war, which informs the AUMF, limit the President's detention authority to individuals who personally engaged in combat against the United States. See Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4, Aug. 12, 1949, 6 U.S.T. 3320, 3322, 75 U.N.T.S. 138, 140 (defining different categories of prisoners of war, without regard to whether the individual had personally engaged in combat). As the D.C. Circuit has explained, a rule requiring proof that a detainee "actively engaged in combat" is "untenable" because in "modern warfare, * * * supporting troops behind the front lines do not confront enemy combatants face to face." *Khairkhwa*, 703 F.3d at 550.

Petitioner misreads the plurality opinion in *Hamdi*. That opinion made clear that the plurality sought to answer "only the narrow question before us," which was whether a United States citizen who "was part of or supporting forces hostile to the United States or coalition partners * * * and who engaged in an armed conflict against the United States" in Afghanistan qualifies as an enemy combatant who may be detained under the AUMF. 542 U.S. at 516 (opinion of O'Connor, J.) (internal quotation marks omitted). The plurality concluded that the AUMF authorizes the detention of such persons, see *id*. at 518, 521, but did not suggest that the President's detention authority encompasses only individuals who personally engaged in combat against the United States. To the contrary, the plurality did not find or require that the detainee personally had engaged in combat. Moreover, the plurality stated that "[t]he legal category of enemy combatant has not been elaborated on in great detail," and instructed that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them." *Id*. at 522 n.1. Petitioner thus errs in contending that the plurality opinion in *Hamdi* supports his view that, despite carrying a weapon while serving under the command structure of the Taliban in Afghanistan in 2001, he may not be detained because he did not personally participate in combat against United States forces.

For much the same reason, petitioner is incorrect that the denial of his habeas petition demonstrates that the courts below deprived him of the meaningful review required by this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). The decision below did not authorize the detention of an individual who engaged only in "care for the sick and injured." Rather, the district court, after carefully reviewing the evidence in the record, found that petitioner served as a medic only on an as-needed basis, and the court of appeals affirmed that finding in holding that petitioner was detainable under the AUMF. No decision of this Court establishes that such members of enemy forces are immune from capture and detention.

2. Assuming that Article 24 of the First Geneva Convention applies here, the court of appeals correctly held that it does not preclude petitioner's continued detention, both because petitioner concededly was not issued and did not possess the requisite indicia of status and because, in any event, the record evidence was entirely inconsistent with his claim that he was exclusively employed as a medic.

a. i. Article 24 concerns personnel who are "exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, [and] staff exclusively engaged in the administration of medical units and establishments." 6 U.S.T. 3132, 75 U.N.T.S. 48. … [T]he First Geneva Convention provides that Article 24 personnel "shall be respected and protected" at all times, *ibid*., which means, among other things, that they must not be made the object of attack, see [Int'l Comm. of the Red Cross, *Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Jean S. Pictet, ed. 1952)] *GCI Commentary* 134-135, 220-221. In addition, if

captured, Article 24 personnel have "retained personnel" status under Article 28, which means that they "shall continue to carry out * * * their medical * * * duties" and "shall be retained only in so far as the state of health * * * and the number of prisoners of war require." First Geneva Convention, art. 28, 6 U.S.T. 3134, 75 U.N.T.S. 50. If their retention is not indispensable for the care of prisoners of war, they "shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit." *Id*. art. 30, 6 U.S.T. 3134, 75 U.N.T.S. 50.

By contrast, "auxiliary personnel" who provide medical services only "should the need arise" are not encompassed by Article 24 and are not entitled to "retained personnel" status. First Geneva Convention, art. 25, 6 U.S.T. 3132, 75 U.N.T.S. 48. Such persons must be "respected and protected" only if they are carrying out medical duties when they come into contact with the enemy, and they are not entitled to be returned as soon as a road is open and military requirements permit. *Ibid*.

The parties to the First Geneva Convention recognized that the special protections afforded to Article 24 personnel create a powerful incentive for abuse. For example, as the *GCI Commentary* notes, if anyone who provided medical assistance were entitled to "retained status" under the Geneva Convention, "[o]ne can well imagine a belligerent giving training as stretcher-bearers to large numbers of the fighting troops of his armed forces, in order to furnish them with a claim to repatriation, should they be captured." *GCI Commentary* 258-259. To guard against such abuse, the Convention provides that Article 24 personnel must be designated as such by military authorities. See First Geneva Convention, art. 40, 6 U.S.T. 3140, 75 U.N.T.S. 56 (referring to exclusive medical personnel "designated in Article 24"). As the *GCI Commentary* explains, Article 24 refers to the "official medical personnel * * * of the armed forces." *GCI Commentary* 218. Thus, "[i]t is for each Power to decide the composition of its Medical Service and to say who shall be employed in it." *Ibid*.

The First Geneva Convention also specifies the means by which military authorities must designate their official medical personnel. In the case of a medic trained and designated by military authorities, Article 40 provides that individuals designated as Article 24 personnel "*shall* wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority," and that they must be issued a "special identity card bearing the distinctive emblem * * * [and] embossed with the stamp of the military authority." First Geneva Convention, art. 40, 6 U.S.T. 3140, 3142, 75 U.N.T.S. 56, 58 (emphasis added). The armband itself is not sufficient; the individual must also "be in a position to prove that he is entitled to wear it," so "[a] special identity card is * * * necessary." *GCI Commentary* 312. It is the stamp of the military authority, which indicates that the items have "been issued by, and on the responsibility of, the military authority," that renders both the armband and the identity card authentic. *Id*. at 311, 315.

Because petitioner concededly was never issued and did not possess either an armband or an identity card, the court of appeals correctly held that he cannot establish his entitlement to Article 24 status. Even assuming, moreover, that a form of documentation other than those specified in the Convention could satisfy the identification requirement, petitioner does not contend that he possessed any other form of documentation supporting his Article 24 status. Indeed, petitioner does not even claim that Taliban forces designated him as Article 24 medical personnel, and the government's unrebutted evidence demonstrated that Taliban forces did not have any established medical corps in 2001, much less a practice of designating or identifying members of its forces as permanent and exclusive medical personnel.

ii. Petitioner argues that, even if he did not possess any documentation identifying him as Article 24 personnel, he qualified for that status because he worked full-time in medical clinics at some point prior to his capture, assertedly satisfying Article 24's substantive standard. That contention lacks merit. The First Geneva Convention's "mandatory language," requires that Article 24 personnel be formally designated by the relevant party to the conflict, which then must issue the armband and special identity card enabling Article 24 personnel to prove their status. Petitioner's functional approach is inconsistent with that requirement.

Any other conclusion would be impracticable in a battlefield situation. To hold that Article 24 status turns on an individual's activities would leave the capturing party without a means for determining whether the individual should be treated as an Article 24 permanent medic, who qualifies for "retained personnel" status, or instead as a person who is not entitled to that status, such as an Article 25 as-needed medic or other combatant who is simply performing medical duties. …As the district court explained, "[r]eliance on a functional evaluation would leave the soldier without the means of determining whether the uniformed individual is a permanent medic entitled to full immunity or an enemy combatant who is simply attending to the wounded at that time." *Id*. at 36a. And as discussed above, … a functional analysis could lead to rampant abuse of the First Geneva Convention because combatants could readily feign Article 24 status upon capture.

Petitioner cites a statement from the International Committee of the Red Cross *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Claud Pilloud, et al., eds., 1987) (*Additional Protocols Commentary*), that "the means of identification do not constitute the right to protection, and that from the moment that medical personnel . . . have been identified, shortcomings in the means of identification cannot be used as a pretext for failing to respect them." … That statement does not indicate that an individual can prove Article 24 status through a means other than those specified in the Geneva Convention—*i.e.*, an armband or a special identity card. Rather, it means only that "shortcomings" in those methods of proof (*e.g.*, a failure to include certain required information on the special identity card) do not automatically deprive an individual of Article 24 status. Moreover, the very same section of the *Additional Protocols Commentary* on which petitioner relies reiterates that "the medical personnel who [are]* * * to be protected" are "only personnel duly recognized and authorized by the Parties to the conflict concerned." *Additional Protocols Commentary* 224. As discussed above, petitioner does not allege that he was ever recognized and authorized by the Taliban to be a permanent and exclusive medic, nor could he plausibly so argue on this record, given the unrebutted evidence that the Taliban did not engage in those practices when petitioner was captured.

* * * *

iii. Petitioner argues that further review is warranted because of the "sweeping" scope of the court of appeals' decision. That contention rests on a misunderstanding of the decision below. Petitioner asserts, for example, that the decision below forecloses medical personnel of the Taliban or any other "irregular forces" from successfully invoking Article 24 status. That is not so. The court of appeals relied on the district court's finding that the Taliban failed to issue the identification materials mandated by Article 40, but that finding was based exclusively on the evidence presented in this case. Consequently, the court of appeals' ruling would not foreclose

another detainee from submitting evidence that the Taliban did in fact issue identifying documentation that complied with the Convention's requirements. And it certainly would not foreclose such a claim by members of other irregular forces, for whom the district court made no findings. Although the decision below held that individuals without proper identification cannot invoke the protections of Article 24 status, at least where their lack of identification is not attributable to "captors or inadvertence," Pet. App. 10a n.1, that is a consequence of the balance struck in the Convention between protecting medical personnel and ensuring that captured combatants cannot abuse Article 24 by falsely claiming to be medical personnel.

iv. Accordingly, the decision below correctly held that petitioner lacked Article 24 status and thus was properly detainable even assuming Article 24 applies in this proceeding. Because petitioner does not claim that the court's legal conclusion conflicts with any decision of this Court or another court of appeals, further review of the court's holding is not warranted.

* * * *

(3) Enteral feeding cases

As discussed in *Digest 2013* at 611-15, the United States filed its brief on appeal in the consolidated claims brought by several detainees challenging the practice of enteral feeding used with detainees on hunger strikes. The Court of Appeals for the D.C. Circuit decided the appeal on February 11, 2014, concluding that certain challenges to the conditions of confinement, including petitioners' claims in this case, could properly be raised in a statutory *habeas corpus* petition consistent with Circuit precedent, but that these detainees failed to meet the standard for granting preliminary injunctive relief. Excerpts follow from the opinion of the D.C. Circuit. The Court disagreed with the U.S. argument in its brief that the Military Commissions Act ("MCA") removes the courts' jurisdiction over such claims. *Aamer et al. v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

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We begin, as we must, with the question of subject-matter jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101–02, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The government contends, as both district courts held, that the MCA's jurisdiction-stripping provision bars federal courts from considering petitioners' force-feeding challenges. Our review is de novo. *Ass'n of Civilian Technicians v. FLRA*, 283 F.3d 339, 341 (D.C.Cir.2002).

* * * *

[T]he jurisdictional question we consider here is relatively narrow: are petitioners' claims the sort that may be raised in a federal habeas petition under section 2241? As the government emphasizes, petitioners challenge neither the fact nor the duration of their detention, claims that would lie at the heart of habeas corpus. *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody."). Instead, they attack the conditions of their confinement, asserting that

their treatment while in custody renders that custody illegal—claims that state and federal prisoners might typically raise in federal court pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). But although petitioners' claims undoubtedly fall outside the historical core of the writ, that hardly means they are not a "proper subject of statutory habeas." *Kiyemba,* 561 F.3d at 513. "Habeas is not 'a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.' " *Boumediene,* 553 U.S. at 780, 128 S.Ct. 2229 (quoting *Jones v. Cunningham,* 371 U.S. 236, 243, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963)).

If, as petitioners assert, their claims fall within the scope of habeas, then the district courts possessed jurisdiction to consider them because the federal habeas corpus statute extends, in its entirety, to Guantanamo. *See Kiyemba,* 561 F.3d at 512 & n. 2. But if petitioners' claims do not sound in habeas, their challenges "constitute[ ] an action other than habeas corpus" barred by section 2241(e)(2). *Al–Zahrani,* 669 F.3d at 319.

Contrary to the contentions of the government and the dissent, in order to resolve this jurisdictional question we have no need to inquire into Congress's intent regarding federal court power to hear Guantanamo detainees' claims. Although Congress undoubtedly intended to preclude federal courts from exercising jurisdiction over *any* claims brought by Guantanamo detainees, it chose to do so through a statute that separately proscribes two different sorts of challenges: "habeas" actions, *see* 28 U.S.C. § 2241(e)(1), and all "other" actions, *see id.* § 2241(e)(2). *Boumediene* struck down the first of these—the provision that would, but for *Boumediene,* preclude Guantanamo detainees from bringing habeas actions. *See Kiyemba,* 561 F.3d at 512. The remaining, lawful subsection of MCA section 7 has, by its terms, "no effect on habeas jurisdiction." *Al–Zahrani,* 669 F.3d at 319. In the wake of *Boumediene* and this court's interpretation of that decision in *Kiyemba,* Congress might very well want to preclude Guantanamo detainees from bringing particular types of habeas actions. But even assuming that Congress intends to again strip federal courts of habeas jurisdiction, it has yet to do so. Because we are unable to give effect to a non-existent statute, any such unmanifested congressional intent has no bearing on whether petitioners may bring their claims. Instead, given that statutory habeas extends to Guantanamo, the issue now before us is not Guantanamo-specific. We ask simply whether a challenge such as that advanced by petitioners constitutes "a proper claim for habeas relief" if brought by an individual in custody in Guantanamo or elsewhere. *Kiyemba,* 561 F.3d at 513.

For the same reasons, we have no need to explore the reach or breadth of the Suspension Clause. Simply put, there is no longer any statute in place that might unconstitutionally suspend the writ. We express no view on whether Congress could constitutionally enact legislation designed to preclude federal courts from exercising jurisdiction over the particular species of habeas claim petitioners advance. For our purposes, it suffices to say that Congress has not done so. Moreover, because of our focus on statutory habeas corpus, we have less need in this case to examine the writ's scope at the time the Constitution was ratified than we might in a case in which the constitutional question was presented. …. It is to the question of the current scope of statutory habeas corpus that we now turn.

C.

The Supreme Court once suggested—indeed, held—that the scope of the writ encompasses conditions of confinement claims such as those petitioners assert. In *Johnson v. Avery,* 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), the Court permitted a federal prisoner to challenge by writ of habeas corpus a prison regulation that prohibited him from providing

legal assistance to other prisoners. *See id.* at 484, 490, 89 S.Ct. 747. Likewise, in *Wilwording v. Swenson*, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971), the Court expressly held that a petition brought by state prisoners challenging "their living conditions and disciplinary measures," *id.* at 249, 92 S.Ct. 407, was "cognizable in federal habeas corpus," *id.* at 251, 92 S.Ct. 407.

Subsequently, however, in *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Supreme Court reversed course, opting instead to treat as an open question the writ's extension to conditions of confinement claims. …

Since *Preiser*, the Court has continued—quite expressly—to leave this question open. In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Court left "to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself." *Id.* at 527 n. 6, 99 S.Ct. 1861. More recently, in *Boumediene* itself, the Court declined to "discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." 553 U.S. at 792, 128 S.Ct. 2229.

Although the Supreme Court has avoided resolving the issue, this circuit has not. Our precedent establishes that one in custody may challenge the conditions of his confinement in a petition for habeas corpus, and we must "adhere to the law of our circuit unless that law conflicts with a decision of the Supreme Court." *Rasul v. Myers*, 563 F.3d 527, 529 (D.C.Cir.2009).

Most important is our decision in *Hudson v. Hardy*, 424 F.2d 854 (D.C.Cir.1970) ("*Hudson II* "). In *Hudson II*, an inmate in the District of Columbia jail sought relief from certain jail officials who he claimed subjected him to beatings and threats and deprived him of his right to practice his religion, among other things. *Id.* at 855; *see also Hudson v. Hardy*, 412 F.2d 1091, 1091 (D.C.Cir.1968) ("*Hudson I* ") (describing petitioner's claims). Responding to the government's argument that the case had become moot because the petitioner had since been transferred outside the jurisdiction, we held that even if the complaint could not be construed as a section 1983 claim for damages, the "core of [the inmate's] complaint when filed was an unlawful deprivation of liberty," and thus the petition was "in effect ... for a writ of habeas corpus." *Hudson II*, 424 F.2d at 855. In language directly applicable to this case, we held: "Habeas corpus tests not only the fact but also the form of detention." *Id.* at 855 n. 3. If, we continued, the inmate's pleadings were treated as a petition for habeas corpus, then the case might not be moot for a number of reasons, among them that the inmate's "disciplinary record may follow him throughout the prison system" in a manner that could both lead to harsher treatment while he was incarcerated and "affect his eligibility for parole." *Id.* at 856. We therefore remanded for the district court to ascertain whether, if the petition was for habeas corpus, as opposed to a claim for damages, the inmate was "still subject to disabilities because of the unlawful acts alleged." *Id.* at 856.

Hudson II's description of the writ's availability to test "not only the fact but also the form of detention" was integral to our ultimate disposition of the case, and thus constitutes binding precedent. If habeas jurisdiction would not lie over the inmate's claims, we would have had no need to direct the district court to conduct further proceedings regarding the mootness of any such habeas petition. We based the necessary antecedent conclusion regarding habeas jurisdiction on two premises: that the petitioner attacked the conditions of his confinement while in custody; and that such claims may be raised in habeas corpus. Doing so quite explicitly, we held that the inmate's petition—which, again, alleged that jail officials "had subjected him to cruel and unusual punishment, to punishment without cause, and to unconstitutional

discrimination," *Hardy II*, 424 F.2d at 855—was "for a writ of habeas corpus" because "[h]abeas corpus tests not only the fact but also the form of detention." *Id.* at 855 & n. 3. Indeed, unless we were holding that habeas jurisdiction would lie for this purpose, we could not have offered as a potential justification for the continued existence of a live controversy the possibility that the disciplinary record would subject petitioner to harsher treatment while in prison, *see id.* at 856—an independent, and therefore precedential, basis for our remand. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.").

* * * *

During oral argument, the government asserted that our decisions recognize only that a habeas petitioner may challenge the *place* of confinement, not the conditions therein. It is true that the petitioner in *Miller* alleged that his confinement in a particular place was illegal. *See Miller*, 206 F.2d at 419. But neither *Hudson II* nor *Wilson* was so limited. Not only did petitioners in both cases directly attack their treatment while in custody, but we made no mention of the possibility that they might instead be detained in a different place in which such conditions were absent.

In any event, we see little reason to distinguish a place of confinement challenge, which unquestionably sounds in habeas, *see, e.g.*, *Kiyemba*, 561 F.3d at 513; *In re Bonner*, 151 U.S. 242, 255–56, 14 S.Ct. 323, 38 L.Ed. 149 (1894), from the one presented here. The substantive inquiry in which courts engage in the two types of cases will often be identical. A place of confinement claim such as that asserted in *Miller* rests on the contention that the conditions of confinement in a particular place violate the law. … A conditions of confinement claim involves the very same inquiry: do the conditions in which the petitioner is currently being held violate the law? *See Wilson*, 471 F.2d at 1080; *Hudson II*, 424 F.2d at 855.

The principal functional difference between the two sorts of challenges lies in the relief that a court might grant. In a place of confinement claim, the petitioner's rights may be vindicated by an order of transfer, while in a conditions of confinement claim, they may be vindicated by an order enjoining the government from continuing to treat the petitioner in the challenged manner. But even this distinction is largely illusory, as either of these two forms of relief may be reframed to comport with the writ's more traditional remedy of outright release. …

Indeed, as *Miller* illustrates, the near-complete overlap between these two sorts of challenges ultimately reflects the fact that in this circuit the underlying rationale for exercising habeas jurisdiction in either case is precisely the same. *Miller* relied on *Coffin v. Reichard*, 143 F.2d 443 (6th Cir.1944), which involved a habeas petition alleging "assaults, cruelties and indignities from guards and ... co-inmates." *Id.* at 444. *Coffin* unequivocally held that a habeas court has jurisdiction over such conditions of confinement claims and "may remand with directions that the prisoner's retained civil rights be respected." *Id.* at 445. …

This circuit is by no means alone in adopting this reasoning. Several of our sister circuits have concluded that an individual in custody may utilize habeas corpus to challenge the conditions under which he is held. ...

Of course, as the government emphasizes, other circuits have reached a contrary conclusion. But even if we had authority to depart from our own precedent, none of these decisions would provide a compelling reason to do so.

The Fifth Circuit appears to have relied on its own, longstanding precedent in holding that a habeas petitioner may not challenge his treatment while in custody. *See Cook v. Hanberry,* 592 F.2d 248, 249 (5th Cir.1979) ("Habeas corpus is not available to prisoners complaining only of mistreatment during their legal incarceration.") (citing *Granville v. Hunt,* 411 F.2d 9, 12–13 (5th Cir.1969)). This precedent originally rested, however, on the now-questionable rationale that the conditions of confinement are within the discretion of prison administrators and thus beyond the cognizance of the courts. *See Granville,* 411 F.2d at 12; *but see, e.g., Procunier v. Martinez,* 416 U.S. 396, 405–06, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

The other circuits that have reached a similar conclusion appear to have done so on the basis of an even more questionable rationale, one reflecting a fundamental misunderstanding of the Supreme Court's decision in *Preiser.* As recounted above, *see supra* at 1050, *Preiser* imposed a habeas-channeling rule, not a habeas-*limiting* rule: the Court held only that claims lying at the "core" of the writ must be brought in habeas, and expressly disclaimed any intention of restricting habeas itself. ...

In sum, although the Supreme Court has left the question open, the law of this circuit—which is consistent with the weight of the reasoned precedent in the federal Courts of Appeal—compels us to conclude that a prisoner may, in a federal habeas corpus petition, "challenge the conditions of his confinement." *Wilson,* 471 F.2d at 1081. Petitioners here advance just such a challenge. They raise claims that their force-feeding at the hands of their jailers constitutes an "additional and unconstitutional restraint[ ] during [their] lawful custody," *Preiser,* 411 U.S. at 499, 93 S.Ct. 1827, and violates their fundamental right to religious freedom, *see* 42 U.S.C. § 2000bb–1, thus rendering their "imprisonment more burdensome than the law allows or curtail[ing] [their] liberty to a greater extent than the law permits." *Miller,* 206 F.2d at 420 (quoting *Coffin,* 143 F.2d at 445); *see also Reed v. Farley,* 512 U.S. 339, 347–48, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) (describing availability of federal habeas corpus for fundamental nonconstitutional claims). They have therefore brought "a proper claim for habeas relief" over which the district courts possess subject-matter jurisdiction. *Kiyemba,* 561 F.3d at 513. We thus turn to the question of whether petitioners have established their entitlement to injunctive relief.

III.

" 'A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.' " *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C.Cir.2011) (alteration in original) (quoting *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). We review the district court's balancing of these four factors for abuse of discretion, while reviewing de novo the questions of law involved in that inquiry. *Id.* at 393.

A.

We begin with the first and most important factor: whether petitioners have established a likelihood of success on the merits. Petitioners advance two separate substantive claims regarding the legality of force-feeding.

Their first and central claim is that the government's force-feeding of hunger-striking detainees violates their constitutionally protected liberty interest—specifically, the right to be free from unwanted medical treatment, *see Cruzan v. Director, Missouri Department of Health,*

497 U.S. 261, 278–79, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990)—and that the government is unable to justify the practice of force-feeding under the standard established in *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). In *Turner*, the Supreme Court set forth the general test for assessing the legality of a prison regulation that "impinges on" an inmate's constitutional rights, holding that such a regulation is "valid if it is reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254. As the government does not press the issue, we shall, for purposes of this case, assume without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantanamo and that we should use the *Turner* framework to evaluate petitioners' claim. *But cf. Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C.Cir.2009), *vacated by Kiyemba v. Obama*, 559 U.S. 131, 130 S.Ct. 1235, 175 L.Ed.2d 1070 (2010), *modified and reinstated*, 605 F.3d 1046, 1048 (D.C.Cir.2010).

In their briefs, petitioners detail the significant number of international organizations, medical associations, and public figures who have criticized the practice of force-feeding prisoners unwilling to eat. … Since oral argument in this case, a task force organized by the Institute on Medicine as a Profession and the Open Society Foundation has issued a scathing report detailing the abuses of medical ethics in the government's treatment of detainees in Guantanamo, Afghanistan, and Iraq, concluding specifically that doctors who assist in the treatment of hunger-striking Guantanamo detainees "have become agents of a coercive and counter-therapeutic procedure that for some detainees continued for months and years, resulting in untold pain, suffering, and tragedy for the detainees for whom they were medically responsible." Task Force Report, *Ethics Abandoned: Medical Professionalism and Detainee Abuse in the War on Terror* 84 (2013) (submitted by petitioners pursuant to Fed. R.App. P. 28(j)); see also Denise Grady & Benedict Carey, Medical Ethics Have Been Violated at Detention Sites, a New Report Says, N.Y. TIMES, Nov. 5, 2013, at A16 (describing the task force's report). Given these authorities—and, we might add, given the government's own description of its force-feeding protocol—we have no doubt that force-feeding is a painful and invasive process that raises serious ethical concerns.

For petitioners to be entitled to injunctive relief, however, it is not enough for us to say that force-feeding may cause physical pain, invade bodily integrity, or even implicate petitioners' fundamental individual rights. This is a court of law, not an arbiter of medical ethics, and as such we must view this case through *Turner*'s restrictive lens. The very premise of *Turner* is that a "prison regulation [that] impinges on inmates' constitutional rights" may nonetheless be "valid." *Turner*, 482 U.S. at 89, 107 S.Ct. 2254. That is, although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," they do substantially change the nature and scope of those constitutional protections, as well as the degree of scrutiny that courts will employ in assessing alleged violations. *Id.* at 84, 107 S.Ct. 2254; *see Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."). Thus, even if force-feeding "burdens fundamental rights," *Turner*, 482 U.S. at 87, 107 S.Ct. 2254, *Turner* makes clear that a federal court may step in only if the practice is not "reasonably related to legitimate penological interests," *id.* at 89, 107 S.Ct. 2254.

The government has identified two penological interests at stake here: preserving the lives of those in its custody and maintaining security and discipline in the detention facility. As the government emphasizes, many courts have concluded that such interests are legitimate and justify prison officials' force-feeding of hunger-striking inmates. *E.g., In re Grand Jury Subpoena John Doe v. United States,* 150 F.3d 170, 172 (2d Cir.1998); *Garza v. Carlson,* 877 F.2d 14, 17 (8th Cir.1989); *Matter of Bezio v. Dorsey,* 21 N.Y.3d 93, 967 N.Y.S.2d 660, 989 N.E.2d 942, 950–51 (2013); *Laurie v. Senecal,* 666 A.2d 806, 809 (R.I.1995). The New York Court of Appeals recently explained that prison officials faced with a hunger-striking inmate whose behavior is life-threatening would, absent force-feeding, face two choices: (1) give in to the inmate's demands, which would lead other inmates to "copy the same tactic, manipulating the system to get a change in conditions"; or (2) let the inmate die, which is a harm in its own right, and would often "evoke[ ] a strong reaction from the other inmates and create[ ] serious safety and security concern[s]." *Matter of Bezio,* 967 N.Y.S.2d 660, 989 N.E.2d at 951 (internal quotation marks omitted); *accord Freeman v. Berge,* 441 F.3d 543, 547 (7th Cir.2006) ("If prisoners were allowed to kill themselves, prisons would find it even more difficult than they do to maintain discipline, because of the effect of a suicide in agitating the other prisoners."). …

Thus, the overwhelming majority of courts have concluded, as did Judge Collyer and as we do now, that absent exceptional circumstances prison officials may force-feed a starving inmate actually facing the risk of death. *See Freeman,* 441 F.3d at 546; *Commissioner of Correction v. Coleman,* 303 Conn. 800, 38 A.3d 84, 95–97 (2012) (collecting cases). Petitioners point to nothing specific to their situation that would give us a basis for concluding that the government's legitimate penological interests cannot justify the force-feeding of hunger-striking detainees in Guantanamo.

* * * *

IV.

For the forgoing reasons, we affirm the district courts' denials of petitioners' applications for a preliminary injunction.

* * * *

(4) Abdullah v. Obama

On April 4, 2014, the U.S. Court of Appeals for the D.C. Circuit affirmed the decision of the district court denying a detainee's motion for a preliminary injunction regarding his allegedly illegal indefinite detention, and regarding his allegedly unlawful conditions of confinement. *Abdullah v. Obama*, 753 F.3d 193 (D.C. Cir. 2014). Abdullah contended that his detention violated an executive agreement between the United States and Yemen as well as the Third Geneva Convention. As discussed in *Digest 2013* at 616-19, the United States filed its brief on appeal in 2013, arguing that Abdullah's detention was

lawful. Excerpts follow (with footnotes omitted) from the opinion of the Court of Appeals.

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* * * *

Abdullah has not made a "clear showing" that he is entitled to the requested declaration. *Sherley,* 644 F.3d at 392. Even accepting *arguendo,* first, his claim that indefinite detention violates the Yemen Agreement and, second, that he may enforce the protections of the Agreement in court, he has not demonstrated he is likely to succeed on his habeas petition because he has not shown that *his* detention is indefinite or otherwise illegal. Contrary to Abdullah's assertions, the Government does not claim the right to detain him indefinitely but instead only "for the duration of hostilities." Appellees' Br. 17, *Abdullah v. Obama,* No. 13–5203 (D.C.Cir. Oct. 31, 2013). And, as noted, the AUMF permits the President to detain enemy combatants "for the duration of the particular conflict in which they were captured." *Hamdi,* 542 U.S. at 518, 124 S.Ct. 2633 (plurality opinion); *id.* at 588–89, 124 S.Ct. 2633 (Thomas, J., dissenting); *see also Boumediene,* 553 U.S. at 733, 128 S.Ct. 2229; *Janko,* 741 F.3d at 138; *Maqaleh,* 738 F.3d at 317. Further, a plurality of the Supreme Court has recognized, as have we, that such detention is sanctioned by international law. *See Hamdi,* 542 U.S. at 518, 124 S.Ct. 2633 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' ") (quoting *Ex parte Quirin,* 317 U.S. 1, 28, 30, 63 S.Ct. 2, 87 L.Ed. 3 (1942)); *id.* at 520, 124 S.Ct. 2633 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities." (citing Third Geneva Convention, art. 118, 6 U.S.T. 3316 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”))); *Al–Bihani v. Obama,* 590 F.3d 866, 874 (D.C.Cir.2010) (Third Geneva Convention "codif[ies] what common sense tells us must be true: release is only required when the fighting stops"). Abdullah was captured during the conflict in Afghanistan, and it is undeniable that the conflict persists. *See Maqaleh,* 738 F.3d at 330 (political branches have exclusive authority to mark end of conflicts and neither has indicated Afghanistan conflict has ended). Absent a challenge to the *fact* of his detention on appeal, we can only conclude, then, that the *duration* of Abdullah's detention is consistent with the AUMF and with international law and, consequently, that he is unlikely to succeed on his underlying habeas petition.

Nor has Abdullah demonstrated that the remaining preliminary injunction factors weigh in his favor. To begin with, Abdullah has forfeited any argument related to irreparable injury, the balance of equities and the public interest because he did not address these factors until his reply brief. *See Am. Wildlands v. Kempthorne,* 530 F.3d 991, 1001 (D.C.Cir.2008) (argument raised for first time in reply brief is forfeited). But even if Abdullah had not forfeited his arguments, it is plain that none of the remaining factors supports the requested relief. Most notably, Abdullah has not shown that he will suffer an irreparable injury if the Court withholds a declaration proscribing indefinite detention. A declaration prohibiting Abdullah's indefinite detention would have no practical effect because the Government plans to detain him not indefinitely but, under the AUMF, until hostilities in Afghanistan conclude. *See supra* at p. 198. Abdullah concedes as much in his opening brief. *See* Appellant's Br. 3–4.

Abdullah's request for relief enjoining his allegedly unlawful conditions of confinement has also been forfeited. Abdullah's opening brief presses this request for injunctive relief with only the bare and conclusory assertion that "Respondents are now, and have been for a decade, violating sections 3, 25, 70–72, and 78–79" of the Third Geneva Convention. Appellant's Br. 16. He does not fully explain the nature of the alleged violations until his reply brief. His efforts fail to preserve the claim. *See Bryant v. Gates*, 532 F.3d 888, 898 (D.C.Cir.2008) (if party's argument consists of "single, conclusory statement argument is forfeited); *accord N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C.Cir.2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (quotation marks omitted)). Moreover, Abdullah does not argue in his opening brief that the irreparable injury, balance-of-equities and public interest prongs warrant granting the injunction, with the result that Abdullah has forfeited his request for injunctive relief on these bases as well. *See Kempthorne*, 530 F.3d at 1001; *see also Davis*, 571 F.3d at 1292 ("[T]he movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.").

For the foregoing reasons, the judgment of the district court is affirmed.

* * * *

(5) Hatim v. Obama

On August 1, 2014, the Court of Appeals for the D.C. Circuit reversed the decision of a lower court sustaining a challenge to changes in security procedures at Guantanamo as improperly interfering with detainees' access to counsel. *Hatim v. Obama,* 760 F.3d. 54 (D.C. Cir. 2014). The Court of Appeals held that the new procedures—changing the location where detainees could meet with their attorneys and additional frisk-searches which cover the groin area—were rationally related to a legitimate government interest in prison security. Excerpts follow (with footnotes omitted) from the opinion of the Court of Appeals.

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* * * *

We need not determine whether the district court's view of the scope of habeas is correct, for this challenge falls squarely within the jurisdiction we recognized recently in *Aamer v. Obama*, 742 F.3d 1023 (D.C.Cir.2014). In *Aamer*, we held that challenges to conditions of confinement can properly "be raised in a federal habeas petition under section 2241," and when so raised are not barred by (e)(2)'s prohibition on *non*-habeas actions. *Id.* at 1030, 1038. The government has expressly conceded that the procedures challenged by these habeas petitions are "conditions of confinement." Br. of Appellant at 17–19. The district court thus had jurisdiction under *Aamer,* and we need not address other jurisdictional theories.

III

We review constitutional challenges to prison policies under the test announced by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). This deferential standard applies to military detainees as well as prisoners.…

* * * *

IV

We assume, without deciding, that the district court was correct in concluding that the detainees' right to habeas includes the right to representation by counsel and that that right has been burdened by the policies that the detainees challenge. *See Overton v. Bazzetta*, 539 U.S. 126, 131–32, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003) (declining to define the asserted right where, even if such a right existed and was violated, the regulations survived *Turner). Turner* requires that we look to four factors to determine if these new policies are reasonable: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it," *Turner*, 482 U.S. at 89, 107 S.Ct. 2254 (internal quotation marks omitted); (2) "whether there are alternative means of exercising the right that remain open to prison inmates," *id.* at 90, 107 S.Ct. 2254; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," *id.*; and (4) "the absence of ready alternatives" to the regulation, *id.* Although we examine each factor, the first is the most important. *Amatel*, 156 F.3d at 196 ("[T]he first factor looms especially large. Its rationality inquiry tends to encompass the remaining factors...."); *see also Beard v. Banks*, 548 U.S. 521, 532, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006) (plurality opinion).

Prison security, the government's asserted purpose for the challenged policies, is beyond cavil a legitimate governmental interest. *See Bell v. Wolfish*, 441 U.S. 520, 546–47, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). *Turner* teaches that, and common sense shouts it out. The only question for us is whether the new policies are rationally related to security. We have no trouble concluding that they are, in no small part because that is the government's view of the matter. "The task of determining whether a policy is reasonably related to legitimate security interests is peculiarly within the province and professional expertise of corrections officials." *Florence*, 132 S.Ct. at 1517 (internal quotation marks omitted). We must accord "[p]rison administrators ... wide-ranging deference in the adoption and execution of policies and practices that *in their judgment* are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547, 99 S.Ct. 1861 (emphasis added); *see Florence*, 132 S.Ct. at 1517; *cf. Phillips*, 591 F.2d at 972.

The touchstone of our deference, of course, is whether the government's assertion of a connection between prison security and the challenged policy is reasonable. Here, Guantanamo officials explained that they adopted the new search policies to address the risk to security posed by hoarded medication and smuggled weapons. It stands to reason that enhancing the thoroughness of searches at Guantanamo in the way called for by standard Army prison protocol would enhance the effectiveness of the searches. *See Florence*, 132 S.Ct. at 1516–17. The detainees make no claim to the contrary. Instead, they argue that more thorough searches are not needed during their visits with counsel because the government failed to provide evidence that the contraband was smuggled into the housing camps during these visits. But the authorities at Guantanamo do not know how or when detainees obtain contraband. ... In light of such

uncertainty and the fact that smuggling takes place, we think administering a more thorough search in connection with attorney visits as well as with any other detainee movements or meetings is a reasonable response to a serious threat to security at Guantanamo.

Likewise, it is reasonable to require that all meetings between detainees and their visitors, including counsel, take place in Camp Echo, which requires fewer guards than the housing camps. Each meeting room in Camp Echo, unlike those in the detainees' housing camps, has a restroom and a space for prayer, which means that guards are not needed to transfer detainees mid-meeting. And the video monitoring in Camp Echo eliminates the need to post guards outside each meeting room, as is necessary in Camps 5 and 6. Guards who would have to stand sentry if the visits took place in a housing camp are instead available for postings elsewhere at Guantanamo, enhancing the facility's overall security.

* * * *

Turner next requires that we consider whether the new policies leave the detainees with some other means to exercise their right to counsel. Detainees who forgo visits with their lawyers to avoid the searches can still communicate with counsel via letter. Supreme Court precedent teaches that alternative means of exercising the claimed right "need not be ideal, however; they need only be available." *See Overton,* 539 U.S. at 135, 123 S.Ct. 2162. But we need not decide whether letters are an adequate replacement for meetings in person, because even if we were to agree with the detainees that they are not, the lack of an alternative "is not conclusive of the reasonableness of the [regulation]" because the other factors must still be considered, *Beard,* 548 U.S. at 532, 126 S.Ct. 2572 (plurality opinion) (internal quotation marks omitted).

Both of the remaining factors cover much of the same ground as the first and reinforce our conclusion that these policies are reasonable. *See Amatel,* 156 F.3d at 196. As to the third factor, the impact of an accommodation, we have already concluded that the new search procedures promote the safety of the guards and inmates by more effectively preventing the hoarding of medication and the smuggling of dangerous contraband, and thus the accommodation the detainees seek would necessarily have a negative impact "on guards and other inmates." *See Turner,* 482 U.S. at 90, 107 S.Ct. 2254; *Beard,* 548 U.S. at 532, 126 S.Ct. 2572 (plurality opinion). Allowing counsel meetings with detainees to take place in the housing camps instead of Camp Echo would burden "the allocation of prison resources." *See Turner,* 482 U.S. at 90, 107 S.Ct. 2254.

Finally, the detainees have pointed to no "ready alternative[ ]" to the new policies. *Id.* To be "ready," a policy must be an "obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Overton,* 539 U.S. at 136, 123 S.Ct. 2162. The detainees' suggested alternative of reverting to the old policies does not meet this "high standard." *Id.* Having already determined that we defer to the military's judgment that the old policies hinder the government's interest in security, we can hardly say that they are nonetheless "ready alternatives." In the considered and experienced judgment of Guantanamo administrators, the old policies contributed to the troubling lapses in security. We will not second-guess that determination. *See id.; see also Thornburgh v. Abbott,* 490 U.S. 401, 419, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) ("[W]hen prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*.").

* * * *

b. Former Detainees

Al Janko v. Gates

On January 17, 2014, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Al Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014). The U.S. brief filed in the D.C. Circuit in the case in 2013 is discussed and excerpted in *Digest 2013* at 623-25. The Court of Appeals agreed with the primary argument in the United States brief, namely, that the district court correctly held it lacked jurisdiction over Al Janko's complaint about his detention filed after he had been released due to the jurisdiction-stripping provision of the Military Commissions Act ("MCA"), 28 U.S.C. § 2241(e)(2). Excerpts follow (with footnotes omitted) from the decision of the Court of Appeals.[**]

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* * * *

[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and *has been determined by the United States to have been properly detained* as an enemy combatant.... 28 U.S.C. § 2241(e)(2) (emphasis added). This action is undoubtedly an action (1) other than habeas corpus or direct review of a [Combatant Status Review Tribunal or] CSRT determination (2) against the United States or its agents (3) brought by an alien (4) previously detained by the United States, which action (5) relates to an aspect of his detention. The crux of the parties' dispute is whether the Appellant was "determined by *the United States* to have been properly detained as an enemy combatant." *Id.* (emphasis added).

1. Meaning of "the United States"

The Government argues that the statute bars the Appellant's claims because "the United States" means only "the Executive Branch." Because the CSRT is an executive-branch tribunal, the Government contends that the first CSRT's determination that the Appellant was properly detained triggered the jurisdictional bar. The Appellant, citing to a dictionary and to cases interpreting unrelated statutes, argues that "the United States" ordinarily encompasses all three branches of the federal government and not solely the Executive Branch. He argues that the bar does not apply to him because the district court's grant of the writ is a determination by the United States "that he was *never* properly detained as an enemy combatant." Pl.-Appellant's Opening Br. 2 (Janko Br.), *Janko v. Gates*, No. 12–5017 (D.C.Cir. Jan. 9, 2013) (emphasis in original).

* * * *

[**] Editor's note: On March 9, 2015, the U.S. Supreme Court denied the petition for writ of certiorari in the case. *Al Janko v. Gates*, No. 14-650.

If "the United States" seems "ambiguous in isolation," it is "clarified by the remainder of the statutory scheme[ ] because the same terminology is used elsewhere in a context that makes its meaning clear...." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). The statute applies to any alien "detained by *the United States* " and "determined by *the United States* to have been properly detained as an enemy combatant." 28 U.S.C. § 2241(e)(2) (emphases added). In light of the "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning," the Congress's use of the same words to describe the detaining authority and the authority responsible for making the propriety-of-detention determination leads us to conclude that they are one and the same. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 501, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998); *see also Powerex Corp. v. Reliant Energy Servs., Inc.,* 551 U.S. 224, 232, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007). As the Congress well understood when it enacted the MCA, the detention of aliens as enemy combatants is an exclusively executive function. *See Boumediene,* 553 U.S. at 782–83, 128 S.Ct. 2229 (distinguishing between those "detained by executive order" at Guantanamo and those held pursuant to criminal sentence); *Hamdi,* 542 U.S. at 516–17, 124 S.Ct. 2633 (holding AUMF gives "the Executive ... the authority to detain citizens who qualify as 'enemy combatants' "); *Rasul v. Bush,* 542 U.S. 466, 475, 483 n. 15, 485, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004) (recognizing that detainees at Guantanamo are in exclusively executive detention); Detention, Treatment, and Trial of Certain Non–Citizens in the War Against Terrorism, 66 Fed.Reg. 57,833, 57,834 (Nov. 13, 2001) (executive order authorizing detention of enemy combatants); *see also* Oral Argument 13:17, *Janko v. Gates,* No. 12–5017 (D.C.Cir. Oct. 22, 2013) (The Appellant's counsel conceding that "courts ordinarily don't detain people so the reference to 'the United States' in terms of an 'alien detained by the United States' ordinarily" refers to the Executive Branch); *cf. Uthman v. Obama,* 637 F.3d 400, 402 (D.C.Cir.2011). Because the detaining authority referred to as "the United States" in section 2241(e)(2) is exclusively the Executive Branch, and the determination triggering the jurisdictional bar is made by the detaining authority, a "determin[ation] by the United States" is one made by the Executive Branch.

Section 2241(e)(1), enacted as part of the same statutory subsection, confirms our interpretation. The provision ousts all federal courts of jurisdiction over a habeas petition filed by any alien " detained by the United States" and "determined by the United States to have been properly detained as an enemy combatant." 28 U.S.C. § 2241(e)(1). This provision is plainly *in pari materia* with section 2241(e)(2) and so we must give a consistent interpretation to the two provisions' identical language. *See Nijhawan v. Holder,* 557 U.S. 29, 39, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) ("Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations."); *cf. Erlenbaugh v. United States,* 409 U.S. 239, 244, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972). This we can easily do. In a statute depriving federal courts of jurisdiction to decide the lawfulness of *executive* detention, the phrase "determined by the United States" must refer to an executive-branch determination. We will not " 'attribute a schizophrenic intent to the' " Congress by reading "the United States" to refer to executive-branch determinations in section 2241(e)(1) but not in section 2241(e)(2). *Yousuf v. Samantar,* 451 F.3d 248, 256 (D.C.Cir.2006) (quoting *Marek v. Chesny,* 473 U.S. 1, 21, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985)).

Finally, we find support for our interpretation in the version of section 2241(e)(2) which the MCA amended. *See Johnson v. United States,* 529 U.S. 694, 710, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000) ("[W]hen a new legal regime develops out of an identifiable predecessor, it

is reasonable to look to the precursor in fathoming the new law."); *see also Hamilton v. Rathbone,* 175 U.S. 414, 421, 20 S.Ct. 155, 44 L.Ed. 219 (1899). The Congress originally added 28 U.S.C. § 2241(e) to the U.S.Code in section 1005(e) of the Detainee Treatment Act (DTA) of 2005, Pub.L. 109–148, § 1005, 119 Stat. 2739, 2742–43. Section 1005(e)(2) granted this Court exclusive jurisdiction to review CSRT determinations, *see Bismullah v. Gates,* 501 F.3d 178, 183 (D.C.Cir.2007), *vacated and remanded on other grounds by* 554 U.S. 913, 128 S.Ct. 2960, 171 L.Ed.2d 881 (2008), and section 1005(e)(1) (the portion codified at 28 U.S.C. § 2241(e)(2)) ousted the federal courts of jurisdiction to consider any non-habeas claim "against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who ... has been determined *by the United States Court of Appeals for the District of Columbia Circuit* [D.C. Circuit] ... to have been properly detained as an enemy combatant," DTA § 1005(e)(1), 119 Stat. at 2742 (codified at 28 U.S.C. § 2241(e)(2) (Supp. V 2005)) (emphasis added).

Responding to the Supreme Court's interpretation of section 1005(e) of the DTA, *see Hamdan v. Rumsfeld,* 548 U.S. 557, 572–84, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006), the Congress amended 28 U.S.C. § 2241(e) in the MCA. Despite retaining our review of CSRT determinations, *see* MCA § 7(a), 120 Stat. at 2636 (excepting from jurisdictional bar actions brought under "paragraph [ ](2) ... of section 1005(e) of the" DTA), section 7(a) replaced both "the Department of Defense" (the detaining authority) and the "D.C. Circuit" (the relevant status determiner) with "the United States," *compare* DTA § 1005(e)(1), 119 Stat. at 2742, *with* MCA § 7(a), 120 Stat. at 2635–36. The change is significant. Under the DTA, the relevant propriety-of-detention determination was made by a tribunal (the D.C. Circuit) independent of the detaining authority (the Department of Defense). Under the MCA, however, the Congress abandoned the independent, judicial propriety-of-detention determination in favor of a non-judicial determination made by the same entity that detains the alien (the United States). Adopting the Appellant's interpretation would deprive the changes made by section 7(a) of any "real and substantial effect" and flout the Congress's manifest intent to have section 2241(e)(2)'s applicability turn on a non-judicial status determination. *Stone v. INS,* 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995).

2. The Appellant's Counterarguments

The Appellant counters our interpretation by arguing that we effectively read "properly" out of the statute. His contention rests on the belief that the statute bars claims only from detainees who received "proper" CSRT determinations, to wit, those detainees who *in fact* are enemy combatants. A CSRT determination is "proper," apparently, if a habeas court subsequently reaches the same conclusion. Because the district court in *Al Ginco* disagreed with the Appellant's two CSRTs, he argues that he is not in fact an enemy combatant and section 2241(e)(2) does not apply.

The Appellant's argument results in a very subtle rewriting of the statute. The statute applies to an alien "determined by the United States to have been *properly* detained as an enemy combatant." 28 U.S.C. § 2241(e)(2) (emphasis added). He reads "properly" to modify "determined," thereby requiring that a CSRT *correctly* determine a detainee's status in order that section 2241(e)(2) apply. But "properly" does not modify "determined"; it modifies "detained." The phrase "properly detained as an enemy combatant" identifies the type of determination the Executive Branch must make, *viz.,* a determination that the detainee meets the AUMF's criteria for enemy-combatant status. *See, e.g., Barhoumi v. Obama,* 609 F.3d 416, 423, 432 (D.C.Cir.2010) (detainee is "properly detained pursuant to the AUMF" if he meets the

requirements for enemy combatant status). But the statute does not say that the bar applies to an alien whom "the United States has *properly* determined to have been properly detained as an enemy combatant." It requires only that the Executive Branch determine that the AUMF authorizes the alien's detention without regard to the determination's correctness. Conditioning the statute's applicability on the accuracy of the Executive Branch's determination would do violence to the statute's clear textual directive.

* * * *

C. Constitutional Challenge

Having determined that the statute applies to the Appellant, we must now decide whether its application is constitutional. We conclude that it is. He first argues that section 2241(e)(2) is unconstitutional because it deprives him of a damages remedy for violations of his constitutional rights. Apparently recognizing that we rejected this argument in *Al–Zahrani*, 669 F.3d at 319–20, the Appellant once again relies on his successful habeas petition to distinguish his case. While his successful habeas petition is a factual distinction, it makes no constitutional difference. Jurisdiction, in this context, is the authority of a court to decide a particular class of cases. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–61, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010) ("[T]he term 'jurisdictional' properly applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating [the court's] authority." (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004))). The class of claims to which section 2241(e)(2) constitutionally applies plainly encompasses the Appellant's claims—that is, *any* detention-related claims, whether statutory or constitutional, brought by an alien detained by the United States and determined to have been properly detained as an enemy combatant. *Al–Zahrani*, 669 F.3d at 318–19. The writ, although perhaps relevant to the merits of his constitutional claims, does not move them out of the class to which section 2241(e)(2) constitutionally applies.

* * * *

3. Criminal Prosecutions and Other Proceedings

a. Al Bahlul v. United States

The U.S. Court of Appeals for the District of Columbia Circuit issued its en banc decision in the case of Ali Hamza Ahmad Suliman Al Bahlul on July 14, 2014. 767 F.3d. 1 (D.C. Cir. 2014). The U.S. brief on appeal is discussed and excerpted in *Digest 2013* at 633-38. Mr. Bahlul was convicted by a U.S. military commission of conspiracy, solicitation, and material support for terrorism based on his activities in support of al-Qaida and Osama bin-Laden and in assisting with preparations for the September 11, 2001 attacks. A

panel of the Court of Appeals for the D.C. Circuit vacated his conviction based on *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) ("*Hamdan II*"), which concluded that conspiracy and other crimes not recognized under the international law of war could not be the basis for prosecution under the 2006 Military Commissions Act ("MCA"). The en banc Court of Appeals rejected Mr. Bahlul's Ex Post Facto challenge to his conspiracy conviction but vacated his material support and solicitation convictions, and remanded his other constitutional challenges back to a panel of the D.C. Circuit for resolution. Excerpts follow (with footnotes omitted) from the majority opinion of the en banc court.

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* * * *

As noted, *Hamdan II* held that the 2006 MCA "does not authorize *retroactive* prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission." 696 F.3d at 1248. Because we conclude, for the reasons that follow, that the 2006 MCA is unambiguous in its intent to authorize retroactive prosecution for the crimes enumerated in the statute—regardless of their pre-existing law-of-war status—we now overrule *Hamdan II* 's statutory holding. …

A. The 2006 MCA is Unambiguous

The 2006 MCA confers jurisdiction on military commissions to try "*any* offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001*." 10 U.S.C. § 948d(a) (2006) (emphases added). "Any," in this context, means "all." …The "offense[s] made punishable by this chapter" include the charges of which Bahlul was convicted: conspiracy to commit war crimes, providing material support for terrorism and solicitation of others to commit war crimes. 10 U.S.C. §§ 950u, 950v(b)(25), 950v(b)(28) (2006). There could hardly be a clearer statement of the Congress's intent to confer jurisdiction on military commissions to try the enumerated crimes regardless whether they occurred "before, on, or after September 11, 2001." And the provisions of the statute enumerating the crimes triable thereunder expressly "do not preclude trial for crimes that occurred before the date of the enactment of this chapter." 10 U.S.C. § 950p(b) (2006). For good reason: If it were otherwise, section 948d's conferral of jurisdiction to prosecute the enumerated crimes occurring on or before September 11, 2001 would be inoperative. …Although we presume that statutes apply only prospectively "absent clear congressional intent" to the contrary, that presumption is overcome by the clear language of the 2006 MCA. …

Review of the inter-branch dialogue which brought about the 2006 MCA confirms the Congress's intent to apply all of the statute's enumerated crimes retroactively. …

The Congress answered the Court's invitation with the 2006 MCA, which provides the President the very power he sought to exercise in *Hamdan*—the power to try the 9/11 perpetrators for conspiracy—by including conspiracy as an offense triable by military commission, 10 U.S.C. § 950v(b)(28) (2006), and by conferring jurisdiction on military commissions to try alien unlawful enemy combatants for conspiracy based on conduct that

occurred "before, on, or after September 11, 2001," *id.* § 948d(a). We must heed this inter-branch dialogue, as *Boumediene* instructs. 553 U.S. at 738, 128 S.Ct. 2229.

* * * *

… In enacting the military commission provisions of the 2006 MCA, the Congress plainly intended to give the President the power which *Hamdan* held it had not previously supplied—just as the 2006 MCA clarified that in fact the Congress *did* intend section 7(b)'s ouster of habeas jurisdiction to apply to pending cases. The legislative history confirms this view. *See Boumediene,* 553 U.S. at 739, 128 S.Ct. 2229 ("The Court of Appeals was correct to take note of the legislative history when construing the statute...."). Supporters and opponents of the legislation alike agreed that the 2006 MCA's purpose was to authorize the trial by military commission of the 9/11 conspirators. And because the 9/11 conspiracy took place long before 2006, the statute could accomplish its explicit purpose only if it applied to pre-enactment conduct. As the Court itself made clear, "we cannot ignore that the [2006] MCA was a direct response to *Hamdan* 's holding." *Boumediene,* 553 U.S. at 739, 128 S.Ct. 2229.

Reading the MCA in this context and given the unequivocal nature of its jurisdictional grant, we conclude the 2006 MCA unambiguously authorizes Bahlul's prosecution for the charged offenses based on pre–2006 conduct.

B. The Avoidance Canon is Inapplicable

Hamdan II 's contrary conclusion turned on the following provision of the 2006 MCA:

> (a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.
>
> (b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

10 U.S.C. § 950p (2006). In *Hamdan II*, the Court read this provision to reflect the Congress's "belie[f] that the Act codified no new crimes and thus posed no ex post facto problem." 696 F.3d at 1247. Because the Congress was wrong in its textually stated premise—*i.e.*, the Act *did* codify new war crimes—the Court found "at least something of an ambiguity" in the statute. *Id.* at 1248. It then turned to the avoidance canon to resolve the ambiguity, concluding that the Congress intended to authorize retroactive prosecution only if "the conduct was already prohibited under existing U.S. law as a war crime triable by military commission." *Id.*

The "avoidance canon" reflects a fundamental principle of judicial restraint. *See Ashwander v. TVA*, 297 U.S. 288, 341–48, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). But "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them.*" *Clark v. Martinez,* 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (emphasis in original); … Because the 2006 MCA unqualifiedly confers jurisdiction on military commissions to try "*any* offense

made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001*," 10 U.S.C. § 948d(a) (2006) (emphases added), it is not "fairly possible" to read the statute to apply only prospectively. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916) (Holmes, J.).

* * * *

The "ambiguity" *Hamdan II* identified was the Congress's failure to address what it "would ... have wanted" if it "had known that the Act was codifying some new crimes." 696 F.3d at 1247. In other words, *Hamdan II* found the statute ambiguous because the Congress did not include in the text of the statute alternative language in case it was wrong in its reading of the law on which it premised its legislation. But the Congress always legislates on the basis of some set of facts or premises it believes to be true. It holds hearings and investigates precisely for the purpose of acquiring facts and then legislates on the basis of those facts. Because it believes to be true the facts on which it bases its legislation, the Congress seldom (if ever) includes instructions on what to do if those facts are proven incorrect. Here, the Congress authorized prosecution for "any offense made punishable by" the 2006 MCA, including offenses based on pre-enactment conduct, precisely because it believed that all of the offenses were already triable by military commission. The Congress's plainly expressed belief about pre-enactment law should govern our understanding of the Congress's intent expressed in the text of the statute. If judicial inquiry reveals that the Congress was mistaken, it is not our task to rewrite the statute to conform with the actual state of the law but rather to strike it down insofar as the Congress's mistake renders the statute unconstitutional. *See Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 n. 7 (D.C.Cir.2013) ("The constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures."), *cert. granted* (June 23, 2014).

* * * *

IV. Bahlul's *Ex Post Facto* Challenge

Because the Congress's intent to authorize retroactive prosecution of the charged offenses is clear, we must address Bahlul's *ex post facto* argument. …As noted, we may overturn Bahlul's convictions only if they constitute plain constitutional error.

The Constitution prohibits the Congress from enacting any "*ex post facto* Law." U.S. Const. art. I, § 9, cl. 3. "The phrase *ex post facto* law was a term of art with an established meaning at the time of the framing." *Peugh v. United States*, —— U.S. ——, 133 S.Ct. 2072, 2081, 186 L.Ed.2d 84 (2013) (quoting *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)) (quotation marks omitted). In *Calder v. Bull*, Justice Chase set forth his understanding of that meaning:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798) (opinion of Chase, J.); *see Peugh,* 133 S.Ct. at 2081 (reciting Justice Chase's formulation); *Carmell v. Texas,* 529 U.S. 513, 525, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) (Supreme Court has "repeatedly endorsed" Justice Chase's formulation); *see also id.* at 537–39, 120 S.Ct. 1620 (noting that *Collins* did not eliminate Justice Chase's fourth category).

In our order granting *en banc* review, we asked the parties to brief whether the *Ex Post Facto* Clause applies in cases involving aliens detained at Guantanamo. The Government has taken the position that it does. Although we are not obligated to accept the Government's concession, *see Young v. United States,* 315 U.S. 257, 258–59, 62 S.Ct. 510, 86 L.Ed. 832 (1942); *United States v. Baldwin,* 563 F.3d 490, 491 (D.C.Cir.2009), we will assume without deciding that the *Ex Post Facto* Clause applies at Guantanamo. In so doing, we are "not to be understood as remotely intimating in any degree an opinion on the question." *Petite v. United States,* 361 U.S. 529, 531, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960) (per curiam); *see also Casey v. United States,* 343 U.S. 808, 808, 72 S.Ct. 999, 96 L.Ed. 1317 (1952) (per curiam) ("To accept in this case [the Solicitor General's] confession of error would not involve the establishment of any precedent."); *United States v. Bell,* 991 F.2d 1445, 1447–48 (8th Cir.1993).

A. Conspiracy

We reject Bahlul's *ex post facto* challenge to his conspiracy conviction for two independent and alternative reasons. First, the conduct for which he was convicted was already criminalized under 18 U.S.C. § 2332(b) (section 2332(b)) when Bahlul engaged in it. It is not "plain" that it violates the *Ex Post Facto* Clause to try a pre-existing federal criminal offense in a military commission and any difference between the elements of that offense and the conspiracy charge in the 2006 MCA does not seriously affect the fairness, integrity or public reputation of judicial proceedings. Second, it is not "plain" that conspiracy was not already triable by law-of-war military commission under 10 U.S.C. § 821 when Bahlul's conduct occurred.

1. Section 2332(b)

Bahlul was convicted of conspiracy to commit seven war crimes enumerated in the 2006 MCA, including the murder of protected persons. Although the 2006 MCA post-dates Bahlul's conduct, section 2332(b) has long been on the books, making it a crime to, "outside the United States," "engage [ ] in a conspiracy to kill[ ] a national of the United States." 18 U.S.C. § 2332(b); *see* Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub.L. No. 99–399, § 1202(a), 100 Stat. 853, 896. Section 2332(b) is not an offense triable by military commission but, the Government argues, "[t]he fact that the MCA provides a different forum for adjudicating such conduct does not implicate ex post facto concerns." E.B. Br. of United States 67. We agree. *See infra* p. 31 (remanding to panel to determine Bahlul's other constitutional challenges).

The right to be tried in a particular forum is not the sort of right the *Ex Post Facto* Clause protects. *See Collins,* 497 U.S. at 51, 110 S.Ct. 2715. In *Collins,* the Supreme Court sifted through its *Ex Post Facto* Clause precedent, noting that some cases had said that a "procedural" change—*i.e.,* a "change[ ] in the procedures by which a criminal case is adjudicated"—may violate the *Ex Post Facto* Clause if the change "affects matters of substance" by "depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime or arbitrarily infringing upon substantial personal rights." *Id.* at 45, 110 S.Ct. 2715 (citations, brackets and quotation marks omitted). The Court observed that such language had "imported confusion" into its doctrine and it attempted to reconcile that language so as to not enlarge the *Ex Post Facto* Clause's application beyond laws that "make innocent acts criminal,

alter the nature of the offense, or increase the punishment." *Id.* at 46, 110 S.Ct. 2715…

Similarly, in *Cook v. United States,* the Court held that an act vesting jurisdiction over a crime in a newly formed judicial district does not violate the *Ex Post Facto* Clause because "[i]t only ... subjects the accused to trial in th[e new] district rather than in the court of some other judicial district established by the government against whose laws the offense was committed. This does not alter the situation of the defendants in respect to their offense or its consequences." 138 U.S. 157, 183, 11 S.Ct. 268, 34 L.Ed. 906 (1891); …

It is therefore not a plain *ex post facto* violation to transfer jurisdiction over a crime from an Article III court to a military commission because such a transfer does not have anything to do with the definition of the crime, the defenses or the punishment. That is so regardless of the different evidentiary rules that apply under the 2006 MCA. *See Carmell,* 529 U.S. at 533 n. 23, 120 S.Ct. 1620 (change in "[o]rdinary rules of evidence ... do[es] not violate the *[Ex Post Facto]* Clause"); *id.* at 542–47, 120 S.Ct. 1620; *Collins,* 497 U.S. at 43 n. 3, 110 S.Ct. 2715; *Beazell v. Ohio,* 269 U.S. 167, 171, 46 S.Ct. 68, 70 L.Ed. 216 (1925); *Thompson v. Missouri,* 171 U.S. 380, 386–88, 18 S.Ct. 922, 43 L.Ed. 204 (1898); *Hopt v. Utah,* 110 U.S. 574, 589–90, 4 S.Ct. 202, 28 L.Ed. 262 (1884). Nor is this a case like *Carmell,* where a law retroactively reduced the "quantum of evidence necessary to sustain a conviction," 529 U.S. at 530, 120 S.Ct. 1620; the 2006 MCA requires the Government to prove guilt beyond a reasonable doubt, *see* 10 U.S.C. § 949*l* (c); *see also* Trial Tr. 233, 878 (military judge's instructions to commission).

Our inquiry is not ended, however, because the 2006 MCA conspiracy-to-murder-protected-persons charge and section 2332(b) do not have identical elements. The difference is a potential problem because the *Ex Post Facto* Clause prohibits "retrospectively eliminating an element of the offense" and thus "subvert[ing] the presumption of innocence by reducing the number of elements [the government] must prove to overcome that presumption." *Carmell,* 529 U.S. at 532, 120 S.Ct. 1620. Both statutes require the existence of a conspiracy and an overt act in furtherance thereof. *See* 18 U.S.C. § 2332(b)(2); 10 U.S.C. § 950v(b)(28) (2006); *see also* Trial Tr. 846, 849–50 (military judge's instructions to commission). The 2006 MCA conspiracy charge is in one sense more difficult to prove than section 2332(b) because it applies only to alien unlawful enemy combatants engaged in hostilities against the United States. *See* 10 U.S.C. §§ 948b(a), 948c, 948d; *see also* Trial Tr. 843–45 (instructions). But the 2006 MCA charge is in two ways easier to prove than a section 2332(b) charge. It does not require that the conspiracy occur "outside the United States" or that the conspiracy be to kill a "national of the United States," as section 2332(b) does. It simply requires a conspiracy to murder "one or more protected persons." Trial Tr. 850–51 (instructions); *see supra* n. 10 (providing MCA's definition of "protected person"). Although the two statutes are quite similar, then, the 2006 MCA conspiracy charge eliminates two elements required to convict a defendant under section 2332(b).

Nevertheless, Bahlul cannot bear his burden of establishing that the elimination of the two elements "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano,* 507 U.S. at 732, 113 S.Ct. 1770 (quotation marks omitted); *see United States v. Vonn,* 535 U.S. 55, 62–63, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002) (defendant bears burden of proving *Olano* 's fourth prong); *see also United States v. Johnson,* 331 F.3d 962, 967 (D.C.Cir.2003) (proceeding directly to fourth prong if it can resolve appeal). He cannot satisfy the fourth prong because the charges against him and the commission's findings necessarily included those elements and the evidence supporting them was undisputed. …

* * * *

Here, the evidence of the two missing elements was not simply "overwhelming" and "essentially uncontroverted"—it was *entirely* uncontroverted. Bahlul was charged with committing numerous overt acts "in Afghanistan, Pakistan and elsewhere" that furthered the conspiracy's unlawful objects; those objects included the murder of protected persons. App. 122–25. He did not dispute that his conduct occurred outside the United States nor did he dispute that the purpose of the conspiracy was to murder United States nationals. *See* Trial Tr. 167 (Bahlul: "And what I did ... is to kill Americans...."); *id.* at 511–12 ("[Bahlul] does not consider anybody protected person[s] or civilians.... [A]s long as you're a[n] American, you are a target."). Indeed, several witnesses testified that Bahlul considered *all* Americans to be targets. *Id.* at 503, 512, 596, 653. The commission was instructed on the overt acts allegedly undertaken by Bahlul in furtherance of the conspiracy, *see id.* at 846–47, and was instructed that one of the conspiracy's object offenses was the murder of protected persons, *id.* at 850. The commission specifically found that Bahlul committed ten overt acts, all of which took place outside the United States and several of which directly relate to the 9/11 attacks that killed thousands of United States nationals. App. 132–33. And it found that all seven of the alleged object offenses, including murder of protected persons, were objects of the conspiracy. App. 131. There is no scenario in which the commission could have found that Bahlul committed these overt acts yet rationally found that the conspiracy did not take place outside the United States and did not have as an object the murder of United States nationals. *Accord Webb*, 255 F.3d at 901. Although the commission was not specifically instructed that it had to find these two elements, the overt acts it *did* find Bahlul had committed necessarily included the two elements and Bahlul did not, and does not, dispute either. Therefore, although the 2006 MCA conspiracy offense, as charged here, does "eliminat[e] an element of the offense," *Carmell*, 529 U.S. at 532, 120 S.Ct. 1620, the omission did not seriously affect the fairness, integrity, or public reputation of the proceedings.

2. Section 821

When Bahlul committed the crimes of which he was convicted, section 821 granted—and still grants—military commissions jurisdiction "with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. Section 821 and its predecessor statute have been on the books for nearly a century. *See* Pub.L. No. 64–242, 39 Stat. 619, 653 (1916); Pub.L. No. 66–242, 41 Stat. 759, 790 (1920); Pub.L. No. 81–506, 64 Stat. 107, 115 (1950); *Madsen v. Kinsella*, 343 U.S. 341, 350–51 & n. 17, 72 S.Ct. 699, 96 L.Ed. 988 (1952). We must therefore ascertain whether conspiracy to commit war crimes was a "law of war" offense triable by military commission under section 821 when Bahlul's conduct occurred because, if so, Bahlul's *ex post facto* argument fails.

In answering this question, we do not write on a clean slate. In *Hamdan*, seven justices of the Supreme Court debated the question at length. Four justices concluded that conspiracy is not triable by military commission under section 821. 548 U.S. at 603–13, 126 S.Ct. 2749 (plurality opinion of Stevens, J.). Three justices opined that it is. *Id.* at 697–704, 126 S.Ct. 2749 (Thomas, J., dissenting). Both opinions scoured relevant international and domestic authorities but neither position garnered a majority. The case was resolved on other grounds and the eighth vote—one justice was recused—left the conspiracy question for another day, noting that the Congress may "provide further guidance in this area." *See id.* at 655, 126 S.Ct. 2749 (Kennedy, J., concurring). In light of the uncertainty left by the split, it was not "plain" error to try Bahlul for conspiracy by military commission pursuant to section 821. *See United States v. Terrell*, 696 F.3d 1257, 1260

(D.C.Cir.2012) (plain error met only if "its erroneous character" is established by "a clear precedent in the Supreme Court or this circuit").

The reason for the uncertainty is not only the divided result in *Hamdan* but also the High Court's failure to clearly resolve a subsidiary question: What body of law is encompassed by section 821's reference to the "law of war"? That dispute takes center stage here. Bahlul contends that "law of war" means the *international* law of war, full stop. The Government contends that we must look not only to international precedent but also "the common law of war developed in U.S. military tribunals." E.B. Br. of United States 28; *see also* Oral Arg. Tr. 15 ("[W]e believe the law of war is the international law of war as supplemented by the experience and practice of our wars and our wartime tribunals."). The answer is critical because the Government asserts that conspiracy is *not* an international law-of-war offense. *See* E.B. Br. of United States 34; Oral Arg. Tr. 15.

* * * *

Ultimately, we need not resolve *de novo* whether section 821 is limited to the international law of war. It is sufficient for our purpose to say that, at the time of this appeal, the answer to that question is not "obvious." *Olano,* 507 U.S. at 734, 113 S.Ct. 1770; *see Henderson v. United States,* —— U.S. ——, 133 S.Ct. 1121, 1130–31, 185 L.Ed.2d 85 (2013) (plainness of error determined at time of appeal). As seven justices did in *Hamdan,* we look to domestic wartime precedent to determine whether conspiracy has been traditionally triable by military commission. That precedent provides sufficient historical pedigree to sustain Bahlul's conviction on plain-error review.

Most notably, the individuals responsible for the assassination of President Abraham Lincoln were charged with a single offense—"combining, confederating, and conspiring ... to kill and murder ... Abraham Lincoln"—and were convicted of that offense by military commission. General Court–Martial Order No. 356, War Dep't (July 5, 1865), *reprinted in* H.R. DOC. NO. 55–314, at 696 (1899). The specification of the offense includes several paragraphs, each of which sets forth a separate overt act done "in further prosecution of the unlawful and traitorous conspiracy." *Id.* at 697–98; *see also* THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 18–21 (New York, Moore, Wilstach & Baldwin 1865). A federal district court later denied three of the conspirators' habeas petitions raising jurisdictional objections to the commission. *Ex Parte Mudd,* 17 F.Cas. 954 (S.D.Fla.1868).

President Andrew Johnson personally approved the convictions. In doing so, he considered the jurisdictional limits of military commissions: He asked Attorney General James Speed whether the accused could be tried for conspiracy in a military commission. In a lengthy opinion, Attorney General Speed said they could. *See* Military Commissions, 11 Op. Att'y Gen. 297 (1865). We think this highest-level Executive Branch deliberation is worthy of respect in construing the law of war. *Cf. Sosa v. Alvarez–Machain,* 542 U.S. 692, 733–34, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (looking "albeit cautiously" to sources like "controlling executive ... act[s]" to ascertain current state of international law (quoting *The Paquete Habana,* 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900))); *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774, 780 n. 6 (D.C.Cir.1984) (Edwards, J., concurring) (Attorney General opinions not binding but "entitled to some deference, especially where judicial decisions construing a statute are lacking"). Granted, the Attorney General's framing of the question presented—"whether the

persons charged with the offence of having assassinated the President can be tried before a military tribunal"—casts some doubt on whether he was addressing inchoate conspiracy or the offense of assassination. 11 Op. Att'y Gen. at 297; *see Hamdan,* 548 U.S. at 604 n. 35, 126 S.Ct. 2749 (plurality). But the Attorney General's opinion was written *after* the commission had been convened and the convictions had been approved; he would therefore have been aware that the sole offense alleged was conspiracy. On the other hand, that the Attorney General's opinion was written after the convictions were approved may undermine its persuasive value, as it could be viewed as a *post hoc* rationalization for a decision already made.

Either way, the Lincoln conspirators' trial was a matter of paramount national importance and attracted intense public scrutiny. Thus, when the Congress enacted section 821's predecessor—and "preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions," *Hamdan,* 548 U.S. at 593, 126 S.Ct. 2749 (majority)—it was no doubt familiar with at least one high-profile example of a conspiracy charge tried by a military commission. Because of the national prominence of the case and the highest-level Executive Branch involvement, we view the Lincoln conspirators' trial as a particularly significant precedent.

Also noteworthy is the World War II-era military commission trial of several Nazi saboteurs who entered the United States intending to destroy industrial facilities; they were convicted of, *inter alia,* conspiracy to commit violations of the law of war. *See Quirin,* 317 U.S. at 21–23, 63 S.Ct. 2. Although the Supreme Court resolved the case on other grounds and therefore did not review the validity of the conspiracy conviction, the case remains another prominent example of a conspiracy charge tried in a law-of-war military commission. President Franklin D. Roosevelt, like President Johnson before him, approved the charges. *See* 7 Fed.Reg. 5103–02 (July 7, 1942). Moreover, *Quirin* is not the sole example from that era. *See Colepaugh v. Looney,* 235 F.2d 429, 431–32 (10th Cir.1956) (upholding conviction by military commission of Nazi saboteur of conspiracy to commit offense against law of war); General Order (G.O.) No. 52, War Dep't (July 7, 1945) (President Truman approves convictions of *Colepaugh* conspirators), *reprinted in* Supp. Auth. 149–50; Memo. of Law from Tom C. Clark, Assistant Att'y Gen., to Major General Myron C. Kramer, Judge Advocate Gen., at 6 (Mar. 12, 1945), *reprinted in* Supp. Auth. 139 (opining, with regard to *Colepaugh* case, that "it may be said to be well established that a conspiracy to commit an offense against the laws of war is itself an offense cognizable by a commission administering military justice"). Finally, during the Korean War, General Douglas MacArthur ordered that persons accused of "conspiracies and agreements to commit ... violations of the laws and customs of war of general application" be tried by military commission. *See* Letter Order, Gen. HQ, United Nations Command, Tokyo, Japan, *Trial of Accused War Criminals* (Oct. 28, 1950) (Rules of Criminal Procedure for Military Commissions, Rule 4).

We do not hold that these precedents conclusively establish conspiracy as an offense triable by military commission under section 821. After all, four justices examined the same precedents and found them insufficiently clear. *Hamdan,* 548 U.S. at 603–09, 126 S.Ct. 2749 (plurality); *cf. Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). But there are two differences between *Hamdan* and this case. First, the elements of the conspiracy charge were not defined by statute in *Hamdan* and therefore the plurality sought precedent that was "plain and unambiguous." 548 U.S. at 602, 126 S.Ct. 2749. Here, the Congress has positively identified conspiracy as a war crime. We need not decide the effect of the Congress's action, however, because we rely on the second difference: The *Hamdan*

plurality's review was *de novo;* our review is for plain error. We think the historical practice of our wartime tribunals is sufficient to make it not "obvious" that conspiracy was not traditionally triable by law-of-war military commission under section 821. *Olano,* 507 U.S. at 734, 113 S.Ct. 1770. We therefore conclude that any *Ex Post Facto* Clause error in trying Bahlul on conspiracy to commit war crimes is not plain. *See United States v. Vizcaino,* 202 F.3d 345, 348 (D.C.Cir.2000) (assuming error to decide it was not plain).

B. Material Support

A different result obtains, however, regarding Bahlul's conviction of providing material support for terrorism. The Government concedes that material support is not an international law-of-war offense, *see* Oral Arg. Tr. 15; Panel Br. of United States 50, 57, and we so held in *Hamdan II,* 696 F.3d at 1249–53. But, in contrast to conspiracy, the Government offers little domestic precedent to support the notion that material support or a sufficiently analogous offense has historically been triable by military commission. Although Bahlul carries the burden to establish plain error, *see United States v. Brown,* 508 F.3d 1066, 1071 (D.C.Cir.2007), we presume that in the unique context of the "domestic common law of war"—wherein the Executive Branch shapes the relevant precedent and individuals in its employ serve as prosecutor, judge and jury—the Government can be expected to direct us to the strongest historical precedents. What the Government puts forth is inadequate.

The Government relies solely on a number of Civil War-era field orders approving military commission convictions of various offenses that, the Government contends, are analogous to material support. Before delving into the specifics of the orders, we note our skepticism that such informal field precedent can serve as the sole basis for concluding that a particular offense is triable by a law-of-war military commission. Unlike the Lincoln conspirators' and Nazi saboteurs' cases, which attracted national attention and reflected the deliberations of highest-level Executive Branch officials, the field precedents are terse recordings of drumhead justice executed on or near the battlefield. …In addition, the military commissions these orders memorialize were not always models of due process. And, as the *Hamdan* plurality explained, the Civil War commissions "operated as both martial law or military government tribunals and law-of-war commissions," obliging us to treat the precedents "with caution" because of their unclear jurisdictional basis. 548 U.S. at 596 n. 27, 126 S.Ct. 2749 (plurality); *see also id.* at 608, 126 S.Ct. 2749.

In any event, even if the law of war can be derived from field precedents alone, none of the cited orders charges the precise offense alleged here—providing material support for terrorism. The Government nonetheless contends that the material support charge "prohibits the same conduct, under a modern label, as the traditional offense of joining with or providing aid to guerrillas and other unlawful belligerents." E.B. Br. of United States 48. But we do not think the cited field orders establish that such conduct was tried by law-of-war military commissions during the Civil War.

* * * *

The upshot is that the Civil War field precedent is too distinguishable and imprecise to provide the sole basis for concluding that providing material support for terrorism was triable by law-of-war military commission at the time of Bahlul's conduct. We therefore think it was a plain *ex post facto* violation—again, assuming without deciding that the protection of the Ex Post Facto Clause extends to Bahlul, *see supra* pp. 17–18—to try Bahlul by military commission for that new offense. *See Collins,* 497 U.S. at 42–43, 110 S.Ct. 2715. The error is prejudicial and we

exercise our discretion to correct it by vacating Bahlul's material support conviction. *Olano,* 507 U.S. at 734–36, 113 S.Ct. 1770; *see also Casey,* 343 U.S. at 808, 72 S.Ct. 999 (vacating conviction based on Government's confession of error); *United States v. Law,* 528 F.3d 888, 909 (D.C.Cir.2008) (same); *cf. Petite,* 361 U.S. at 531, 80 S.Ct. 450 (vacating conviction based on Government's motion).

C. Solicitation

We also conclude that solicitation of others to commit war crimes is plainly not an offense traditionally triable by military commission. The Government concedes it is not an international law-of-war offense. *See* Oral Arg. Tr. 15; Panel Br. of United States 50, 57. The Government contends that solicitation "possesses a venerable lineage as an offense triable by military commission," E.B. Br. of United States 50, but it cites only two Civil War-era field orders involving three defendants in support thereof.…

As noted, we are skeptical that field orders can be the sole basis for military commission jurisdiction over a particular offense. *See supra* p. 27. Moreover, the two field orders discussed fall far short of meeting any showing we would require. Because solicitation to commit war crimes was not an offense triable by law-of-war military commission when Bahlul's conduct occurred, it is a plain *ex post facto* violation—again, assuming without deciding that the protection of the *Ex Post Facto* Clause extends to Bahlul, *see supra* pp. 17–18—to try him by military commission for that new offense. *See Collins,* 497 U.S. at 42–43, 110 S.Ct. 2715. The error is prejudicial and we exercise our discretion to correct it by vacating Bahlul's solicitation conviction. *Olano,* 507 U.S. at 734–736, 113 S.Ct. 1770; *see also Casey,* 343 U.S. at 808, 72 S.Ct. 999; *Law,* 528 F.3d at 909; *cf. Petite,* 361 U.S. at 531, 80 S.Ct. 450.

V. Remaining Issues

In his brief to the panel, Bahlul raised four challenges to his convictions that we have not addressed here. He argued that (1) the Congress exceeded its Article I, § 8 authority by defining crimes triable by military commission that are not offenses under the international law of war, *see* Br. for Bahlul 38, *Bahlul v. United States,* No. 11–1324 (D.C.Cir. Mar. 9, 2012); (2) the Congress violated Article III by vesting military commissions with jurisdiction to try crimes that are not offenses under the international law of war, *see id.* at 39–40; (3) his convictions violate the First Amendment, *see id.* at 43; and (4) the 2006 MCA discriminates against aliens in violation of the equal protection component of the Due Process Clause, *see id.* at 54. We intended neither the *en banc* briefing nor argument to address these four issues. *See* Order, *Bahlul v. United States,* No. 11–1324 (D.C.Cir. May 2, 2013) (notifying parties that Equal Protection and First Amendment issues are not "within the scope of the rehearing en banc"). And with the exception of a few passages regarding the first two, we received none from the parties. We therefore remand the case to the original panel of this Court to dispose of Bahlul's remaining challenges to his conspiracy conviction. *See United States v. McCoy,* 313 F.3d 561, 562 (D.C.Cir.2002) (en banc) (remanding outstanding issue to panel).

For the foregoing reasons, we reject Bahlul's *ex post facto* challenge to his conspiracy conviction and remand that conviction to the panel to consider his alternative challenges thereto. In addition, we vacate Bahlul's convictions of providing material support for terrorism and solicitation of others to commit war crimes, and, after panel consideration, remand to the CMCR to determine the effect, if any, of the two vacaturs on sentencing.

* * * *

b. Military Commission Charges

As discussed in *Digest 2013* at 638, charges were sworn against Guantanamo detainee Abd al Hadi al-Iraqi, an Iraqi national, in 2013. On June 18, 2014, Chief Prosecutor Mark Martins delivered remarks at Guantanamo Bay announcing Al-Iraqi's arraignment. Mr. Martins's speech is excerpted below.

* * * *

Good afternoon. Today Abd al Hadi al-Iraqi—an Iraqi national whose records indicate was born as Nashwan Abd al Razzaq in 1961 in the city of Mosul—was arraigned before a United States military commission on charges that, as a senior member of Al Qaeda, he conspired with and led others in a series of unlawful attacks and related offenses in Afghanistan, Pakistan, and elsewhere from 2001 to 2006. These attacks and other offenses allegedly resulted in the death and injury of U.S. and coalition service members and civilians. I emphasize that the charges against Abd al Hadi are only allegations. In this military commission, he is presumed innocent unless and until proven guilty beyond a reasonable doubt.

He also is afforded "all of the judicial guarantees recognized as indispensable by civilized peoples," the requirement when conducting trials under the law of armed conflict. His trial will take place in accordance with the Military Commissions Act passed by Congress in 2009 and signed into law by the President of the United States that same year. His alleged crimes, which include violations long outlawed by the community of nations, have been codified as offenses triable by military commission within U.S. federal law. To the present date, he has been lawfully, humanely, and securely detained as an unprivileged belligerent, and since 2008, he and his attorney have had recourse to the writ of habeas corpus in federal court.

As alleged in the charge sheet, which is available on the military commissions' website, Abd al Hadi joined Al Qaeda by 1996 and, in furtherance of the group's hostile and terrorist aims, participated as a high-ranking leader on various senior councils that set Al Qaeda's goals and policies. He served as liaison between Al Qaeda and the Taliban. He commanded Al Qaeda's insurgency efforts in Afghanistan and Pakistan, during which he supported, supplied, funded, and directed attacks against U.S. and coalition forces. These operations violated the law of armed conflict in a variety of ways, in that they involved detonation of vehicle-borne improvised explosive devices and suicide vests in civilian areas, firing upon a medical helicopter as it attempted to recover casualties, rewarding an intentional attack that killed a United Nations aid worker, and other means and methods of war that have long been condemned. Abd al Hadi directed his fighters to kill all coalition soldiers encountered during their attacks, thereby denying quarter to potential captive or wounded coalition troops. In addition to commanding Al Qaeda's insurgency in Afghanistan and Pakistan, Abd al Hadi was eventually tasked by Usama bin Laden to travel to Iraq to advise and assist Al Qaeda in Iraq's insurgency there.

For these and other alleged acts, Abd al Hadi is now formally charged with the following offenses under the Military Commissions Act of 2009: denying quarter; attacking protected property; using and attempting treachery or perfidy; and conspiring with Usama bin Laden and other Al Qaeda leaders to commit terrorism. The convening authority referred these charges to a non-capital military commission on June 2, 2014. The maximum penalty for these charges is life

imprisonment, except for attacking protected property and attempting to use treachery or perfidy to kill or injure, which carry a maximum penalty of 20 years' imprisonment each. No trial date has yet been set in this case.

The serious charge of using treachery calls for further brief definition, as members of the public may be unfamiliar with this offense against the law of war—a set of rules concerning hostilities that is also referred to as international humanitarian law. One who uses treachery invites others to believe that he is entitled to protection under the law of war and then betrays that belief in order to kill or injure. Treachery is not merely deception, as war has long included lawful actions of deception. Such lawful deceptions are sometimes termed "ruses of war." Rather, treachery is a particular type of deception that secures its advantage through an adversary's compliance with law. It is forbidden because it can destroy the basis for a restoration of peace, thus prolonging or escalating the conflict and multiplying the number of innocents exposed to armed violence. Far from quaint or old-fashioned, the traditional prohibition on treachery is grounded in wisdom acquired from the harsh realities of conflict. It polices the principle of distinction between combatants and noncombatants that is at the heart of international humanitarian law.

The charges against Abd al Hadi are the result of extensive military-to-military and law enforcement cooperation and of determined work by the Federal Bureau of Investigation; the Defense Department's Criminal Investigation Task Force, Office of General Counsel, and Office of Military Commissions; the State Department; the Justice Department; the intelligence community; and many other components of government. The prosecution of this case combines dedicated trial counsel from the Defense and Justice Departments.

To the family and friends of the fallen, we understand that nothing can fill the empty spaces in your homes. No words can ease the pain of your loss. But know that the United States is committed to justice and accountability for those who violate with impunity those longstanding laws by which humankind has sought to limit the depravity and suffering of war. This arraignment—a session that includes public notification of the nature of the charges, advisement by the judge regarding counsel rights, and commencement of commission proceedings—marks an important milestone in that process.

To counter transnational terror networks, we must use all the lawful instruments of our national power and authority. I have previously stated that there is a narrow but important category of cases in which the pragmatic choice among those instruments is a military commission. This is such a case. The nature of the alleged offenses, the identities of the victims (who were from eight countries), the location in which the offenses allegedly occurred, the context of genuine hostilities with Al Qaeda, and the manner in which the case was investigated and evidence gathered all make a military commission the most appropriate forum to try this case. I am confident that these proceedings—which incorporate every fundamental guarantee of a fair trial that is demanded by our shared values—will help protect peaceful peoples everywhere and serve the interests of justice. …

* * * *

Cross References

Terrorism, **Chapter 3.B.1.**
ILC Draft Articles on Effects of Armed Conflict on Treaties, **Chapter 4.A.4.**
Al-Shimari v. CACI*,* **Chapter 5.A.2.b. & 5.B.1.**
KBR v. Harris*,* **Chapter 5.B.3.**
KBR v. Metzgar*,* **Chapter 5.B.4.**
U.S. observations at ICCPR on law of armed conflict, **Chapter 6.A.2.**
Children and armed conflict, **Chapter 6.C.2.**
UN Committee Against Torture, **Chapter 6.H.**
Arbitrary detentions, **Chapter 6.I.2.**
Remotely piloted aircraft, **Chapter 6.N.2.**
ILC's work on protection of the environment in relation to armed conflict, **Chapter 7.D.3.**
Internet governance, **Chapter 11.F.2.**
ITU plenipotentiary conference, **Chapter 11.F.3.**
Sanctions relating to armed conflict, **Chapter 16.A.7.**
Arms Export Control Act and International Trafficking In Arms regulations, **Chapter 16.B.**
Protecting civilians during peacekeeping operations, **Chapter 17.B.9.**
Mutual Defense Agreement with the United Kingdom, **Chapter 19.B.10.g.**
Arms Trade Treaty, **Chapter 19.J.**

CHAPTER 19

Arms Control, Disarmament, and Nonproliferation

A. GENERAL

On July 31, 2014, the State Department released the unclassified version of its report to Congress on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, submitted pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. The report contains four parts. Part I addresses U.S. compliance with arms control, nonproliferation, and disarmament agreements and commitments. Part II discusses compliance with treaties and agreements the United States concluded bilaterally with the Soviet Union or its successor states. Part III assesses compliance by other countries that are parties to multilateral agreements. And Part IV covers other countries' compliance with international commitments, such as the Missile Technology Control Regime ("MTCR"). The 2014 report primarily covers the period from January 1, 2013 through December 31, 2013. The report is available at *www.state.gov/t/avc/rls/rpt/2014/230047.htm*.

B. NUCLEAR NONPROLIFERATION

1. Overview

On December 18, 2014, Rose Gottemoeller, Under Secretary of State for Arms Control and International Security, delivered remarks on U.S. nuclear arms control policy at the Brookings Institution in Washington, DC. The Under Secretary referenced President Obama's 2009 speech in Prague outlining his agenda for arms control and his follow-up to that speech in Berlin in 2013. For excerpts from the President's 2009 speech in

Prague, see *Digest 2009* at 761-64. For excerpts from the President's 2013 speech in Berlin, see *Digest 2013* at 640-41. Excerpts follow from Under Secretary Gottemoeller's speech at the Brookings Institution, which are available in full at *www.state.gov/t/us/2014/235395.htm*.

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…The Prague Agenda is an achievable long-term goal and one worth fighting for. I will say here what I said in Prague. There should be no doubt: the U.S. commitment to achieving the peace and security of a world without nuclear weapons is unassailable. We continue to pursue nuclear disarmament and we will keep faith with our Nuclear Non-Proliferation Treaty (NPT) commitments, prominent among them, Article VI. Our responsible approach to disarmament has borne fruit in the form of major reductions in nuclear weapons, fissile material stocks and infrastructure. These efforts have led us to reduce our nuclear arsenal by approximately 85% from its Cold War heights. In real numbers, that means we have gone from 31,255 nuclear weapons in our active stockpile in 1967 to 4,804 in 2013. We know we still have more work to do.

As we consider future reductions, our focus must be on achievable and verifiable measures that all interested parties—nuclear states and non-nuclear states alike—can trust. Our past experience—both successes and disappointments—will inform how and when we proceed, with each step building on the last.

When we take stock of the last thirty years, it is clear that our path has been the right one. … Within a decade of 1985, Washington and Moscow would conclude the Intermediate-Range Nuclear Forces Treaty (INF), the Strategic Arms Reduction Treaty (START), the Presidential Nuclear Initiatives, and the HEU Purchase Agreement.

These various bilateral and parallel unilateral initiatives led to array of impressive and long-reaching effects: banning an entire class of missiles carrying nuclear weapons, reducing the deployed nuclear stockpiles of the United States and Russia by over 11,000 warheads, drastically reducing and eliminating whole categories of tactical nuclear weapons, while removing others from routine deployment, and converting Russian nuclear material equivalent to an astounding 20,000 nuclear weapons into fuel for nuclear power.

Those efforts were followed by the Strategic Offensive Reductions Treaty (SORT), or Moscow Treaty, that further reduced U.S. and Russian deployed strategic forces. And of course, in 2010, the U.S. and Russia signed the New START Treaty. When it is fully implemented, New START will limit deployed strategic nuclear warheads to their lowest levels since the 1950s.

New START is enhancing security and strategic stability between the United States and Russia. Both nations are now faithfully implementing the Treaty's inspection regime. Current tensions with the Russian Federation highlight the durability of the verification regime and the important confidence that is provided by data exchanges and on-site inspections under the Treaty, as well as the security and predictability provided by verifiable mutual limits on strategic weapons. None of these achievements could have been predicted back in 1985, nor laid out in a long-term, time-bound program. On the contrary, it was the careful implementation of each initiative that provided the trust and confidence, and the strategic opportunity to move ahead.

Underpinning all of our efforts, stretching back decades, has been our clear understanding and recognition of the humanitarian consequences of the use of these weapons. That is the message the United States delivered at the Conference on the Humanitarian Impact of Nuclear Weapons in Vienna last week. We appreciated hearing the testimonies and statements of the participants there. While we acknowledge the views of those who call for the negotiation of a nuclear weapons ban treaty, the United States cannot and will not support efforts of this sort. We believe the practical path we have followed so successfully in the past remains the only realistic route to our shared goal of a nuclear weapons- free world. Again, it should be remembered that we share the same goal; we just have different ideas on the process. The international community cannot ignore or wish away the obstacles confronting us that slow the pace of progress on arms control and nonproliferation efforts. We must all acknowledge that not every nation is ready or willing to pursue serious arms control and nonproliferation efforts. We are seeing new and enduring pressures on the NPT—pressures that threaten global stability. We are seeing nations turn away from cooperation, turn away from the common good of nonproliferation efforts, and cling ever more tightly to their nuclear arsenals.

As we push those nations to accept their own global and ethical responsibilities, the United States will maintain a safe, secure, and effective nuclear arsenal for the defense of our nation and our allies. This is not a stance that is mutually exclusive of U.S. disarmament goals. It merely recognizes the international security environment in which we find ourselves—and must take account of—as we pursue further progress. Simply put, we must carefully maintain the arsenal that remains, in order to make deeper reductions. We are conscious of our current obligations and responsibilities and we are meeting them. The United States also knows that it has a responsibility to lead efforts toward disarmament, and I can affirm to you that we will never relent in this pursuit. There are people here in Washington and people around the world that see the landscape and say that we cannot control the spread of weapons of mass destruction or further reduce stockpiles. They are wrong.

It was in Prague that President Obama reminded us that, "such fatalism is a deadly adversary, for if we believe that the spread of nuclear weapons is inevitable, then in some way we are admitting to ourselves that the use of nuclear weapons is inevitable." Again, the United States cannot and will not accept this. "When we fail to pursue peace," the President also said, "then it stays forever beyond our grasp…[t]o denounce or shrug off a call for cooperation is an easy, but also a cowardly thing to do."

The United States will press ahead, even in the face of obstacles. While we have accomplished much over the past five years, we have no intention of diverting from our active efforts to reduce the role and numbers of nuclear weapons, increase confidence and transparency, strengthen nonproliferation, and address compliance challenges. We will do so pursing all available and practical avenues. For instance, the United States earlier this month contributed resources and experts to the successful on-site inspection exercise held by the Comprehensive Test Ban Treaty Organization in Jordan. Such practical efforts help ensure that the international community will have an effective verification regime in place for the day when the CTBT enters into force. The United States has made clear that we are prepared to engage Russia on the full range of issues affecting strategic stability and that there are real and meaningful steps we should be taking that can contribute to a more predictable, safer security environment. Given that the United States and Russia continue to possess over 90% of the world's nuclear weapons, this is an important and worthy goal.

In June 2013 in Berlin, President Obama stated U.S. willingness to negotiate a reduction of up to one-third of our deployed strategic warheads from the level established in the New START Treaty. Progress requires a willing partner and a conducive strategic environment, but the offer remains on the table. On the broader world stage, progress on disarmament requires that states take greater responsibility to resolve the conflicts that give rise to proliferation dangers. It requires ending the nuclear build-up in Asia; that Iran join an agreement restoring full confidence in the peaceful nature of its nuclear program; and that North Korea return to compliance with its international obligations. And it requires that we make progress where we can. This includes in the Middle East where we will spare no effort to convene an historic conference on a zone free of all weapons of mass destruction and systems for their delivery.

Further, as the United States considers arms control and nonproliferation priorities, we will continue to consult closely with our allies and partners every step of the way. Our security and defense—and theirs—is non-negotiable. We are in a difficult crisis period with the Russian Federation over Ukraine and Russia's violation of the INF Treaty. Addressing both situations is an ongoing process. With specific regard to the Russian INF violation, we will continue engaging the Russian government to resolve U.S. concerns. Our objective is for Russia to return to verifiable compliance with its INF Treaty obligations, as the Treaty is in our mutual security interest and that of the globe.

Indeed, we need cooperation with Russia and other nations to address new threats—first and foremost the threat of terrorists acquiring a nuclear weapon or nuclear material. They need this cooperation for their own security, as well. As I have outlined, there is no way to skip to the end and forgo the hard work of solving the truly daunting technical and political nonproliferation and disarmament challenges that lie ahead. It is not enough to have the political will to pursue this agenda; we have to have a practical way to pursue this agenda.

We can all acknowledge that verification will become increasingly complex at lower numbers of nuclear weapons, while requirements for accurately determining compliance will dramatically increase. Everyone who shares the goal of a world free of nuclear weapons should be devoting a lot time and energy to address this challenge right now. With that idea in mind, I announced in Prague a new initiative: the International Partnership for Nuclear Disarmament Verification. The United States proposes to work with both nuclear weapon states and non-nuclear weapons states to better understand the technical problems of verifying nuclear disarmament, and to develop solutions. The United Kingdom and Norway have already pioneered this type of work. This new initiative will build on the spirit of that experiment to create a non-traditional partnership that draws on the expertise of talented individuals around the world, in both the public and private sectors. The Nuclear Threat Initiative will be a prime partner, providing intellectual energy and resources to the project. We are excited to work with them. We hope to work with more of you.

Beyond this effort, we will continue to work with the P5 on transparency and verification. The United States is pleased that the United Kingdom will host the sixth annual P5 conference early next year. The regular interaction, cooperation and trust-building happening now is the foundation on which future P5 multilateral negotiations on nuclear disarmament will stand.

In closing I would like to make clear that the United States has plans and we intend to see them through. Again, at the core of our efforts is our deep understanding of the human impacts of nuclear weapons. That is why I have traveled to the Marshall Islands, Hiroshima and twice to Utah this past year, so that I could meet with the people whose lives have been affected by nuclear weapons use or explosive testing. That is why the United States sent a delegation to the

Vienna Conference on the Humanitarian Impact of Nuclear Weapons Use last week. The United States understands that nuclear weapons are not a theoretical tool—they are real and any use would exact a terrible toll. No one in this country or any country should ever forget that.

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2. Non-Proliferation Treaty ("NPT")

a. P5 Conference

In 2014, the permanent five members of the UN Security Council, or P5 (China, France, Great Britain, Russia, and the United States), continued to confer in preparation for the 2015 NPT Review Conference. After their conference April 14-15 in Beijing, China, the P5 issued a joint statement, available at *www.state.gov/r/pa/prs/ps/2014/04/224867.htm*, and excerpted below.

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1. The five Nuclear Non-Proliferation Treaty (NPT) nuclear-weapon states, or P5, met in Beijing on April 14-15, 2014, under the chairmanship of the People's Republic of China, to build on the 2009 London, 2011 Paris, 2012 Washington, and 2013 Russian-hosted Geneva P5 conferences. The P5 reviewed progress towards fulfilling the commitments made at the 2010 NPT Review Conference (RevCon), and continued discussions on issues related to all three pillars of the NPT—disarmament, nonproliferation, and the peaceful uses of nuclear energy. The P5 also had a useful discussion with representatives of civil society during the Conference.

2. The P5 reviewed significant developments at the 2013 Preparatory Committee (PrepCom) for the 2015 NPT Review Conference and in the context of the NPT since the 2013 Geneva P5 Conference. The P5 reaffirmed that the NPT remains the essential cornerstone for the nuclear nonproliferation regime and the foundation for the pursuit of nuclear disarmament, and they remain committed to strengthening the NPT. They emphasized the importance of continuing to work together in implementing the Action Plan adopted by consensus at the 2010 NPT Review Conference, and reaffirmed their commitment to the shared goal of nuclear disarmament and general and complete disarmament as provided for in Article VI of the NPT. The P5 intend to continue to seek progress on the step-by-step approach to nuclear disarmament, which is the only practical path to achieving a world without nuclear weapons and in keeping with our NPT obligations.

3. The P5 intend to strengthen P5 engagement to advance progress on NPT obligations and 2010 NPT Review Conference Action Plan commitments. The P5 advanced their previous discussions on the issues of transparency, confidence-building, and verification, and welcomed the achievement under France's leadership of P5 consensus on a reporting framework. They introduced to each other their national reports consistent with this reporting framework and Actions 5, 20, and 21 of the 2010 NPT RevCon Final Document, with a view to reporting to the 2014 PrepCom. They encourage other NPT States Party to submit reports, consistent with Action 20 of the NPT RevCon Final Document.

4. The P5 reviewed the work carried out by the Working Group on the Glossary of Key Nuclear Terms under China's leadership, and in this regard, noted the success of the Second Experts' Meeting of the Working Group held on 26-27 September 2013, in Beijing, which established milestones for the completion of the first phase of the Glossary effort for the 2015 RevCon. The progress made in this effort provides a solid foundation for the Working Group to submit its outcome on the terms currently under discussion to the 2015 NPT Review Conference. The P5 stressed again the importance of this work, which is increasing mutual understanding and will facilitate further P5 discussions beyond 2015 on nuclear issues.

5. The P5 had an exchange of views on their nuclear doctrines, strategic stability, and international security from their individual country perspectives to gain better understanding and build strategic trust. They also discussed the importance of verification in achieving progress towards further disarmament and ensuring the success of nonproliferation efforts. The P5 welcomed briefings by the Russian Federation and the United States on aspects of the New START Treaty's implementation, as well as on implementation of the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly-Enriched Uranium Extracted From Nuclear Weapons, signed in Washington, D.C. on 18 February 1993, and its related Protocol on HEU Transparency Arrangements. The P5 shared further information on their respective experiences in verification and resolved to continue such exchanges.

6. The P5 visited the Chinese National Data Centre for the implementation of the Comprehensive Nuclear Test-Ban Treaty (CTBT), as an endeavor to enhance transparency and mutual understanding. They recalled their commitment in the 2010 NPT RevCon Final Document to promote and take concrete steps towards early entry into force of the CTBT and its universalization. They called upon all States to uphold their national moratoria on nuclear weapons-test explosions or any other nuclear explosions, and to refrain from acts that would defeat the object and purpose of the treaty pending its entry into force. The P5 intend to continue their cooperative work to strengthen the CTBT verification regime. The P5 confirmed their support for the ad referendum arrangement for collaborative work by their CTBT technical experts towards improved critical on-site inspection techniques and technology.

7. The P5 supported efforts to revitalize the Conference on Disarmament (CD) and continue to be concerned with the impasse at the CD. They discussed efforts to find a way forward in the CD and reiterated their support for a comprehensive program of work, which includes the immediate start of negotiations in the CD on a legally binding, verifiable international ban on the production of fissile material (Fissile Material Cut-off Treaty or FMCT) for use in nuclear weapons or other nuclear explosive devices on the basis of CD/1299 and the mandate contained therein. The P5 participated fully in the first session of the UN Group of Governmental Experts (GGE) on FMCT, established in UNGA/A/RES/67/53, and look forward to further engagement in this group.

8. In reaffirming the historic contribution of the pragmatic, step-by-step process to nuclear disarmament and stressing the continued validity of this proven route, the P5 also emphasized their shared understanding of the severe consequences of nuclear weapon use and their resolve to continue to give the highest priority to avoiding such contingencies, which is in the interests of all nations.

9. The P5 shared their views on topical proliferation issues and remain concerned about serious challenges to the nonproliferation regime. They pledged to continue their efforts in different formats and at various international fora to find peaceful diplomatic solutions to the

outstanding issues faced by the nonproliferation regime. As they did previously, and looking ahead to the 2014 PrepCom, they called on the states concerned to fulfill without delay their international obligations under the appropriate UN Security Council resolutions, undertakings with the IAEA and other appropriate international commitments.

10. The P5 shared their views on how to prevent abuse of NPT withdrawal (Article X). They resolved to make efforts to broaden consensus among NPT States Party on the withdrawal issue at the 2014 PrepCom, thus making a further contribution to the NPT Review Process.

11. The P5 reviewed their efforts to bring about the entry into force of the relevant legally binding protocols of nuclear-weapon-free zone treaties as soon as possible. They also reiterated their support for the early convening of a conference, to be attended by all the States of the Middle East, on the establishment of the Middle East zone free of nuclear weapons and all other weapons of mass destruction, on the basis of arrangements freely arrived at by the states of the region.

12. The P5 discussed issues related to strengthening the International Atomic Energy Agency (IAEA) safeguards system. They stressed the need for strengthening IAEA safeguards including through the promotion of the universal adoption of the Additional Protocol and the development of approaches to IAEA safeguards implementation based on objective state factors. The P5 also discussed the role of the nuclear-weapon-states, in conformity with the provisions of the NPT, in assisting the IAEA in cases involving possible detection of nuclear weapon programs in non-nuclear weapon states.

13. The P5 noted that they are now more engaged than ever in regular interactions on disarmament, arms control, and nonproliferation issues. The P5 pledged to continue to meet at all appropriate levels on nuclear issues to further promote dialogue and mutual confidence. In addition to meeting at all appropriate levels, the P5 intend to hold a sixth P5 conference. The P5 welcomed the offer by the United Kingdom to host this conference in London in 2015.

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b. NPT Preparatory Committee

The Third Session of the Preparatory Committee ("PrepCom") for the 2015 NPT Review Conference met in New York April 28-May 9, 2014. See April 27, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/04/225230.htm*. The April 27 media note describes U.S. plans for the PrepCom:

> At the PrepCom, the United States will advance efforts to promote full compliance with the NPT and IAEA safeguards agreements and gain support for actions to reduce nuclear arms and promote peaceful uses of nuclear energy. The PrepCom is an opportunity to build on the Action Plan approved by consensus at the 2010 NPT Review Conference and to discuss priorities for the next Review Conference in 2015. At the outset of the PrepCom, Under Secretary for Arms Control and International Security Rose Gottemoeller will provide opening remarks for the United States. The United States also will release a comprehensive national report on steps taken to implement the 2010 NPT

Action Plan and, as a measure of further transparency, will release updated nuclear weapon stockpile numbers.

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See section B.10.c., *infra*, for discussion of and excerpts from remarks by Thomas M. Countryman, U.S. Assistant Secretary of State for the Bureau of International Security and Nonproliferation, during the PrepCom at a session hosted by the Permanent Mission of Ukraine to the UN.

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On April 29, 2014, Under Secretary Gottemoeller addressed the Preparatory Committee in New York. Her remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/225351.htm*.

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Let me begin by offering this message on behalf of the U.S. Secretary of State, John Kerry:

"As we approach the 45th anniversary of the Nuclear Non-Proliferation Treaty's entry into force, let us take a moment to appreciate how remarkably well the Treaty has stood the test of time. The NPT remains the cornerstone of the global nonproliferation regime. Its three mutually reinforcing pillars constitute an essential legal barrier to the further spread of nuclear weapons, the foundation of efforts to further reduce existing nuclear arsenals, and the vehicle for promoting the peaceful uses of nuclear energy and technology under appropriate safeguards.

At this final session of the Preparatory Committee before the 2015 Review Conference, the United States urges all States Parties to take stock of progress made in implementing the 2010 Action Plan, identify remaining obstacles, and work to find common ground on ways to overcome them. We look forward to reporting detailed information on our efforts to translate those actions into accomplishments.

Let me assure you that the United States is more committed than ever to pursuing full implementation of the Treaty, as well as finding comprehensive solutions to the challenges it faces, to ensure that our children and grandchildren can enjoy the peace and security of a world without nuclear weapons. There is much hard work to be done, and there are no shortcuts or easy ways out. I wish this Preparatory Committee well and offer my hope for a productive and positive session that puts us on a path to success in 2015."

Mr. Chairman, the United States is here to work. For nearly seven decades, the international community has struggled with the profound challenge nuclear weapons pose to our security as nations and our survival as human beings. My recent trips to the Marshall Islands and Hiroshima were potent reminders of the need to persevere in confronting this challenge. It is imperative that we make sure that people remember the human impact of nuclear weapons. Indeed, it is the United States' deep understanding of the consequences of nuclear weapons

use—including the devastating health effects—that has guided and motivated our efforts to reduce and ultimately eliminate these most hazardous weapons.

The NPT plays a central role in our pursuit of a nuclear weapons-free world. Before the Treaty was created, many feared that the number of states with nuclear weapons would grow at an exponential rate, with incalculable risks of catastrophic nuclear confrontations.

The NPT stemmed the tide of proliferation and today, the complementary and reinforcing pillars of the Treaty bring important benefits to all NPT parties. The United States is committed to action on all fronts to strengthen the NPT. We have provided a comprehensive report as a working paper for this meeting that will illustrate our strong record of accomplishment.

Mr. Chairman, we have made significant progress on disarmament since the end of the Cold War. At its peak in 1967, the U.S. nuclear arsenal was comprised of 31,255 nuclear weapons. To paraphrase scientist Carl Sagan, we and the Soviets were waist deep in gasoline with some sixty thousand matches between us.

Three years later, the NPT entered into force. Today, I am pleased to announce that as of September 2013, the number of nuclear weapons in the active U.S. arsenal has fallen to 4,804. This newly declassified number represents an 85 percent reduction in the U.S. nuclear stockpile since 1967. It is indisputable that progress toward the NPT's disarmament goals is being made.

And our efforts continue. The New Strategic Arms Reduction Treaty—New START—with the Russian Federation is now in its fourth successful year of implementation. In 2018, when the central limits of the Treaty will be accomplished, our deployed strategic nuclear weapons will be at levels not seen since the days of President Eisenhower and Premiere Khrushchev.

We are not finished. We have just passed the fifth anniversary of President Obama's historic speech in Prague, where he called for the peace and security of a world without nuclear weapons. The President reiterated these goals in Berlin in June 2013. He stated that the United States can ensure its security and that of its allies while safely pursuing further nuclear reductions with Russia of up to one-third in the deployed strategic warhead level established in the New START Treaty. The United States remains open to negotiate further reductions with Russia in all categories of nuclear weapons—including strategic and non-strategic nuclear weapons, deployed and non-deployed.

Recent actions have significantly undermined mutual trust and that trust will take time to rebuild. Still, no one should forget that even in the darkest days of the Cold War, the United States and the Soviet Union found it in our mutual interest to work together on reducing the nuclear threat.

In addition to bilateral efforts, the P5 have just concluded our fifth conference, hosted by China in Beijing. I would like to compliment and thank our Chinese colleagues for hosting an excellent interchange. P5 engagement is a long-term investment designed to strengthen the NPT, build trust, and create a stronger foundation to pursue steps toward our goal of a world without nuclear weapons. Among other accomplishments, we achieved consensus on a P5 NPT Reporting Framework, which has guided our national reporting to the 2014 PrepCom. In keeping with our Action Plan commitments, we will release our report to NPT Parties later this morning.

The entry into force of the Comprehensive Test-Ban Treaty remains a top priority for the United States. We are working to educate the American public on the security benefits of the Treaty, as well as the dangerous health effects of explosive nuclear testing. Of course, there is no reason for the remaining Annex 2 states to wait for the United States before completing their own ratification processes. We urge all States to provide adequate financial and political support

for the completion of the CTBT verification regime and its provisional operations between now and the entry into force of the treaty.

Mr. Chairman, multilateral nonproliferation efforts are also moving ahead. The United States is working to support nuclear-weapon-free zones that advance regional security and bolster the global nonproliferation regime. We look forward to signing the protocol to the Central Asian Nuclear Weapon Free Zone Treaty, and to working with ASEAN toward signature of the Southeast Asian Nuclear Weapon Free Zone Treaty protocol.

We also remain committed to the goal of a Middle East zone free of all weapons of mass destruction and to convening a regional conference to discuss such a zone. The recent direct engagement among states in the region is an important step forward. We urge those states to take advantage of this opportunity and to reach consensus on arrangements so that a conference can take place soon.

Even with these successes, noncompliance by a few states presents a direct challenge both to regional security and to the global nuclear nonproliferation regime. Countries that cheat on their commitments increase the risk of conflict and further proliferation, endangering people everywhere. It is in the interest of all parties to insist that violators return to compliance, and we are making every effort to resolve such challenges through peaceful, diplomatic means. This sentiment applies to all international security agreements and Treaties.

To protect against additional proliferation and respond to cases of non-compliance, the safeguards system of the International Atomic Energy Agency needs our full support and cooperation. As States Parties have increasingly recognized, that includes the adoption of an Additional Protocol, which bolsters regional and global security by providing a higher degree of assurance that countries are engaged solely in peaceful nuclear cooperation. Over 120 states have set a strong example by adopting Additional Protocols.

And as I speak of setting strong examples, yesterday, Ukraine held an event celebrating its historic decision twenty years ago, alongside Belarus and Kazakhstan, to join the Non-Proliferation Treaty as non-nuclear-weapon states. Ukraine's reaffirmation of its nonproliferation obligations reminds us of its critical contribution to help move us toward a world without nuclear weapons. We strongly appreciate the clear sightedness of Ukraine on this matter.

Mr. Chairman, in support of the third pillar of the NPT, the United States will continue to promote the safe and secure uses of peaceful nuclear technologies. We are by far the largest contributor to IAEA nuclear assistance programs. We will continue this support and look to increase where we can.

Since 2010, eleven states and the European Union have joined us in providing approximately $66 million to the IAEA Peaceful Uses Initiative, which has helped more than 120 IAEA Member States worldwide. We encourage all states in a position to contribute to join us in supporting this initiative.

In closing, let us take the next two weeks to strengthen the Treaty that has brought us from a world that was in danger of having scores of nuclear weapons states to a world where we are cooperating to move toward zero nuclear weapons. We know and can acknowledge the differences among us on issues ranging from speed of action to priorities. We cannot and should not get caught up in what divides us. We have a job to do. Let us reinvigorate our common goals as outlined in the 2010 Action Plan, build consensus around the next logical steps in our path and focus on the mechanisms for accomplishing those steps.

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On May 1, 2014, Assistant Secretary Countryman delivered the U.S. statement on regional issues at the Preparatory Committee. Mr. Countryman's statement—addressing Iran, Syria, establishing a WMD-free zone in the Middle East, and North Korea—is excerpted below and available at *www.state.gov/t/isn/rls/rm/2014/225511.htm*.

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The United States and our E3+3 partners are engaged in a process aimed at peacefully resolving one of the most serious challenges to the integrity and credibility of the global nonproliferation regime: Iran's nuclear program. The E3+3 and Iran have been meeting intensively since February to discuss all of the issues that must be resolved as part of a long-term comprehensive solution that resolves the international community's concerns regarding Iran's nuclear program, verifiably ensures that Iran's nuclear program is exclusively peaceful, ensures Iran does not acquire a nuclear weapon, and returns Iran to full compliance with its NPT and other nonproliferation obligations. These discussions have been useful and constructive, and all sides are showing good faith.

In parallel, the IAEA is continuing its efforts to resolve the outstanding issues regarding Iran's nuclear program, including its possible military dimensions. We commend the IAEA for the professional, objective, and diligent manner in which it has conducted its efforts. It remains essential and urgent for Iran to cooperate fully with the IAEA to address all present and past issues to resolve the international community's legitimate concerns and advance a comprehensive diplomatic solution.

We look forward to the international community's continued support for the E3+3's efforts in the weeks and months ahead, which remains essential as we pursue a comprehensive diplomatic resolution which returns Iran to full compliance with its NPT obligations and would result in Iran being treated in the same manner as any other non-nuclear weapon state party to the Treaty.

…With regard to Syria, it has been nearly three years since the IAEA Board of Governors found Syria in noncompliance with its safeguards agreement. The Asad regime's continued failure to uphold Syria's nonproliferation obligations reinforces the international community's strong concerns regarding the continued potential for covert nuclear activities in Syria. It remains essential that … Syria cooperate fully with the IAEA to remedy its noncompliance.

As we have made clear, the instability and violence the regime has wrought against its own people is no excuse for its failure to meet Syria's international obligations. Its noncompliance with its safeguards agreement remains a matter of serious and continuing concern to the international community. We commend the IAEA's efforts to resolve Syria's noncompliance.

…These cases of noncompliance undermine our efforts to achieve the goal of a Middle East free of all weapons of mass destruction (WMD) and their means of delivery. The United States continues to fully support this goal, and we stand by our commitment to convene a conference [freely arrived at by the states in the region] to discuss the establishment of a WMD-free zone in the Middle East.

There is significant progress since last year's PrepCom meeting. Regional states have participated in three rounds of multilateral consultations in Switzerland, moving closer to consensus on an agenda and modalities for a conference. Direct engagement among the parties in

the region is an essential step forward. We encourage the parties to continue discussions and continue the positive tone all parties—both our Arab friends and Israel—have displayed. The fact that three rounds of consultations have been held over a six month period and that statements in the small room in Glion were more positive than what we hear in this hall, is itself a confidence building measure, and one that has helped advance this process considerably.

Ambassador Laajava has proposed additional meetings following this PrepCom meeting and we commend him for his leadership and intensive efforts to bring the parties together. These consultations are an important element of preparation, but do not replace the conference itself. We hope that all states in the region take full advantage of this opportunity, to attend the consultations, to seek solutions in good faith and above all, to do what the states of Africa, the states of Latin America, the states of Southeast Asia, and other regions have done: to take ownership of the process and responsibility for the difficult compromises ahead.

Beyond the conference, actual achievement of a WMD-free zone in the Middle East is a long-term undertaking, and will require that essential conditions be in place in order to achieve it. These conditions include a comprehensive and durable peace in the region, and ensuring full compliance by all regional states with their arms control and nonproliferation obligations.

…A critical and growing threat to the integrity of the global nonproliferation regime, and to our common peace and security, is North Korea's continued pursuit of nuclear weapons and their means of delivery. Despite consistent calls to correct course, North Korea continues to act in direct defiance of the clear and overwhelming international consensus that the DPRK must abandon all its nuclear weapons and existing nuclear programs—including plutonium production and uranium enrichment—and cease all related activities immediately.

As we have made clear, the United States remains open to a meaningful and authentic diplomatic process to implement the 2005 Joint Statement of the Six-Party Talks and to bring North Korea into compliance with its UN Security Council obligations through irreversible steps leading to denuclearization. However, the onus remains on North Korea to make the right choice—its recent actions and threats indicate that it is intent on defiance over denuclearization. Together with our partners in the Six-Party process, we are focused on urging North Korea to take meaningful actions toward verifiable denuclearization and refrain from further provocations.

Our message to North Korea is clear. The international community will not accept North Korea as a nuclear-armed state. We seek its return to the NPT and IAEA safeguards as a non-nuclear weapon state party and to full compliance with its nuclear nonproliferation obligations. We also call on North Korea to make a firm commitment and concrete progress toward complete, verifiable and irreversible denuclearization, and join the community of responsible nations.

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On May 2, 2014, Christopher Buck, Deputy Chief of Mission for the U.S. Delegation to the Conference on Disarmament, delivered the U.S. statement on nuclear disarmament and security at the PrepCom in New York. Mr. Buck's remarks are excerpted below and available at *www.state.gov/t/isn/npt/prepcom/remarks/225654.htm*.

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I am pleased to provide an update on ongoing U.S. activities in fulfillment of our obligations and commitments under Article VI of the Nuclear Non-Proliferation Treaty (NPT) and the 2010 NPT Action Plan. In this context, I highlight the extensive report that the United States has submitted to this Preparatory Committee meeting, consistent with Actions 5, 20, and 21 of the 2010 NPT Action Plan.

U.S. policy is to achieve the peace and security of a world without nuclear weapons. This remains a central element of President Obama's nuclear agenda, and we are working to create conditions that can enable its eventual achievement by pursuing a multifaceted, step-by-step approach incorporating national, bilateral, and multilateral actions.

It is because we understand the consequences of the use of nuclear weapons that the United States continues to devote considerable resources in a decades-long effort to reduce and ultimately eliminate nuclear weapons. There is no "quick fix" to achieving nuclear disarmament. There is no path other than the hard, daily work of verifiable step-by-step disarmament to which we remain resolutely committed.

In line with our support for the NPT, in 2010 the United States changed our nuclear posture to further reduce the number and role of nuclear weapons in our national security strategy and emphasize the interest of all nations in extending the 69-year record of non-use of nuclear weapons. The President also made it clear that the United States will not develop new nuclear warheads nor will we pursue new military missions for nuclear weapons.

This important shift in U.S. nuclear posture has taken place against the backdrop of dramatic and ongoing reductions in our nuclear arsenal. In fact, when the NPT entered into force in 1970, the United States had a nuclear stockpile of over 26,000 nuclear weapons. As Under Secretary Gottemoeller announced on Tuesday, the U.S. nuclear stockpile now has been reduced to 4,804 warheads, which reflects an 85% decrease from its Cold War peak. During this period, the United States reduced its non-strategic nuclear warheads by 90 percent. To lend a better sense of the scale of this ongoing activity in the post-Cold War period, between 1994 and 2013, the United States dismantled 9,952 nuclear warheads.

Moreover, this effort continues as we fulfill our obligations under the New Strategic Arms Reduction Treaty (New START) between the United States and Russia, now in its fourth year of implementation. When the Treaty limits are reached in 2018, the strategic forces of the United States and Russia will be capped at 1,550 deployed strategic warheads, their lowest level since the 1950s.

Contrary to the view expressed by some in this hall, we do not regard the achievement of nuclear disarmament as simply a rhetorical goal. It is one the United States is working on and pursuing every day.

And this work is not done. As outlined by President Obama in Berlin in June 2013, the United States remains open to negotiate further reductions with Russia in all categories of nuclear weapons—including strategic and non-strategic nuclear weapons.

We are also developing effective verification methodologies and processes that will be essential as we move toward increasingly smaller nuclear arsenals. Our experience with verified bilateral nuclear disarmament provides valuable experience and useful tools for multilateral nuclear disarmament approaches in the future. To that end, we are working closely with all NPT nuclear weapon states (or "P5") to lay the foundation for future arms control agreements with participants beyond Russia and the United States.

Within the P5 process we have institutionalized regular dialogue on nuclear weapons-related issues. China hosted a fifth P5 Conference in Beijing on April 14 and 15, and the United Kingdom has agreed to host a sixth conference next year. Through these high-level conferences and frequent expert-level meetings, the P5 were able to reach consensus on a framework for reporting to this PrepCom in accordance with their commitments in the Action Plan. …

Turning to the broader multilateral context, the United States supports the immediate commencement of negotiations on a Fissile Material Cutoff Treaty (FMCT), which is the next logical and necessary step toward achieving our shared disarmament goals. A verifiable ban on the production of fissile material for use in nuclear weapons is necessary if we are to create conditions for a world without nuclear weapons. All states can contribute to achieving this goal. We are disappointed that the Conference on Disarmament (CD) has been unable to initiate negotiations on an FMCT. Even as we continue our efforts in the CD, the United States is actively engaged in the meeting of the FMCT Group of Governmental Experts (GGE), which can usefully complement efforts to promote negotiations of an FMCT in the CD.

In another important multilateral effort, the ratification and entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) remains a top priority for the U.S. Administration. Our active involvement in all activities of the CTBT Organization's Preparatory Commission clearly demonstrates our ongoing commitment to the Treaty and the vital importance the United States attaches to completing the verification regime. The United States recognizes that the voluntary adherence to unilateral nuclear testing moratoria is no substitute for a legally binding prohibition against the conduct of such explosions. Entry into force of the CTBT is in the security interests of every nation. All States have an important role to play in providing the necessary resources to complete the Treaty's verification regime and maximize the capabilities of the Provisional Technical Secretariat.

…The United States recognizes the importance of security assurances in the context of the NPT. Accordingly, the United States updated and strengthened its long-standing negative security assurance policy in the context of the U.S. Nuclear Posture Review published in April 2010. The United States declared that it will not use or threaten to use nuclear weapons against non-nuclear weapon States that are party to the NPT and in compliance with their nuclear nonproliferation obligations. It was also made clear that the United States would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or our allies and partners.

The United States also supports well-crafted nuclear-weapon-free zones (NWFZs) that are vigorously enforced and developed in accordance with the guidelines adopted by the United Nations Disarmament Commission. We are a Party to both Protocols of the Treaty of Tlatelolco and in recent years the United States has worked toward extending legally binding negative security assurances by submitting for ratification the protocols to the African and South Pacific nuclear-weapon-free zones. We are pleased to note that the United States and other NPT nuclear weapon states will soon sign the Protocol to the Central Asian Nuclear Weapon Free Zone Treaty. The nuclear weapon states are also engaging ASEAN to resolve any remaining differences so that we can sign the revised Protocol to the Southeast Asia nuclear-weapon-free zone. These actions are a priority for us.

* * * *

After the conclusion of the 2014 PrepCom, on May 9, 2014, the State Department issued a fact sheet on its outcomes, excerpted below and available at *www.state.gov/r/pa/prs/ps/2014/05/225910.htm*.

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Under the Chairmanship of Ambassador Enrique Roman-Morey of Peru, the PrepCom accomplished all of its procedural tasks ahead of the 2015 NPT Review Conference and provided for a substantive, detailed exchange on the three NPT pillars: disarmament, nonproliferation, and peaceful uses of nuclear energy. The United States emphasized the central role of the NPT in addressing the profound challenges that nuclear weapons pose to the security and survival of nations. In a comprehensive report presented to the PrepCom, the United States highlighted the significant progress underway to reduce the number and role of nuclear weapons and to ensure compliance with the Treaty's nonproliferation goals. As a transparency step, the United States also released a newly declassified nuclear weapon stockpile fact sheet that shows more than 1,200 nuclear weapons dismantled since 2009. Highlighting the PrepCom, the United States and the other nuclear weapon states (China, France, Russia and the UK), signed the Protocol to the Central Asia Nuclear Weapon Free Zone Treaty. The Protocol, once in force, provides legal assurances against the use or threat of use of nuclear weapons to the five Central Asian states.

"The NPT remains the cornerstone of global nonproliferation efforts and all Parties share in the responsibility to uphold it," said Assistant Secretary Countryman. "I was pleased to sign the Central Asia Treaty Protocol, a step that benefits the security of states that are parties to the NPT and meet their nonproliferation obligations." In remarks to the PrepCom, Assistant Secretary Countryman also highlighted progress underway to convene a conference on a Middle East zone free of weapons of mass destruction that has the full support of all regional states. "The United States remains committed to the goal of convening a conference once the regional states reach consensus on an agenda and related documents," said Assistant Secretary Countryman.

The United States will continue to pursue steps that contribute to nuclear disarmament, while addressing the serious challenge of cases of noncompliance with Treaty obligations, including that posed by North Korea, and continuing to support access to the peaceful uses of nuclear energy in areas such as human health, water resources, agriculture, and food security. The United States is the largest single contributor to IAEA peaceful uses programs, and has pledged $50 million to the IAEA Peaceful Uses Initiative over a period of five years beginning in 2010. In parallel, the United States is seeking to build support for this initiative by inviting contributions from other states, with a goal of bringing the total support for this initiative to $100 million.

* * * *

c. Litigation Involving Alleged NPT Breach

On July 21, 2014, the United States filed its motion to dismiss a case brought in federal court in California by the Republic of the Marshall Islands alleging that the United States has breached its obligations under Article VI of the NPT. *Republic of the Marshall Islands*

v. United States, No. 4:14-cv-01885-JSW (N.D. Cal.). Article VI provides that "[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." The complaint requests a declaratory judgment that the United States has breached this obligation and an injunction requiring the United States to call for and convene disarmament negotiations within one year. The Republic of the Marshall Islands also filed complaints against the United States and other countries in the International Court of Justice ("ICJ") making similar claims. Excerpts follow (with footnotes omitted) from the U.S. brief in support of its motion to dismiss, which is available in full at *www.state.gov/s/l/c8183.htm*. The U.S. brief in reply to plaintiff's opposition to the motion to dismiss is also available at *www.state.gov/s/l/c8183.htm*.*

* * * *

I. Plaintiff Has Failed to Allege the Necessary Elements of Standing

The constitutional separation of powers, as embodied in Article III of the Constitution, restricts the subject matter jurisdiction of the federal courts to the resolution of specific "'cases' and 'controversies'" and prevents courts from taking action to address matters better suited to legislative or executive action. *Allen v. Wright*, 468 U.S. 737, 750 (1984). One manifestation of the "case or controversy" limitation is the requirement of "standing." …

Plaintiff alleges two injuries in its Complaint to support its standing. First, plaintiff asserts that the "failure" of the United States to "honor its Article VI commitments . . . leaves *Plaintiff* Nation exposed to the dangers of existing nuclear arsenals and the real probability that additional States will develop nuclear arms." …. Such a generalized and speculative fear of the potential danger of nuclear proliferation does not constitute a concrete injury required to establish injury in fact. *See Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988) ("Inferences concerning the uncertain and indefinite effects of the nation's strategic defense policy are, at best, speculative."); *Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960) (holding that plaintiffs lacked standing in suit to enjoin nuclear testing because the alleged injury was shared in common with "all mankind.").

In addition, even assuming a concrete injury, plaintiff has not established causation or redressability. The United States is not the only State with nuclear weapons, and the United States alone cannot therefore be identified as the source of plaintiff's purported injury. Moreover, it is entirely speculative whether, should this Court declare the United States in breach of its Article VI obligations and order the United States to call for and convene negotiations for nuclear disarmament, any other nuclear weapon state would agree to participate in such negotiations, let alone whether such a conference would lead to the cessation of the nuclear race or nuclear disarmament. *See … also Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (citing *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980)

* Editor's note: On February 3, 2015, the district court granted the motion to dismiss on the grounds that the plaintiff lacks standing and that the case presents a non-justiciable political question.

(holding that the invalidation of an international agreement would not redress injury because relief depended on the conduct of a foreign sovereign)).

Plaintiff's second allegation in support of its standing—that it has been denied the "benefit of its Treaty bargain" —is similarly incapable of redress by this Court. ….Whatever the nature of that benefit, this Court could not provide relief that would remedy that alleged harm because such a remedy necessarily depends on the actions of other State Parties to the Treaty not before this Court. What plaintiff actually wants is an advisory opinion that would allow it to "determine its next steps in pursuit of the grand bargain represented by the Treaty." … This Court lacks jurisdiction to issue such an opinion. *See, e.g.*, *MacCaulay v. U.S. Foodservice, Inc.*, 152 F. Supp. 2d 1229, 1230 (D. Nev. 2001) ("It is improper for a United States District Court to express advisory opinions about what an agency within the executive branch will do or require.").

II. Plaintiff's Request for this Court to Dictate United States Negotiations Regarding Nuclear Disarmament Is Prohibited by the Political Question Doctrine

Plaintiff urges this Court to declare that the United States "is in continuing breach of the obligations under Article VI of the [NPT] to pursue negotiations in good faith" and to order that the United States "take all steps necessary to comply with its obligations under Article VI . . . within one year of the date of this Judgment, including by ***calling for and convening*** negotiations for nuclear disarmament in all its aspects." …. Such negotiations, in plaintiff's view, would occur "as required and within the construct contained in the foregoing Declaratory Judgment." …

In sum, plaintiff seeks an order (1) declaring the United States in breach of its obligations under a multilateral international treaty, (2) requiring the United States to conduct "in good faith" multilateral negotiations with foreign States, including the specific remedy of calling for and convening negotiations on nuclear disarmament "in all its aspects," and (3) requiring such negotiations to take place within "one year of the date of this Judgment" and within the "construct" set forth by this Court (presumably under the threat of contempt sanctions should the Court deem the negotiations insufficient).

In light of the principles set out in *Baker v. Carr*, 369 U.S. 186, 208-26 (1962), it is difficult to conceive of a case that is less suited for judicial resolution than the present one. "The most appropriate case for applicability of the political question doctrine concerns the conduct of foreign affairs." *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 665 (N.D. Cal. 2002); *see also Chi. & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 111 (1948). Indeed, "[i]t is well established that the judiciary cannot order the government of the United States to comply with the terms of an agreement with another sovereign." *Kwan v. United States*, 84 F. Supp. 2d 613, 623 (E.D. Penn. 2000); *see also Antolok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989); *Holmes v. Laird*, 459 F.2d 1211, 1220, 1220 n.61 (D.C. Cir. 1972) (collecting cases); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940).

As an initial matter, an order of this Court declaring the United States in violation of its international Treaty obligations would squarely contradict, and interfere with, the position of the United States that it is "in compliance with all its obligations under arms control, nonproliferation, and disarmament agreements and commitments." Department of State, Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments (2013), *at* *http://www.state.gov/t/avc/rls/rpt/2013/211884.htm* (last visited July 18, 2014) ….

Moreover, even if this Court deemed it proper to decide whether the United States is in breach of its international obligations, it would have no standards by which it could determine, *inter alia*, the framework for future negotiations, or decide whether future negotiations would be sufficient. …Indeed, this Court's involvement in the NPT regime and multilateral disarmament negotiations could have myriad unanticipated consequences. For example, the arbitrary "one year" timeframe sought by plaintiff or the absence of nations not before this Court would present entirely new variables to confront in negotiations.

Echoing these concerns, the Ninth Circuit previously declined to exercise such authority in a similar context. In *Earth Island Institute v. Christopher*, 6 F.3d 648, 650, 653 (9th Cir. 1993), the Ninth Circuit held that plaintiffs' request for an order requiring the Executive to "initiate treaty negotiations" is "not one that is justiciable in any federal court." According to the Ninth Circuit, "[t]he statute's requirement that the Executive initiate discussions with foreign nations violates the separation of powers, and this court cannot enforce it." *Id*. at 652.

Accordingly, this case presents a political question that is not justiciable in federal court.

III. The NPT Is Not Self-Executing And Does Not Provide a Private Cause of Action

Plaintiff's claims should also be dismissed because Article VI of the NPT is not self-executing and thus may not be directly enforced in United States courts. In addition, the NPT does not provide a private cause of action.

* * * *

There is no intent expressed in the text of Article VI, the ratification history of the NPT, or its post-ratification understanding that Article VI is self-executing. …

…Indeed, Article VI "is . . . silent as to any enforcement mechanism" in the event of noncompliance. *Medellin*, 552 U.S. at 508. Accordingly, Article VI "is not a directive to domestic courts"; rather, "'[t]he words of [Article VI] call upon governments to take certain action.'" *Id*. … "In other words, [Article VI of the NPT] reads like 'a compact between independent nations' that 'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" *Medellin*, 552 U.S. at 508-09 (quoting *Head Money Cases*, 112 U.S. at 598); *see also Bond v. United States*, 134 S. Ct. 2077, 2084 (2014); *Head Money Cases*, 112 U.S. at 599; *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

The intent of the Senate in ratifying the Treaty confirms this conclusion. Because the issue of judicial enforcement of Article VI of the NPT was not a central feature of the ratification debate, the record lacks any indication that Article VI was intended to be enforceable in domestic courts. To the contrary, when the issue of the legal effect of the treaty was raised, Senator Fulbright, Chair of the Committee on Foreign Relations, explained that, should Congress later abrogate the treaty, the "infraction becomes the subject of international negotiations and reclamations . . . . *It is obvious that with all this the judicial courts have nothing to do and can give no redress*." 115 Cong. Rec. 6204 (1969) (internal quotations omitted) (emphasis added).

The post-ratification history of the NPT also supports the conclusion that Article VI is not self-executing.… [I]n conjunction with the fourth review conference on the NPT in 1990, the Senate agreed to a concurrent resolution to … express the sense of the Senate that the treaty has been of great use to the United States. *See* 136 Cong. Rec. S9303-02 (daily ed. June 28, 1990). In presenting the concurrent resolution, its sponsor expressly indicated that "[t]he NPT is not self-executing." 136 Cong. Rec. S7152-01 (daily ed. June 5, 1990). Rather, "[s]ignatories must

actively pursue policies in favor of nonproliferation and monitor developments closely if the treaty is to succeed." *Id.*

Indeed, despite multiple conferences on the NPT post-ratification, there has been no indication that the United States or any of the other State Parties contemplated any domestic enforcement mechanism for alleged violations of the Treaty. Rather, State Parties have specifically indicated that "concerns over compliance with any obligation under the Treaty by any State Party should be pursued through diplomatic means." 2010 Review Conference, Final Document at 3, *available at* *http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50 (VOL.I)* (last visited July 18, 2014).

Even if this Court finds that the NPT is self-executing, further inquiry would be needed to determine whether it creates a private cause of action that provides for the enforcement of the treaty by individuals in federal court. *See Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010); *Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007). "Whether or not aptly characterized as a 'presumption,' the general rule is that [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts . . . ." *Cornejo*, 504 F.3d at 859 (internal quotation omitted).

Unlike other agreements that could be interpreted to provide a private cause of action, Article VI of the NPT concerns only negotiations between nation States. *See id.* at 861 ("The Vienna Convention on Consular Relations is an agreement among States whose subject matter-'Consular Relations'-is quintessentially State-to-State."). Accordingly, Article VI does not provide a cause of action that would permit plaintiff to enforce the Article in federal court.

* * * *

V. This Court Cannot, And Should Not, Grant Plaintiff Its Requested Relief After Failing to Raise Its Claim in Federal Court for Almost Two Decades

Pursuant to 28 U.S.C. § 2401(a), "all civil actions against the United States must be filed within six years after the right of action first accrues," *i.e.* when plaintiff "knew or should have known of the wrong and was able to commence an action based upon that wrong." *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1233 (E.D. Wash. 2010). Here, plaintiff alleges that "[m]ore than 44 years have passed . . . and the U.S. has not pursued negotiations in good faith." …. Indeed, plaintiff alleges that the "early date" for negotiations "has long since passed." *Id.* Moreover, plaintiff acceded to the treaty in 1995, … yet almost two decades passed before plaintiff chose to file suit.

Plaintiff suggests that the United States is in "continuing breach of the treaty." … However, the alleged "continuation" of the purported wrong does not entitle plaintiff to delay unreasonably in pursuit of a legal remedy. Indeed, "[p]laintiff['s] interpretation . . ., taken to its logical end, suggests a *de facto* elimination of any statute of limitation, for the limitation period would never begin to accrue." *Wild Fish Conservancy*, 688 F. Supp. 2d at 1236….

Even if the statute of limitations did not bar plaintiff's claim, this Court should still refuse to grant the requested relief. "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431 (1948); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). Here, the issuance of declaratory (and associated injunctive) relief would be contrary to the public interest, as it would risk interfering with the efforts of the

Executive Branch in the foreign and military arenas, where discussions regarding the appropriate steps in support of nuclear disarmament are ongoing. Indeed, the next review conference on the NPT is scheduled for 2015 at the United Nations in New York, and, as always, the matter of efforts under Article VI will be the subject of discussion among the multitude of State Parties.

The inequity of a declaratory judgment in the present case is highlighted by the fact that the NPT has been in force since 1970, *see supra* at 1, that plaintiff acceded to the treaty in 1995, …, and that the International Court of Justice issued the ruling on which plaintiff heavily relies in 1996, …. Plaintiff should not now be permitted to raise its claims in disruption of the diplomatic context that has prevailed for a generation. *See Apache Survival Coal. v. United States*, 21 F.3d 895, 905 n.12, 905-06 (9th Cir. 1994) ("We note that a declaratory judgment, because it is equitable in nature, can be barred by laches.").

* * * *

3. Comprehensive Nuclear Test Ban Treaty

On March 1, 2014, Acting Under Secretary of State for Arms Control and International Security Gottemoeller[*] discussed the importance of the Comprehensive Nuclear Test Ban Treaty at a ceremony in honor of the Republic of Marshall Islands Nuclear Remembrance Day. Her remarks pertaining to the CTBT appear below. Her remarks in their entirety are available at *www.state.gov/t/us/2014/222790.htm*.

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* * * *

Mindful of the devastating human consequences of nuclear war, the United States has also clearly stated that it is in our interest, and that of all other nations, that the nearly 70-year record of non-use of nuclear weapons be extended forever. We also concluded that the time for a complete and total ban on nuclear explosive testing is long overdue. U.S. ratification of the Comprehensive Nuclear Test-Ban Treaty (CTBT) is a pivotal part of this effort.

Ratification of the CTBT is central to leading other nuclear weapons states toward a world of diminished reliance on nuclear weapons, reduced nuclear competition, and eventual nuclear disarmament. The United States now maintains a safe, secure and effective nuclear arsenal through our science-based Stockpile Stewardship program without nuclear explosive testing, which the United States halted in 1992.

The United States will be patient in our pursuit of ratification, but we will also be persistent. It has been a long time since the CTBT was on the front pages of newspapers, so we will need time to make the case for this Treaty. Together, we can work through questions and concerns about the Treaty and explosive nuclear testing. Our answers to those questions continue to grow stronger with the proven and increasing capabilities of the Stockpile Stewardship program and the verification system of the Treaty, including the International Monitoring System.

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[*] Editor's note: Rose E. Gottemoeller was sworn in as Under Secretary for Arms Control and International Security on March 7, 2014. She had served as Acting in this position since February 7, 2012.

I cannot emphasize strongly enough that it is precisely our deep understanding of the consequences of nuclear weapons—including the dangerous health effects of nuclear explosive testing—that has guided and motivated our efforts to reduce and ultimately eliminate these most dangerous and awe-inspiring weapons. Entry into force of the CTBT is one such essential part of our pragmatic, step by step approach to eliminating nuclear dangers. The Treaty will make the world a safer place for the Marshall Islands, the United States, for every nation around the globe.

* * * *

4. Conference on Disarmament

On February 4, 2014, Acting Under Secretary Gottemoeller delivered a statement (excerpted below) to the Conference on Disarmament in Geneva in which she discussed, among other things, the impasse over the Fissile Material Cut-off Treaty ("FMCT"). Acting Under Secretary Gottemoeller's remarks are available in full at *www.state.gov/t/us/2014/221215.htm*.

* * * *

In his January 21 remarks to the Conference, UN Secretary General Ban Ki-moon spoke about the importance of substantive discussion in laying groundwork for future CD negotiations. The United States believes it is crucial for the CD to adopt a program of work, but we also believe we must continue to engage substantively with one another – both about the disarmament steps we are taking and the steps we hope to take next—as we work to break this body's impasse.

As colleagues here are well aware, we stand ready to begin negotiations on an FMCT, the next logical—and necessary—step in creating the conditions for a world without nuclear weapons. It has been frustrating to watch the CD remain deadlocked over this issue, but negotiation of an FMCT is an essential prerequisite for global nuclear disarmament. In recognition of this fact, Action 15 of the 2010 NPT Review Conference Action Plan included an agreement that the CD should begin immediate negotiation of an FMCT. The United States will continue to urge negotiation of an FMCT in this body, convinced that FMCT negotiations at the CD will provide each member state the ability not only to protect, but also to enhance its national security. With that as our guiding conviction, we look forward to engaging fully in the upcoming meetings of the Group of Governmental Experts (GGE), with a view to providing further impetus to long-sought FMCT negotiations in the CD.

As disappointed as we are that a Program of Work for the CD remains elusive, we are not standing still. The United States has slashed its nuclear stockpile by 85% from Cold War levels. Under the New START Treaty, US and Russian deployed strategic nuclear warheads will decline to their lowest levels in over half a century. Recently, the US-Russia Highly Enriched Uranium (HEU) Purchase Agreement culminated with the final shipment of low enriched uranium converted from the equivalent of 20,000 dismantled Russian nuclear warheads to fuel US nuclear reactors. Those former warheads have been providing ten percent of all US electricity. One in ten light bulbs in the U.S. are lit by former Soviet weapon material

Historic efforts like this one reflect the ongoing and significant progress we are making toward our Nuclear Non-Proliferation Treaty Article VI commitments. Here I would add that there are no shortcuts to reaching our shared goal of a world without nuclear weapons. It is necessarily an incremental process that requires hard work by governments operating in the realm of supreme national and international security commitments impacting regional and global stability. The United States is expending tremendous effort to meet its commitments, and we look forward to continuing to engage the Russian Federation regarding issues of strategic stability and with a view to achieving further bilateral reductions.

Like many of you, we are preparing for the upcoming meeting of the NPT Third Preparatory Committee, where we look forward to discussing the important roles both nuclear weapons states and non-nuclear weapons states play in implementing the 2010 Action Plan, in anticipation of the 2015 NPT Review Conference. We are also preparing for the fifth P5 Conference, which we thank China for hosting this year.

The United States attaches great value to the P5 process. I like to stress, the importance of the P5 process is not what it can produce in the immediate-term, but rather what it means for the prospects of multilateral nuclear disarmament efforts in years to come. These conferences are an essential means for laying the foundation for future agreements that could involve parties beyond the United States and Russia. Most people understand that we and Russia likely will need to take some additional bilateral steps before our arsenals are to a level where other nuclear weapon states would be prepared to join us at the negotiating table. The work we are doing now in these conferences will help to ensure that when that day arrives, we will not be starting at square one. Our partners will have the opportunity to benefit from the experience we have gained and shared regarding how monitoring activities like on-site inspections can be conducted to gain an understanding about the technology required to conduct arms control activities and methods of information sharing that build confidence that treaty partners are adhering to the agreement.

We also hope this process will lead to cooperative work in addressing the significant verification challenges we will face as we move to lower numbers and categories of nuclear weapons beyond strategic weapons. The United States and the UK have begun some of this work on developing verification procedures and technologies, and we have briefed our P5 partners on the results. The P5 are uniquely positioned to engage in such research and development given their experience as nuclear weapon states. In the context of a P5 working group chaired by China, we continue to develop a common glossary of nuclear weapons-related terms. A glossary may not sound important or interesting, until you consider that verifiable multilateral nuclear disarmament will require clear agreement on the definitions and concepts for the vital aspects that must be covered in future treaties.

We continue to work to build support for ratification of the CTBT, making the case to our citizens and legislators that the Treaty will serve to enhance our collective security. We ask for the support of the international community in continuing to build and maintain the International Monitoring System and On-Site Inspection regime. As we make the case for the Treaty's verifiability, this support will be crucial.

These are just a few of the practical measures we are taking to advance toward our shared goal. We celebrate the progress these step-by-step efforts have achieved, but we know we still have much work to do. We remain committed to fulfilling our obligations and working to take additional practical and meaningful steps. Like UN Secretary General Ban Ki-moon, the United States agrees the CD continues to possess promise. It must surmount its deadlock regarding a Program of Work, and in pursuit of that goal the United States is open to renewing the Informal

Working Group. At the same time, we believe that CD member states should foster substantive discussions aimed at future progress, with a view to promoting the prospects for work on issues ripe for negotiation, above all, an FMCT. Like the Secretary General, we hope the CD helps to build "a safer world and a better future" because we also believe "that is its very mission." Thank you.

* * * *

5. International Atomic Energy Agency ("IAEA")

On January 29, 2014, President Obama submitted to Congress for its review a proposed Third Amendment to the Agreement for Cooperation between the United States of America and the International Atomic Energy Agency. The President had made the requisite determination on January 17, 2014 pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2153(b)), that performance of the Third Amendment will promote, and will not constitute an unreasonable risk to, the common defense and security. Daily Comp. Pres. Docs. DCPD No. 00035 (Jan. 17, 2014). As explained in a January 29, 2014 State Department Media Note, available at *www.state.gov/r/pa/prs/ps/2014/01/220774.htm*:

> The original Agreement entered into force on August 7, 1959, and was amended on May 31, 1974, and May 6, 1980. Under the proposed Amendment, the term of the Agreement would be extended an additional forty (40) years for a total term of ninety-five (95) years.
>
> The newly amended Agreement would allow the United States and IAEA to continue their decades of nuclear cooperation. It would continue to provide a comprehensive framework for peaceful nuclear cooperation with the IAEA and facilitate our mutual objectives related to nonproliferation and the peaceful uses of nuclear energy. The Agreement exemplifies the U.S. Government's strong support for IAEA peaceful uses activities, and the United States looks forward to expanding these cooperative efforts in the years to come.

In his message to Congress transmitting the proposed amendment, the President included a summary of the significance to the United States of the Agreement with the IAEA. Daily Comp. Pres. Docs. DCPD No. 00054 (Jan. 29, 2014). Excerpts follow from the President's Message to the Congress Transmitting the Third Amendment to the Agreement for Co-operation Between the United States of America and the International Atomic Energy Agency.

> Pursuant to the proposed Amendment, the Agreement for Co-operation Between the United States of America and the International Atomic Energy Agency, signed at Vienna May 11, 1959, as amended and extended February 12, 1974, and January 14, 1980 (the "Agreement"), would continue to provide a comprehensive framework for peaceful nuclear cooperation with the IAEA and

facilitate our mutual objectives related to nonproliferation and the peaceful uses of nuclear energy. The primary purposes of the Agreement are to enable exports from the United States of nuclear material and equipment to IAEA Member States for research reactors and, in certain cases, for power reactors, and to enable transfers from the United States of small samples of nuclear material to the IAEA for safeguards and research purposes.

Under the proposed Amendment, the term of the Agreement will be extended an additional 40 years for a total term of 95 years.

The Agreement permits the transfer of material, equipment (including reactors), and facilities for nuclear research and nuclear power production. It does not permit transfers of Restricted Data, sensitive nuclear facilities, or major critical components of such facilities, or, unless specifically provided for in a supply agreement or an amendment thereto, transfers of sensitive nuclear technology. In the event of termination of the Agreement, key nonproliferation conditions and controls continue with respect to material, equipment, and facilities subject to the Agreement.

The Amendment entered into force on June 6, 2014.

6. Nuclear Weapon Free Zones and Other Regional Arrangements

On May 6, 2014, Assistant Secretary Countryman delivered remarks at the signing ceremony of the Protocol to the Treaty on a Nuclear-Weapon-Free Zone In Central Asia. His statement is available at *http://usun.state.gov/briefing/statements/225682.htm* and excerpted below.

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On behalf of the United States of America, I am very pleased to sign the Protocol to the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, and to be able to do so here in New York during the Preparatory Committee meeting of the Nuclear Non-Proliferation Treaty (NPT).

It is said often, and I repeat here, that the NPT is the cornerstone of international efforts to prevent the proliferation of nuclear weapons and to pursue effective measures in the direction of nuclear disarmament. As the negotiators of the NPT well understood, regional nuclear weapon free zone treaties contribute greatly to these goals. This is why Article VII of the NPT explicitly ensures a role for such zones. And it is why the United States has signed the Protocols to the treaties establishing regional nuclear weapon free zones in Latin America and the Caribbean, Africa, and the South Pacific, and why the United States is prepared to sign the revised Protocol to the Southeast Asia Nuclear Weapon Free Zone Treaty.

Today, we take yet another—and significant—step to advance nuclear nonproliferation and disarmament by signing the Protocol to the Central Asia Nuclear-Weapons-Free Zone Treaty. I am very pleased to do so with our colleagues from China, France, Russia and the

United Kingdom. That we are signing together signifies our collective support for the NPT and our readiness to offer assurances against the use or threat of use of nuclear weapons against states in the legally binding framework of protocols to nuclear weapon free zone treaties. This is consistent with U.S. policy that it will not use or threaten to use nuclear weapons against non-nuclear weapon States that are party to the NPT and in compliance with their nuclear nonproliferation obligations.

We also take this step in recognition of the sincere and laudable efforts made by the states of Central Asia to keep their region free of all nuclear weapons. This is a goal we most certainly share. This Treaty advances the security of all states represented in this room and wider regional and international security.

With sincere thanks and congratulations to all, this signing is a great achievement.

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On October 27, 2014, Ambassador Robert A. Wood, Alternate Representative for the U.S. delegation to the UN, addressed the First Committee on regional disarmament and security at the 69th UN General Assembly. His remarks, excerpted below, are available at *www.state.gov/t/avc/rls/2014/233458.htm*.

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Reflecting our enduring interest in promoting international peace and prosperity, the United States is strongly committed to strengthening partnerships and cooperation with regional and other inter-governmental organizations. Working with our regional partners, we have seen the fruits of our labors in regions that have enjoyed almost unparalleled periods of peace, prosperity and stability. Years of experience have affirmed that nonproliferation and disarmament initiatives at the global and regional levels are mutually reinforcing. As we all know, effective global norms and instruments are implemented at regional, sub-regional and national levels. At the same time, these efforts can build momentum towards initiatives at the global level.

Mr. Chairman, the United States sees great value in collaborative approaches across the whole spectrum of nonproliferation and arms control initiatives, including conventional arms, biosecurity, and nuclear security. For example, in East Asia, the regional nonproliferation and disarmament architecture has steadily developed and increasingly matured to address the challenges to the global regime. The ASEAN Regional Forum (ARF) just finished its second round of Inter-Sessional Meetings on Nonproliferation and Disarmament focusing on each of the three Nuclear Non-Proliferation Treaty (NPT) pillars. These meetings have led to periodic workshops in the ARF offering opportunities for concrete cooperation on diverse nonproliferation topics such as UN Security Council Resolution (UNSCR) 1540 implementation, nuclear forensics best practices, and biosafety and biosecurity. In addition, the East Asia Summit (EAS) has emerged as a premier forum for discussing regional security and nonproliferation issues, and these issues were featured in multiple workshops devoted to building national capacity and establishing and strengthening regional cooperation.

In the western hemisphere, the Organization of American States (OAS) Member States are working together using workshops and exercises to enhance their bio-incident readiness and response capabilities. These activities serve as a bridge to strengthen coordination between government officials and representatives from a number of agencies involved with emergency response. As a result of the success and benefits of the OAS and the Inter-American Committee against Terrorism (CICTE), the program is expected to expand throughout the region, where Member States have specifically requested further assistance in drafting and/or reviewing their national emergency response plans related to bioterrorism.

Developing partnerships between regions and international organizations is also key to moving ahead. The International Atomic Energy Agency (IAEA) and many Member States deserve a great deal of praise for ongoing efforts to coordinate the application of nuclear techniques to address many development challenges at the regional level, including through the corresponding regional organizations such as ARCAL in Latin America and AFRA in Africa. The United States is proud to continue its strong support for these activities, and has provided roughly $188 million in voluntary contributions since 2010. This includes over $50 million, exceeding our initial pledge to the IAEA Peaceful Uses Initiative that we helped launch just four years ago. We are major supporters of nuclear safety and security through cooperation with the IAEA and with partners in every region of the world, leading efforts to promote high standards for safety and security both in established and emerging nuclear programs.

Mr. Chairman, Parties to the NPT have a common interest in strengthening all three of its pillars: disarmament, nonproliferation, and access to the peaceful uses of the atom. It is important that nuclear-weapon-states (NWS) and non-nuclear-weapon-states (NNWS) see nonproliferation and disarmament not as competing goals but as mutually reinforcing efforts toward the common goal of reducing nuclear threats. All states benefit from these efforts, and we have a common obligation to continue making progress in that direction, step-by-step. In this regard, achieving a successful NPT Review Conference (RevCon) is a priority for the United States. We will work with any and all parties interested in advancing realistic, achievable objectives.

Mr. Chairman, we know from history that strong partnerships take sustained effort. We still have challenges. Many delegations have mentioned proliferation crises in the Middle East and Northeast Asia. It is important that we seek to ensure that parties uphold the integrity of the Treaty by addressing noncompliance. IAEA safeguards benefit the security of every Party and create confidence that enables the fullest possible cooperation in the peaceful uses of nuclear energy. Together, we should ensure that the IAEA has the authority and resources needed to implement safeguards that meet our common expectations.

The United States continues to place high importance on the maintenance of the security structure all of us have worked to develop in Europe after the Cold War. Russia's deliberate and repeated violation of the sovereignty and territorial integrity of Ukraine has undermined security in Europe and beyond. The Open Skies Treaty and the Vienna Document 2011 on confidence- and security-building measures provided some transparency about military activities in Ukraine and western Russia, reflecting the importance of continued implementation and modernization of these agreements. But Russia's failure to respond meaningfully to legitimate inquiries under Vienna Document provisions has undermined their effectiveness. While arms control agreements cannot substitute for adherence to international law and responsible behavior in the international community, in the face of today's security challenges, we and NATO Allies and key partners are committed to finding a way forward to preserve, strengthen, and modernize conventional arms

control, based on key principles and commitments. NATO Allies have also joined with us in calling on Russia to preserve the viability of the Intermediate-Range Nuclear Forces Treaty through ensuring full and verifiable compliance.

Mr. Chairman, the United States is committed to working to bring parties together for the goal of a Middle East Weapons of Mass Destruction (WMD) Free Zone—and we will continue working intensively to convene the Conference as soon as the arrangements can be agreed by the regional parties. There is no substitute for direct dialogue among the states in the region. The conference cannot be imposed by the conveners or facilitator; rather, it must be the regional states themselves that agree on the key points. We remain optimistic that such consensus can be achieved. In every state in the Middle East, there are diplomats who possess vision, creativity and determination, and we will not stop our efforts to work with them in pursuit of this goal.

Mr. Chairman, as we face global challenges together, we should not forget that relationships and interconnections shape our collective work and activities, and we can make real progress. We commend the many regional efforts by states to demonstrate their commitment to all three of the NPT's pillars, including through establishment of nuclear-weapon-free zone treaties in Latin America and the Caribbean, Africa, Southeast Asia, Central Asia, and the South Pacific. These nuclear-weapon-free zones enhance global and regional peace and security, strengthen the global nuclear nonproliferation regime, contribute to the goal of nuclear disarmament, and facilitate regional cooperation in the peaceful uses of nuclear energy. The United States recognizes the important role that we and the other NPT nuclear-weapon states can play by signing and ratifying the relevant treaty protocols, and extending negative security assurances. On May 6 this year, the United States signed the Protocol to the Central Asian Nuclear-Weapon-Free Zone Treaty (CANWFZ); previously we signed protocols for nuclear-weapon-free zones (NWFZ) in Africa and the South Pacific and had ratified the protocols of the NWFZ in Latin America and the Caribbean. The United States is committed to this process and looks forward to signing the Protocol to the Southeast Asian Nuclear-Weapon-Free Zone Treaty (SEANWFZ) as soon as possible. More broadly, the United States has in place a declaratory policy that it will not use or threaten to use nuclear weapons against non-nuclear-weapon-states that are Party to the NPT and in compliance with their nuclear nonproliferation obligations.

Also, consistent with our shared objective of a world free of nuclear weapons, we continue to work toward the goal of seeing South Asia become free of nuclear weapons. To further this goal, the United States has regular ongoing senior level dialogues with officials in the region which cover a range of issues including nonproliferation, disarmament, and regional stability.

Mr. Chairman, as noted in our previous statements, the United States is firmly committed to fulfilling our obligations and working with the international community to take the next steps. The NPT is greater than the sum of its parts, and remains the essential foundation for our common nonproliferation and disarmament goals. Strengthening all aspects of its implementation is critically important. We hope others will approach the 2015 RevCon in this light and focus on agendas that can command consensus.

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7. Nuclear Security

On March 20, 2014, the Governments of the United States of America, Russia, Spain, Republic of Korea, the Netherlands, Australia, and the Kingdom of Morocco released a joint statement on the contributions of the Global Initiative to Combat Nuclear Terrorism ("GICNT") to enhancing nuclear security. The joint statement, excerpted below, is available as a State Department media note at *www.state.gov/r/pa/prs/ps/2014/03/223761.htm*.

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The Global Initiative to Combat Nuclear Terrorism (GICNT) has made valuable contributions in strengthening global capacity to prevent, detect, and respond to nuclear terrorism. To date, the 85 partner nations have completed more than 60 activities under the auspices of the GICNT aimed at building partners' capabilities in this area. We, the Co-Chairs of the GICNT (Russia and the United States), the past and present Implementation and Assessment Group (IAG) Coordinators (Spain and Republic of Korea), and leaders of the three IAG Working Groups (the Kingdom of Morocco, the Netherlands and Australia) wish to inform the states in attendance at the 2014 Netherlands Nuclear Security Summit of the activities of the GICNT since the Nuclear Security Summit hosted by the Republic of Korea in Seoul in March 2012.

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The collaborative efforts fostered by the GICNT are especially significant in light of the 2010 Washington Nuclear Security Summit, the 2012 Seoul Nuclear Security Summit, and the 2014 The Hague Nuclear Security Summit. Already, GICNT collaboration has produced important results that complement the Nuclear Security Summit process and help advance critical elements addressed in the Summit:

The Nuclear Detection Working Group (NDWG), chaired by the Netherlands, is finalizing the Developing a Nuclear Detection Architecture series of documents following the publication of Volume I, Model Guidelines Document for Nuclear Detection Architectures, in 2009. Volume II in the series, Guidelines for Awareness, Training, and Exercises, and Volume III, Guidelines for Planning and Organization, focused on issues inherent to successful implementation and enhancement of nuclear detection architectures. …

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In February 2014, Mexico hosted a field training exercise under the auspices of the NDWG, during which the participants had the opportunity to observe implementation of a radiation detection alarm adjudication process and interagency communications protocol in response to realistic nuclear detection scenarios at the Port of Manzanillo. This exercise highlighted national best practices in detection systems and in coordination of a domestic interagency response to a nuclear terrorism event.

The Nuclear Forensics Working Group (NFWG), chaired by Australia, completed a document entitled, Nuclear Forensics Fundamentals for Policy Makers and Decision Makers, which was endorsed at the GICNT Plenary Meeting in May 2013. …

Also under the auspices of the NFWG, the United Kingdom hosted in January 2014 the "Nuclear Forensics Workshop and Exercise—Exploring the Nuclear Forensics Chain of Custody: Guidance on the Development of Legally Compliant Nuclear Forensics Capabilities and Systems." …

Additionally, awareness-building information modules based on the GICNT Global Initiative Information Portal (GIIP) are in development. Currently, the NFWG is testing a National Nuclear Forensics Library module that provides policy-makers an outline of the national nuclear forensics library concept and identifies key resources for partner nations interested in further information on this subject.

The Response and Mitigation Working Group (RMWG), chaired by the Kingdom of Morocco, is working collaboratively to develop the Response and Mitigation Framework Document, a collection of key considerations that a country with limited capabilities should consider when initializing its national nuclear/radiological emergency response system. …

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In October 2012, the RMWG and NWFG met jointly in Ispra, Italy, to address the intersections of the two working groups in responding to nuclear and radiological events. Based on the success of this joint activity, in February 2014, the NFWG and RMWG jointly held a workshop incorporating the tabletop exercise "Tiger Reef" focused on interagency coordination and training that highlighted best practices and key resources for integrating cross-disciplinary training into national response frameworks. "Tiger Reef" was hosted by Malaysia in Kuala Lumpur and was supported by Australia, New Zealand and Malaysia.

Looking to the future, the GICNT Co-Chairs, the IAG Coordinator and the Working Group Leaders remain committed to working with GICNT partner nations to pursue focused efforts and activities that foster nuclear security collaboration and advance nuclear security goals. Moving forward, the GICNT leadership will seek to engage partner nations in practical exercises and workshops that enable them to prepare for and practice responding to nuclear security events. Such activities will focus on encouraging interagency, regional, and international cooperation and communication, in accordance with the proposals for GICNT work endorsed by the partners at the 2013 Plenary meeting in Mexico City. By enhancing partner nations' capacity to prevent, detect, and respond to nuclear terrorism, GICNT will continue to strengthen nuclear security capabilities globally through efforts that complement and support the objectives of the Nuclear Security Summit.

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8. G-7 Declaration on Non-Proliferation and Disarmament for 2014

On June 5, 2014, the G-7 issued a "Declaration on Non-Proliferation and Disarmament for 2014." The G-7 Declaration follows and is available as a State Department fact sheet at *www.state.gov/t/isn/rls/prsrl/2014/227341.htm*

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1. We are committed to seeking a safer world for all. Preventing the proliferation of weapons of mass destruction (WMD) and their means of delivery remains a top priority. Such proliferation poses a major threat to international peace and security as recognized in UN Security Council Resolutions (UNSCRs) 1540, 1673, 1810, 1887, and 1977. During this tenth anniversary year of UNSCR 1540, we reaffirm our commitment to working together towards full implementation of the resolution by 2021 and to strengthen our efforts to combat the proliferation of nuclear, chemical, and biological weapons and their means of delivery.

2. In seeking this safer world, we reiterate our commitment to create the conditions for a world without nuclear weapons, in accordance with the goals of the Non-Proliferation Treaty (NPT), in a way that promotes international stability, based on the principle of equal and undiminished security for all, and underlining the vital importance of non-proliferation for achieving this goal.

3. We reaffirm our unconditional support for all three pillars of the NPT, which remains the cornerstone of the nuclear non-proliferation regime and the essential foundation for the pursuit of disarmament and the peaceful uses of nuclear energy.

4. We call on all NPT Parties to fulfill their obligations under the Treaty and to preserve and strengthen the international nuclear non-proliferation regime. The 2015 NPT Review Conference presents a vital opportunity for all NPT Parties to further strengthen the Treaty in all its aspects. We recall the successful, consensus outcome of the 2010 NPT Review Conference, including its Action Plan. We remain fully committed to the Action Plan's implementation, and call on all States Parties to implement its actions. In this regard, we welcome and encourage continued engagement of and among the NPT nuclear-weapon States on verification, transparency and confidence-building measures, with a view to strengthening implementation of all three pillars of the NPT. We welcome the April 2014 meeting of China, France, the Russian Federation, the United Kingdom, and the United States (P5) in Beijing, the latest in this ongoing dialogue, and welcome the timely submission of the individual reports made to the third session of the NPT Preparatory Committee in New York in April, 2014, pursuant to Actions 5, 20, and 21 of the Action Plan. We encourage all States Parties, consistent with Action 20 of the Action Plan, to make similar reports.

5. The G7 partners continue to attach great importance to the development of internationally recognized nuclear weapon free zones, established on the basis of agreements freely arrived at among States of the regions concerned, in line with the principles set out by the UN Disarmament Commission in 1999 and recognize the legitimate interest of non-nuclear-weapon States in receiving security assurances from nuclear-weapon States in the framework of the relevant legally binding protocols of nuclear-weapon-free zone treaties. These protocols enhance regional and international security by helping to build confidence between nuclear and non-nuclear weapon states. We welcome the signature of the protocol to the Treaty on a Nuclear Weapon-Free-Zone in Central Asia. We also welcome the commitment of the P5 States to continue to consult with the States Parties to the Treaty on the Southeast Asia Nuclear-Weapon-Free Zone.

6. We reaffirm the importance of commitments and assurances given by the NPT nuclear weapons States to the NPT non-nuclear weapon States. We deplore the recent and ongoing breaches of the commitments given to Ukraine by the Russian Federation in the Budapest Memorandum. In this Memorandum, the Russian Federation, United Kingdom and the United States reaffirmed their commitment to respect Ukraine's independence and sovereignty and existing borders; reaffirmed their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine and that none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations, and reaffirmed their commitment to Ukraine to refrain from economic coercion. We consider that Ukraine's historic decisions in 1994 were significant steps in promoting its own and wider regional and international security. We also welcome Ukraine's statement at the 2014 Non-Proliferation Treaty Preparatory Committee that Ukraine remains committed to the provisions of the NPT.

7. The G-7 strongly support the goal of a zone free of nuclear weapons, as well as other weapons of mass destruction and their means of delivery in the Middle East. Recalling the decision at the 2010 NPT Review Conference to hold a Conference on the establishment of such a zone, we strongly support Finnish Ambassador Laajava's work as facilitator of the Conference, and welcome the continued commitment of the co-sponsors of the 1995 Resolution (the Russian Federation, the United Kingdom and the United States). We call upon the States of the region to continue their direct engagement with each other in order to finalize the preparation and convening of the Conference in the nearest future.

8. While acknowledging the right of withdrawal from the NPT contained in Article X.1, we consider that modalities and measures to address withdrawal from that Treaty are needed as demonstrated by North Korea's announcement of withdrawal. We underscore the role of the UN Security Council in addressing announcements of withdrawal promptly and without delay, assessing the consequences of such withdrawal, including possible adoption of measures in this regard. We also emphasize that a State Party will remain responsible under international law for violations of the NPT committed prior to its withdrawal. We also underscore that nuclear transfers received prior to withdrawal should remain in peaceful uses and subject to IAEA safeguards. We welcome the growing recognition that this issue needs to be addressed urgently at the 2015 Review Conference and we support the adoption of appropriate recommendations on measures that address withdrawal in the Final Document.

Nuclear Proliferation Challenges

9. We underscore our support for E3+3 efforts led by High Representative Ashton to reach a long-term comprehensive solution to the Iranian nuclear issue that resolves fully the international community's concerns regarding the exclusively peaceful nature of Iran's nuclear program and ensures Iran does not acquire nuclear weapons. We welcome the implementation of the Joint Plan of Action (JPOA) between the E3+3 and Iran and the essential role played by the IAEA in verifying the nuclear-related measures. We commend those states which made financial contributions in this context for the monitoring work of the IAEA. We reaffirm our strong support for the IAEA's ongoing efforts to verify the exclusively peaceful nature of Iran's nuclear program and we call on Iran to cooperate fully with the IAEA to resolve all outstanding issues, particularly those which give rise to concerns about the possible military dimensions (PMD) of Iran's nuclear program, the satisfactory resolution of which will be critical for a long-term comprehensive solution to the Iranian nuclear issue.

10. We call on Syria to remedy its noncompliance with its nuclear safeguards obligations, and to cooperate fully with the IAEA in resolving all outstanding questions regarding the nature of its nuclear program.

11. We will not accept North Korea as a nuclear armed state and urge North Korea to abandon all nuclear weapons and existing nuclear programs, and to return, at an early date, to the NPT and to IAEA safeguards and come into full compliance with its nonproliferation obligations. We condemn in the strongest possible terms North Korea's continued development of its nuclear and ballistic missile programs in direct violation of UN Security Council Resolutions 1718, 1874, 2087 and 2094. In this regard, we condemn North Korea's February and March 2014 ballistic missile launches in clear violation of its UNSCR obligations and call on North Korea to refrain from further provocations. We urge North Korea to halt any efforts to restart, readjust, and expand its nuclear facilities at Yongbyon, and cease immediately all nuclear activities including the ones related to its uranium enrichment and plutonium programs. We reaffirm our collective hope for lasting peace and stability on the Korean Peninsula and call on North Korea to refrain from any actions that escalate tensions in the region. We firmly support diplomatic efforts to implement the 2005 Joint Statement and to bring North Korea into compliance with its UN Security Council obligations, and call on North Korea to take concrete steps toward complete, verifiable and irreversible denuclearization. We commend the international community's unified resolve in the face of North Korea's defiance of it and urge continued vigilance by all states to curtail North Korea's proliferation activities and impede the continued pursuit of its proscribed nuclear and ballistic missile programs.

Nuclear Disarmament

12. We encourage the P5 to continue their important dialogue, including on nuclear arms reductions and their work on confidence-building and transparency that represent major steps in accordance with Article VI of the NPT and the Action Plan adopted by the NPT Review Conference in May 2010. We welcome the continued implementation of the New START Treaty by the U.S. and Russia and the disarmament-related actions already made by France and the UK, as well as urge others that possess nuclear weapons but have not yet engaged in nuclear disarmament efforts to reduce their arsenals.

13. Early entry into force and universalization of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) is in the security interests of every nation. States that have yet to sign or ratify the Treaty should do so without waiting for others. For the Treaty to be an effective mechanism for nuclear disarmament and nonproliferation, we believe all States must maintain the political will and provide adequate resources to complete the Treaty's verification regime and maximize the capabilities of the Provisional Technical Secretariat. We welcome the voluntary adherence to unilateral moratoria on nuclear explosive tests and call on all States to refrain from acts which would defeat the object and purpose of the Treaty. We also welcome the establishment of the Group of Eminent Persons and support its activities, which will inject new energy and dynamics into the push for entry into force.

14. The Conference on Disarmament (CD) and its predecessor bodies have a long history of delivering landmark agreements, but we share the growing impatience of many in the international community at the impasse at the CD. We believe the next logical step in multilateral negotiations to advance both nuclear nonproliferation and disarmament goals is the negotiation of a Treaty banning the production of fissile material for use in nuclear or other nuclear explosive devices (FMCT), on the basis of document CD/1299 and the mandate contained therein. While we welcome declared moratoria by some states on the production of

fissile material for use in nuclear weapons or other nuclear explosive devices, a binding and verifiable ban on such production is a necessary step toward a world without nuclear weapons. We welcome the work of the UN Group of Governmental Experts (GGE), which will make recommendations on possible aspects that could contribute to a future Treaty, and can build momentum towards eventual negotiations in the CD.

Peaceful Use of Nuclear Energy

15. All States Parties to the NPT have an inalienable right to use nuclear energy for peaceful purposes, in compliance with their international obligations. We reiterate our willingness to cooperate with States that meet their nuclear non-proliferation obligations and wish to develop a civil nuclear program in a manner that meets the highest standards of safety, security, non-proliferation, and respect for the environment.

16. We urge strong support for implementation of the IAEA's Nuclear Safety Action Plan, including working towards establishing a global nuclear liability regime, and welcome the progress in enhancing the effectiveness of the Convention on Nuclear Safety. We emphasize the importance of the establishment, implementation and continuous improvement of national emergency preparedness and response measures.

17. Multilateral approaches to the nuclear fuel cycle contribute to nuclear energy programs. We support the IAEA's work to establish a bank of Low Enriched Uranium in Kazakhstan and urge the conclusion of a Host State Agreement at an early date in order to allow for the beginning of operation of the bank.

IAEA Safeguards

18. We support the central role of the IAEA, and in particular its safeguards system, which remains essential for the effective implementation of the nuclear non-proliferation regime. The IAEA must continue to have the necessary resources and legal authorities to be able to carry out its mission in full, in accordance with its statutory mandate. We will continue to help promote an IAEA Comprehensive Safeguards Agreement together with an Additional Protocol as the universally accepted international verification standard, which should be a consideration in decisions on the supply of nuclear fuel, equipment, or technology. We call on all States which have not yet done so to sign and bring into force the Additional Protocol and apply its provisions as soon as possible.

Nuclear Security

19. We welcome the outcomes of the Nuclear Security Summit in The Hague on 24-25 March 2014 where 58 world leaders worked to further reduce the threat of nuclear terrorism by securing vulnerable nuclear and other radioactive material around the globe. The Hague Summit participants agreed to a Communique that reaffirms the fundamental responsibility of States, the need to further strengthen and coordinate international cooperation, and the need for a strengthened and comprehensive international security architecture. Many countries agreed to multilateral joint commitments intended to advance the goal of nuclear security. We highlight Belgian and Italian work to complete the removal of their excess supplies of highly enriched uranium and plutonium for elimination, and Japan for announcing that it will work with the United States to eliminate hundreds of kilograms of nuclear material from one of its experimental reactors. We call on others to take additional transparency measures. We also continue to encourage nations to join existing relevant international initiatives that support Summit goals.

20. We urge all States Parties to the Convention on the Physical Protection of Nuclear Material (CPPNM) to ratify, accept or approve the 2005 Amendment to the Convention as soon as possible. In addition to securing nuclear and radiological material at their source, we recognize the need to locate and secure material currently available on the illicit market and prosecute those involved in the trafficking of these materials.

21. We commend the work of the Global Initiative to Combat Nuclear Terrorism and other international efforts to counter nuclear smuggling and combat nuclear terrorism. The ongoing occurrence for more than 20 years of nuclear and radioactive trafficking highlights the threat that terrorists or other malicious actors can acquire these dangerous materials. The international community must be vigilant to prevent the world's most dangerous materials from falling into the wrong hands.

The Nuclear Suppliers Group

22. We welcome the call by the Nuclear Suppliers Group (NSG) on all states to exercise vigilance to ensure that the supply of nuclear related technologies and materials is for peaceful purposes and to make best efforts to ensure that none of their exports of goods and technologies contributes to the spread of nuclear weapons. In this regard, we recognize that the NSG Guidelines serve as the standard for nuclear and nuclear-related dual-use exports. We call on NSG Participating Governments to strictly observe the Guidelines and encourage nuclear supplier states that are not NSG participating governments to act in conformity with the Guidelines on a voluntary basis. We also support the discussion of the Additional Protocol as a condition of supply to enhance nuclear non-proliferation efforts. We welcome the progress that is being made by the Technical Experts Group to ensure that control lists remain current, and we welcome the Group's outreach efforts to enhance non-proliferation. We welcome the membership of Mexico in 2012 and Serbia in 2013.

Chemical Weapons

23. We reaffirm our unconditional support for the Chemical Weapons Convention (CWC) and the functions of the Organization for the Prohibition of Chemical Weapons (OPCW). We applaud the success of the Convention and the awarding of the Nobel Peace Prize to the OPCW for its ongoing work to eliminate an entire class of WMD and toward preventing the re-emergence of chemical weapons. We look forward to continuing the work set out in the final document of the 2013 Review Conference and support efforts to ensure the universalisation and effective implementation of the Convention, and we call on all states not party to the Convention to adhere to it now. Destroying chemical weapons remains a key objective of the Convention together with refraining from the development, production, acquisition, stockpiling, use and proliferation of chemical weapons. We welcome the progress being made by the possessor states as reported recently to the OPCW Executive Council (EC) and Conference of the States Parties. We encourage all possessor states to continue to take every necessary measure to complete their destruction processes as soon as possible in a transparent fashion, and within the framework of the existing verification regime. We reiterate the importance of an effective industry verification regime.

24. We share deep concern over the use of chemical weapons by the Assad regime against its citizens. We share further concern about the more recent allegations of use of a toxic chemical as a weapon in Syria and we support the OPCW fact-finding mission. We urge the regime to cooperate fully with the mission to ensure those who are responsible for such attacks are brought to account. The continued possession of chemical weapons material by the Assad regime represents a sustained danger to Syria's population and all of its neighbors. We support

the full implementation of the OPCW Executive Council Decision of September 27, 2013 and UN Security Council Resolution (2118), which resulted from the Russia U.S. Geneva framework to eliminate Syria's chemical weapons program. We welcome the efforts of the Joint OPCW-UN Mission and the assistance provided by individual States and by the international community at large to support safe elimination of Syria's chemical weapons program. Whilst efforts have been made, the removal process remains behind schedule. We call upon Syria to make sustained efforts in meeting its obligations under the CWC, OPCW EC decisions and UNSCR 2118. International confidence that the program has been completely eliminated requires further review of Syria's declaration of its CW program. Syria must also take immediate steps to physically destroy the remaining 13 chemical production facilities in accordance with the CWC.

Biological Weapons

25. We welcome the work undertaken so far to implement the outcome of the Seventh Review Conference of the Biological and Toxin Weapons Convention (BTWC). We are committed to achieving real progress to promote national implementation, confidence-building measures, and cooperation and assistance, to reviewing developments in science and technology, and to strengthening the Convention's Article VII on responding to use of biological or toxin weapons. We support further exploration or consideration of practical approaches to promote the exchange of best practices, enhance transparency, and build trust among states parties, such as peer review, voluntary transparency visits and briefings, and constructive approaches to raising and addressing concerns where they arise. Such approaches may play a role in strengthening implementation and enhancing assurance of compliance with BWC obligations. We reaffirm our commitment to promote universal membership of the BTWC, and we are determined to work with all the State Parties to reinforce its regime.

Addressing the Proliferation of Weapons of Mass Destruction

26. WMD and delivery means- related export controls by members of the international nonproliferation regimes (Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group) and the Zangger Committee ha[ve] significantly reduced the availability to proliferators of support from countries with the most advanced technology. These controls, and the information-sharing, best practices, and patterns of cooperation fostered by the regimes, have made it more difficult, time-consuming, and costly for proliferators to produce or acquire WMD and their delivery systems. We plan to continue to work through the regimes to reduce the global proliferation threat and urge all countries to unilaterally adopt and apply on a national basis the guidelines and standards of the regimes.

27. We fully support the key role played by the United Nations Security Council in addressing proliferation issues. We welcome the adoption by the Security Council of Resolution 1977, which renewed the mandate of the 1540 Committee for ten years and reaffirmed Resolution 1540's obligations. We invite all States to nominate a national point of contact and to work toward full implementation of UNSCR 1540. We stand ready to provide assistance to States in this regard and we reiterate our support to the 1540 Committee in the discharge of its mandate.

28. We strongly believe that the proliferation of missiles, especially those capable of delivering weapons of mass destruction, continues to be a serious concern to us all and a threat to international peace and security, as reaffirmed in UN Security Council Resolutions 1540, 1887, and 1977. We believe that a multilateral response and international norms are the most adequate and effective way to address this issue. We strongly endorse the MTCR and the Hague Code of Conduct in that regard.

29. We affirm our commitment to the Global Partnership Against the Spread of Weapons and Material of Mass Destruction (Global Partnership) and this commitment remains unwavering. We therefore commend the Global Partnership on its efforts to coordinate and collaborate on programs and activities in the areas of nuclear and radiological security, biological security, chemical security, scientist engagement and countering knowledge proliferation, and in the implementation of UN Security Council Resolution 1540. The Global Partnership has continued its valuable work on engagement with centers of excellence and the expansion of its membership. Since 2013, the Global Partnership has welcomed the Philippines, Hungary and Spain as new members. Members of the Global Partnership also welcome the ongoing participation and closer cooperation of relevant international organizations and bodies in global efforts to improve information sharing and coordination of WMD threat reduction projects. The sub-groups that focused on each of the substantive areas of chemical, biological, nuclear and radiological security helped the Global Partnership improve information sharing, funding and project coordination. The Global Partnership has provided significant funding for the destruction of chemical weapons in Syria. In addition, strengthened matchmaking has begun to enable the Global Partnership to improve coordination of projects globally.

30. We continue to promote robust counter-proliferation tools. We support the Proliferation Security Initiative (PSI). The list of endorsing nations continues to grow, with Vietnam recently being the 104th endorsing nation. We commit to undertake further measures to enhance the capabilities and authorities required to interdict shipments of weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. We promote outreach for enhanced participation in the PSI and continue to focus on legal and operational issues.

Conventional

31. Conventional arms play a legitimate role in enabling governments to defend their citizens, as enshrined in the UN Charter. However, in the wrong hands they pose a threat to global, regional and national security. Improperly controlled, they can fuel terrorism and threaten peace and stability. For this reason, we welcome the adoption of UNSCR 2117 and stress the need for full and effective implementation by States at the national, regional and international levels, of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons. In this context, we also reiterate our support for full implementation of UNSCR 2017 in order to stem arms proliferation from Libya. In addition, the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies contributes to preventing de-stabilizing accumulations of these arms, goods and technologies. We urge those which currently sit outside the regime to make every effort to apply the Wassenaar Arrangement's standards and control lists. Conventional arms agreements and commitments can also address specific regional security concerns. The Vienna Document and Open Skies Treaty have provided useful transparency about military activities in Ukraine and western Russia in recent months, reflecting the importance of continued implementation and modernization of these agreements and commitments.

32. We welcome the rapid progress that has been made towards entry into force of the Arms Trade Treaty since it was opened for signature on 3 June 2013. We call upon States who have not yet done so to join the Treaty as soon as possible. Effective implementation of the Treaty's obligations will contribute to saving lives, reducing human suffering, protecting human rights, preventing the diversion of conventional arms to the illegal market and combating terrorism, while upholding the legitimate trade in arms, which is vital for national defense and

security. We urge States in a position to do so to render assistance in capacity building to enable States Parties needing such assistance to fulfill and implement the Treaty's obligations.

Outer Space

33. Outer space activities continue to play a significant role in the social, economic, scientific, and technological development of states, as well as in maintaining international peace and security. We acknowledge the need to take collaborative, timely, and pragmatic steps to enhance the long-term safety, security, sustainability, and stability of the space environment. In this context, the G-7 supports and encourages constructive discussion on the development and implementation of transparency and confidence building measures to enhance stability in space, taking into account the recommendations of the United Nations Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space. The G7 continues to support ongoing efforts to develop a non-legally-binding International Code of Conduct for Outer Space Activities and strongly encourages completion of the Code in the near future or in the first half of 2015 at the latest. We also support the efforts to complete the United Nations Committee on the Peaceful Uses of Outer Space Guidelines on Long-Term Sustainability for Space Activities in 2015.

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9. International Partnership for Nuclear Disarmament Verification

On May 6, 2014, the United States announced that it was seeking to establish an International Partnership for Nuclear Disarmament Verification. The State Department fact sheet making the announcement is excerpted below and available at *www.state.gov/t/avc/rls/234680.htm*.

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Seeking the peace and security of a world free of nuclear weapons requires the international community to overcome significant technical challenges. As the President said in Prague in 2009, it will take patience and persistence.

In order to overcome these challenges, a common understanding of the technical issues associated with irreversible and verifiable disarmament is necessary, and in the interest of all states.

For this reason, the United States proposes an International Partnership for Nuclear Disarmament Verification that will bring together Nuclear Nonproliferation Treaty (NPT) Nuclear Weapons States (NWS) with NPT Non-nuclear Weapons States (NNWS) under a cooperative framework to further understanding of the complex challenges involved in the verification of nuclear disarmament, and to work to surmount those challenges.

The United States believes such engagement will strengthen the existing work towards the goals of the NPT, while furthering the role of NNWS in the challenging work of verification of nuclear disarmament.

Nuclear Disarmament Verification and Technical Obstacles

Future steps in nuclear disarmament are expected to pose significantly more complex and intrusive verification challenges than past steps. Success in addressing these future verification and monitoring challenges will be dependent, in part, on the development and application of new technologies or concepts. All countries have an interest in the success of these efforts. This need not be an area of engagement confined solely to the NWS. A larger, more diverse group of states with technical expertise in nuclear verification or the related sciences will contribute to the discussion and provide a broader intellectual basis for determining solutions.

The Partnership

The International Partnership for Nuclear Disarmament Verification will assess and, potentially, develop approaches to address monitoring and verification challenges across the nuclear weapons lifecycle—including material production and control, warhead production, deployment, storage, dismantlement, and disposition. The Partnership will build on lessons learned from efforts such as the U.S./U.K. Technical Cooperation Program and the U.K./Norway Initiative.

To take the International Partnership forward, the U.S. government will work with the Nuclear Threat Initiative (NTI) through an official public-private partnership. Drawing from its recently concluded project, Innovating Verification, NTI will bring its expertise and resources to bear to help guide the process of standing up the International Partnership and assist in the development and implementation of a program of work.

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10. Country-Specific Issues

a. Democratic People's Republic of Korea ("DPRK" or "North Korea")

See paragraph 11 in the G-7 declaration, *supra*, regarding condemnation of ballistic missile launches by North Korea in 2014 and ongoing nuclear and missile activities in contravention of UN Security Council resolutions.

b. Iran

On January 12, 2014, Iran and the P5+1 (the permanent five members of the Security Council plus Germany) reached an understanding on the implementation of the Joint Plan of Action ("JPOA"). The technical understandings relate to timing, including which provisions of the JPOA would be implemented immediately and which would be spread out over the period of ongoing negotiations. Among the steps in the JPOA is Iran halting the progress of its nuclear program and rolling it back in key respects. For example, as part of the understanding, Iran began the dilution and conversion of its stockpile, accepted limitations on its enrichment capability and its installation of additional centrifuges, committed to new and more frequent inspections at its nuclear sites (both enrichment facilities and production facilities, including the Arak facility). See January 13, 2014 Background Briefing on the Implementation Plan of the P5+1 and Iran's First

Step Nuclear Agreement, available at *www.state.gov/r/pa/prs/ps/2014/01/219571.htm*. These technical understandings align with the JPOA which took effect January 20, 2014. See *Digest 2013* at 468-71 for background on the JPOA. For discussion of the sanctions relief provided under the JPOA, see Chapter 16. President Obama issued a statement welcoming the understanding reached on implementation of the JPOA. Daily Comp. Pres. Docs. DCPD No. 00014 (Jan. 12, 2014). Secretary Kerry also issued a press statement on January 12, hailing the progress made in preparing for the January 20 implementation date of the JPOA. His statement, excerpted below, is available at *www.state.gov/secretary/remarks/2014/01/219566.htm*.

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We've taken a critical, significant step forward towards reaching a verifiable resolution that prevents Iran from obtaining a nuclear weapon.

On January 20, in just a few short days, we will begin implementation of the Joint Plan of Action that we and our partners agreed to with Iran in Geneva.

As of that day, for the first time in almost a decade, Iran's nuclear program will not be able to advance, and parts of it will be rolled back, while we start negotiating a comprehensive agreement to address the international community's concerns about Iran's program.

Because of the determined and focused work of our diplomats and technical experts, we now have a set of technical understandings for how the parties will fulfill the commitments made at the negotiating table. These understandings outline how the first step agreement will be implemented and verified, as well as the timing of implementation of its provisions.

Iran will voluntarily take immediate and important steps between now and January 20 to halt the progress of its nuclear program. Iran will also continue to take steps throughout the six months to live up to its commitments, such as rendering the entire stockpile of its 20% enriched uranium unusable for further enrichment. As this agreement takes effect, we will be extraordinarily vigilant in our verification and monitoring of Iran's actions, an effort that will be led by the International Atomic Energy Agency.

The United States and the rest of our P5+1 partners will also take steps, in response to Iran fulfilling its commitments, to begin providing some limited and targeted relief. The $4.2 billion in restricted Iranian assets that Iran will gain access to as part of the agreement will be released in regular installments throughout the six months. The final installment will not be available to Iran until the very last day.

While implementation is an important step, the next phase poses a far greater challenge: negotiating a comprehensive agreement that resolves outstanding concerns about the peaceful nature of Iran's nuclear program.

As the United States has made clear many times, our absolute top priority in these negotiations is preventing Iran from obtaining a nuclear weapon. We have been clear that diplomacy is our preferred path because other options carry much greater costs and risks and are less likely to provide a lasting solution.

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On January 20, 2014, the International Atomic Energy Agency ("IAEA") issued a report confirming that Iran had begun implementing the JPOA by taking the initial steps. The United States and its P5+1 partners determined based on Iran's compliance with its responsibilities under the JPOA that they would reciprocate in taking initial steps to implement their commitments under the JPOA. See January 20, 2014 State Department Special Briefing on Iran and Implementation of the JPOA, available at *www.state.gov/r/pa/prs/ps/2014/01/220058.htm*. Specifically, Iran stopped enriching uranium above 5 percent, disabled the interconnections between the cascades being used to enrich up to 20 percent, began the process of diluting half of its stockpile of 20 percent uranium, and provided information to the IAEA required by the JPOA to facilitate increased access to inspect nuclear facilities. See *id*.

Several negotiation sessions were held in 2014 in an effort to reach a final deal. See February 22, 2014 Remarks on Iran by Under Secretary of State Wendy Sherman, available at *www.state.gov/p/us/rm/2014/221923.htm*; March 19, 2014 Background Briefing on EU Coordinated P5+1-Iran Negotiations from Vienna, Austria, available at *www.state.gov/r/pa/prs/ps/2014/03/223712.htm*; April 9, 2014 briefing on talks, available at *www.state.gov/r/pa/prs/ps/2014/04/224624.htm* ; May 16, 2014 briefing, available at *www.state.gov/r/pa/prs/ps/2014/05/226252.htm*; June 16, 2014 briefing, available at *www.state.gov/r/pa/prs/ps/2014/06/227633.htm*; June 20, 2014 briefing, available at *www.state.gov/r/pa/prs/ps/2014/06/228216.htm*. In July, after several weeks of negotiations, the parties decided to extend the JPOA beyond six months until November 24, 2014. See September 18, 2014 briefing, available at *www.state.gov/r/pa/prs/ps/2014/09/231838.htm*. In the September 18, 2014 briefing on the talks, a senior U.S. government official explained the rationale for the extension:

> We made that decision because there had been enough progress to see a path forward; because it's important that Iran's nuclear program not advance further under the terms of the JPOA while we work to negotiate a comprehensive joint plan of action; and because we all know that diplomacy is the best, most enduring way to solve this most pressing security challenge.

After talks concluded on November 24, 2014, the parties agreed to a further seven-month extension. Secretary Kerry held a press conference in Vienna on November 24 to summarize progress in the talks and announce the extension. The Secretary's remarks are excerpted below and available at *www.state.gov/secretary/remarks/2014/11/234363.htm*.

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Now we have worked long and hard not just over these past days but for months in order to achieve a comprehensive agreement that addresses international concerns about Iran's nuclear program. This takes time. The stakes are high and the issues are complicated and technical, and

each decision affects other decisions. There's always an interrelationship, and each decision also deeply affects international security and national interests.

It also takes time to do this because we don't want just any agreement. We want the right agreement. Time and again, from the day that he took office, President Obama has been crystal clear that we must ensure that Iran does not acquire a nuclear weapon, period. And this is not specific to one country; it's the policy of many countries in the world to reduce the numbers of nuclear weapons that exist today and not to allow new ones. And we are engaged in that struggle in many places. And the fact is that even Russia and the United States, who have the largest number, are working hard to reduce that number and to reduce the potential of fissionable nuclear material being available to any additional entity in the world.

President Obama has been just as clear that the best way to do this is through diplomacy, through a comprehensive and durable agreement that all parties can agree to, that all parties are committed to upholding, and whose implementation is not based on trust but on intensive verification. And that is not just because diplomacy is the preferred course; it is also the most effective course.

Diplomacy is also difficult. These talks aren't going to suddenly get easier just because we extend them. They're tough and they've been tough and they're going to stay tough. If it were easier, if views on both sides weren't as deeply held as they are, then we'd have reached a final agreement months or even years ago. But in these last days in Vienna, we have made real and substantial progress, and we have seen new ideas surface. And that is why we are jointly—the P5+1, six nations and Iran—extending these talks for seven months with the very specific goal of finishing the political agreement within four months and with the understanding that we will go to work immediately, meet again very shortly. And if we can do it sooner, we want to do it sooner.

At the end of four months, we have not agreed on the major—if we have not agreed on the major elements by that point in time and there is no clear path, we can revisit how we then want to choose to proceed.

Now we believe a comprehensive deal that addresses the world's concerns is possible. It is desirable. And at this point, we have developed a clearer understanding of what that kind of deal could look like, but there are still some significant points of disagreement, and they have to be worked through.

Now I want to underscore that even as the negotiations continue towards a comprehensive deal, the world is safer than it was just one year ago. It is safer than we were before we agreed on the Joint Plan of Action, which was the interim agreement.

One year ago, Iran's nuclear program was rushing full speed toward larger stockpiles, greater uranium enrichment capacity, the production of weapons-grade plutonium, and ever shorter breakout time. Today, Iran has halted progress on its nuclear program and it has rolled it back for the first time in a decade.

A year ago, Iran had about 200 kilograms of 20 percent enriched uranium in a form that could be quickly enriched into a weapons-grade level. Today, Iran has no such 20 percent enriched uranium—zero, none—and they have diluted or converted every ounce that they had and suspended all uranium enrichment above 5 percent.

A year ago, Iran was making steady progress on the Arak reactor, which, if it had become operational, would have provided Iran with a plutonium path to a nuclear weapon. Today, progress on Arak, as it is known, is frozen in place.

A year ago, inspectors had limited access to Iran's nuclear program. Today, IAEA inspectors have daily access to Iran's enrichment facilities and a far deeper understanding of Iran's program. They have been able to learn things about Iran's centrifuge production, uranium mines, and other facilities that are important to building trust. That's how you build trust, and that's why Iran made the decision to do it. And they've been able to verify that Iran is indeed living up to its JPOA commitments.

All of these steps by Iran and the limited sanctions relief that the international community provided in return are important building blocks to lay the foundation for a comprehensive agreement and they begin to build confidence among nations.

A year ago, we had no idea whether or not real progress could be made through these talks. We only knew that we had a responsibility to try. Today, we are closer to a deal that would make the entire world, especially our allies and partners in Israel and in the Gulf, safer and more secure.

Is it possible that in the end we just won't arrive at a workable agreement? Absolutely. We are certainly not going to sit at the negotiating table forever, absent measurable progress. But given how far we have come over the past year and particularly in the last few days, this is not certainly the time to get up and walk away. These issues are enormously complex. They require a lot of tough political decisions and they require very rigorous technical analysis of concepts. It takes time to work through the possible solutions that can effectively accomplish our goals and that give the leaders of all countries confidence in the decisions that they are being asked to make.

So our experts will meet again very soon. In fact, we will have a meeting in December as soon as possible in order to continue this work and to drive this process as hard as we can. And as the parties continue to negotiate, all of the current restraints on the nuclear program in Iran will remain in place.

Now, let me make it clear: Our goal in these negotiations is not a mystery. It is not a political goal. It is not an ideological goal. It is a practical goal, a goal of common sense, and it is achievable. The United States and our EU and P5+1 partners—the UK, France, Germany, Russia, and China, a group of nations that doesn't always see eye to eye—agree unanimously about what a viable agreement would need to look like.

First and foremost, the viable agreement would have to close off all of the pathways for Iran to get fissile material for a nuclear weapon. A viable agreement would have to include a new level of transparency and verification beyond the expanded access that we've had under the JPOA. And as these conditions are met, a viable agreement would also include for Iran relief from the international nuclear-related sanctions that help to bring them to the table to negotiate in the first place.

And because of the nature of these talks, we should not— and I emphasize we will not— in the days ahead discuss the details of the negotiations. And we're doing that simply to preserve the space to be able to make the choices that lie ahead. But I can tell you that progress was indeed made on some of the most vexing challenges that we face, and we now see the path toward potentially resolving some issues that have been intractable.

I want to also emphasize: This agreement, like any agreement, regarding security particularly, cannot be based on trust because trust can't be built overnight. Instead, the agreement has to be based on verification, on measures that serve to build confidence over time. And I want to make it even further clear to everybody here we really want this to work—but not at the cost of just anything. We want to reach a comprehensive deal and we want it to work for

everybody. And we want the people of Iran to get the economic relief that they seek and to be able to rejoin the international community.

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c. Russia and Ukraine

On March 5, 2014, U.S. Secretary of State John Kerry met in Paris with U.K. Foreign Secretary William Hague and Acting Ukraine Foreign Minister Andriy Deshchystsia to discuss the Budapest Memorandum, a document signed by the United States, the United Kingdom, Ukraine, and Russia in 1994. The Russian Federation was invited, but declined to attend the meeting. In the meeting, the governments of the United States, United Kingdom, and Ukraine discussed measures to restore Ukraine's territorial integrity, including direct talks between Ukraine and Russia and deployment of international observers to eastern Ukraine and Crimea.

On March 25, 2014, the United States and Ukraine issued a Joint Statement rejecting Russia's purported annexation of Crimea. The Joint Statement follows and is available at www.whitehouse.gov/the-press-office/2014/03/25/joint-statement-united-states-and-ukraine.

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On the occasion of the third Nuclear Security Summit in The Hague, the United States and Ukraine today reaffirm their strategic partnership and emphasize the important role of nuclear nonproliferation in that relationship. The United States values its 20-year partnership with Ukraine on these issues. Our nonproliferation partnership dates from Ukraine's 1994 decision to remove all nuclear weapons from its territory and to accede to the Treaty on the Non-Proliferation of Nuclear Weapons as a non-nuclear-weapon state. In the 1994 Budapest Memorandum, the United States, the Russian Federation, and the United Kingdom of Great Britain and Northern Ireland welcomed these Ukrainian actions, and they reaffirmed their commitment to Ukraine to respect the independence, sovereignty, and existing borders of Ukraine. The United States government reaffirms that commitment today to the new Ukrainian government and the people of Ukraine, including in Crimea. The United States government condemns Russia's failure to abide by its commitments under the Budapest Memorandum with its unilateral military actions in Ukraine. Russia's actions undermine the foundation of the global security architecture and endanger European peace and security. Ukraine and the United States emphasize that they will not recognize Russia's illegal attempt to annex Crimea. Crimea is an integral part of Ukraine. The United States will continue to help Ukraine affirm its sovereignty and territorial integrity. As the people of Ukraine work to restore unity, peace, and security to their country, the United States will stand by their side.

The United States and Ukraine reiterate their commitment to upholding their nuclear nonproliferation commitments. The United States recognizes the importance of the 2012 removal of all highly enriched uranium from Ukraine. This removal again highlighted Ukraine's leadership in nuclear security and nonproliferation, as we collectively work together to secure the

world's vulnerable nuclear material. As part of its support for this effort, the United States committed in 2010 to work with Ukraine to construct a Neutron Source Facility at the Kharkiv Institute for Physics and Technology. This month construction of the Neutron Source Facility was completed. The facility, equipped with the most up-to-date technology to operate at the highest safety standards, provides Ukraine with new research capabilities and the ability to produce industrial and medical isotopes for the benefit of the Ukrainian people.

This state of the art facility is representative of the modern, European state the Government of Ukraine is committed to building. To build on this important cooperation, the United States will continue to provide technical support for the Neutron Source Facility as Ukraine completes the necessary final equipment installation, testing, and start-up to make the facility fully operational as soon as practical.

This successful effort reflects broad U.S.-Ukrainian cooperation on nuclear security and nonproliferation. Our countries recently extended the U.S.-Ukraine Cooperative Threat Reduction (CTR) Umbrella Agreement and the U.S.-Ukraine Agreement Concerning Operational Safety Enhancements, Risk Reduction Measures, and Nuclear Safety Regulation for Civilian Nuclear Facilities in Ukraine.

The United States and Ukraine intend to continue to partner to prevent nuclear proliferation by improving Ukraine's ability to detect nuclear materials on its borders, to provide physical protection at sites with nuclear or radioactive materials, and to maintain an adequate export control system in order to help realize the goals of the Nuclear Security Summits.

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On April 28, 2014, in remarks during the PrepCom at a session hosted by the Permanent Mission of Ukraine to the UN, Assistant Secretary Countryman addressed the topic of lessons learned from Ukraine's renunciation of nuclear weapons. Assistant Secretary Countryman's remarks are excerpted below and available at *www.state.gov/t/isn/rls/rm/2014/225346.htm*.

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Budapest Memorandum Commitments

In the 1994 Budapest Memorandum, the United States, Russia, and the United Kingdom made a commitment to respect the independence, sovereignty, and existing borders of Ukraine. The United States government remains committed to the Budapest Memorandum.

Our partnership with Ukraine goes back many years, and is particularly strong in the area of nonproliferation. We appreciate Ukraine's continued leadership in this area.

Ukraine's Nonproliferation Record

This year marks the twentieth anniversary of Ukraine's historic decision to remove the third largest stockpile of nuclear weapons in the world from its territory and to accede to the Nuclear Nonproliferation Treaty as a non-nuclear-weapon state. Ukraine's unwavering commitment to its obligations under the NPT demonstrates that when a country places itself squarely within the NPT and diligently adheres to all of the Treaty's obligations, all nations benefit.

Since 1994, Ukraine has a strong record of supporting nuclear nonproliferation and threat reduction. With support from the "Nunn-Lugar" Cooperative Threat Reduction program, Ukraine dismantled an enormous stockpile of ICBMs, heavy bombers, and related delivery systems. In 2004, it began an augmented program with the U.S. Department of Defense that includes weapons of mass destruction proliferation prevention and border security initiatives. By hosting the multilateral Science and Technology Center in Ukraine (STCU), Ukraine has engaged over 20,000 scientists from the former Soviet weapons program in peaceful activities. The United States has been proud to be a partner in those efforts.

Ukraine brought its IAEA safeguards agreement into force in 1995; it signed the Additional Protocol in 2000 and brought it into force in 2006. Ukraine joined the Global Partnership against the spread of WMD in 2005, in 2007 it was one of the first countries to join the Global Initiative to Combat Nuclear Terrorism. Ukraine participated actively in all three Nuclear Security Summits. In 2012, Ukraine fulfilled its pledge to remove all highly enriched uranium from Ukraine, a highlight of the 2012 Summit.

In 2013, we extended the U.S.-Ukraine Cooperative Threat Reduction Umbrella Agreement for another seven years, as well as an agreement to increase safety and risk reduction at civilian nuclear facilities in Ukraine. Recent events in Ukraine underline the importance of bringing to closure to the legacy of Chernobyl by finishing construction of a landmark shelter to durably protect the population and environment, a project to which the United States has pledged approximately $337 million. Last month, a joint U.S. – Ukraine project to construct a Neutron Source Facility at the Kharkiv Institute for Physics and Technology was completed, providing Ukraine with new research capabilities and the ability to produce industrial and medical isotopes. In short, U.S. – Ukrainian cooperation on nuclear security and nonproliferation is broad and deep.

U.S. Commitment to Nonproliferation

We applaud Minister of Foreign Affairs Deshchytsia's reaffirmation of Ukraine's longstanding commitment to its nonproliferation obligations at the Nuclear Security Summit last month. Like Ukraine, the United States is committed to achieving the peace and security of a world without nuclear weapons. This is a central element of President Obama's nuclear agenda. There is a long road ahead, but we are working to create the conditions for its eventual achievement. As President Obama said in Berlin in June, 2013, the United States can ensure its security and that of its allies while safely pursuing further nuclear reductions with Russia of up to one-third in the deployed strategic warhead level established in the New START Treaty.

As next steps toward nuclear disarmament, the United States remains committed to pursuing entry into force of the Comprehensive Nuclear-Test-Ban Treaty and consensus to start negotiations on a Fissile Material Cutoff Treaty.

I would like to highlight the work done at the P5 Conference earlier this month in Beijing toward implementing the Action Plan adopted at the 2010 NPT Review Conference

The NPT serves as a key element of international security and the basis for international nuclear cooperation. We will continue to address the serious challenges of cases of noncompliance with Treaty obligations, and will continue to support expanding access to the peaceful uses of nuclear energy. We look forward to a productive Preparatory Committee meeting, and reaffirm our commitment to ensuring the Treaty's contributions to international peace and security are strengthened.

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d. Republic of Korea

The existing U.S.-R.O.K. Agreement for Peaceful Nuclear Cooperation Agreement was signed in 1973, entered into force in 1974, and was set to expire on March 19, 2014. As discussed in *Digest 2013* at 677-680, the United States and Republic of Korea decided to extend the existing agreement to allow for continued negotiations of a new agreement. The existing agreement predates the 1978 Nuclear Nonproliferation Act, requiring that Congress take legislative action to permit the extension of an agreement that is not compliant with current law. On January 28, the House passed the needed legislation authorizing the President to extend the existing agreement and the President signed it into law on February 12, 2014 (P.L. 113-81).

On March 18, 2014, the United States and the Republic of Korea concluded an agreement extending the duration of the existing Agreement for Peaceful Nuclear Cooperation until March 19, 2016. The extension entered into force immediately. See March 18, 2014 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/03/223657.htm*. The media note includes the following:

> The United States and the R.O.K. are pleased that the extension of the existing agreement will allow our two sides to continue our extensive and long-standing bilateral cooperation on the peaceful uses of nuclear energy in an environmentally responsible manner. The two-year extension will also provide additional time for the two sides to complete negotiations on a successor nuclear cooperation agreement.

e. Taiwan

On January 7, 2014, President Obama transmitted to Congress, pursuant to sections 123b. and 123d. of the Atomic Energy Act of 1954 as amended (42 U.S.C. § 2153(b), (d)), the text of a proposed Agreement for Cooperation between the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") Concerning Peaceful Uses of Nuclear Energy. Cong. Rec. H8-9 (Jan. 7, 2014); Daily Comp. Pres. Docs. DCPD No. 00006 (Jan. 7, 2014). The agreement entered into force June 22, 2014 after the required 90 days of continuous session for congressional review had passed. The President's transmittal included the following statement about the agreement:

> The proposed Agreement provides a comprehensive framework for peaceful nuclear cooperation with the authorities on Taiwan based on a mutual commitment to nuclear nonproliferation. The proposed Agreement has an indefinite term from the date of its entry-into- force, unless terminated by either

party on 1 year's written notice. The proposed Agreement permits the transfer of information, material, equipment (including reactors), and components for nuclear research and nuclear power production. The Agreement also specifies cooperation shall be in accordance with the provisions of the Agreement and applicable legal obligations, including, as appropriate, treaties, international agreements, domestic laws, regulations, and/or licensing requirements (such as those imposed by the NRC in accordance with 10 CFR 110 and the Department of Energy in accordance with 10 CFR 810). It does not permit transfers of Restricted Data, sensitive nuclear technology and facilities, or major critical components of such facilities. The proposed Agreement also prohibits the possession of sensitive nuclear facilities and any engagement in activities involving sensitive nuclear technology in the territory of the authorities represented by TECRO. In the event of termination of the proposed Agreement, key nonproliferation conditions and controls continue with respect to material, equipment, and components subject to the proposed Agreement.

Over the last two decades, the authorities on Taiwan have established a reliable record on nonproliferation and on commitments to nonproliferation. While the political status of the authorities on Taiwan prevents them from formally acceding to multilateral nonproliferation treaties or agreements, the authorities on Taiwan have voluntarily assumed commitments to adhere to the provisions of multilateral treaties and initiatives. The Republic of China ratified the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1970 and ratified the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (the "Biological Weapons Convention" or "BWC") in 1972. The authorities on Taiwan have stated that they will continue to abide by the obligations of the NPT (i.e., those of a non-nuclear-weapon state) and the BWC, and the United States regards them as bound by both treaties. The authorities on Taiwan follow International Atomic Energy Agency standards and directives in their nuclear program, work closely with U.S. civilian nuclear authorities, and have established relationships with mainland Chinese civilian authorities with respect to nuclear safety. …

f. Vietnam

On February 24, 2014, President Obama made the determination pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended, (42 U.S.C. § 2153(b)), that performance of the proposed Agreement for Cooperation Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam Concerning Peaceful Uses of Nuclear Energy "will promote, and will not constitute an unreasonable risk to, the common defense and security." 79 Fed. Reg. 12,655 (Mar. 6, 2014). The President considered the proposed Agreement along with the views, recommendations, and statements of interested government agencies. The

Federal Register notice also includes the President's approval and authorization as follows: "Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2153(b)), I hereby approve the proposed Agreement and authorize the Secretary of State to arrange for its execution." *Id*.

On May 8, 2014, the President transmitted the proposed 123 Agreement with Vietnam to Congress. Daily Comp. Pres. Docs. DCPD No. 00344 (May 8, 2014). Excerpts below are from the President's message to Congress transmitting the proposed Agreement. The agreement entered into force on October 3, 2014 after the required 90-day period of congressional review.

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The proposed Agreement provides a comprehensive framework for peaceful nuclear cooperation with Vietnam based on a mutual commitment to nuclear nonproliferation. Vietnam has affirmed that it does not intend to seek to acquire sensitive fuel cycle capabilities, but instead will rely upon the international market in order to ensure a reliable nuclear fuel supply for Vietnam. This political commitment by Vietnam has been reaffirmed in the preamble of the proposed Agreement. The Agreement also contains a legally binding provision that prohibits Vietnam from enriching or reprocessing U.S.-origin material without U.S. consent.

The proposed Agreement will have an initial term of 30 years from the date of its entry into force, and will continue in force thereafter for additional periods of 5 years each. Either party may terminate the Agreement on 6 months' advance written notice at the end of the initial 30 year term or at the end of any subsequent 5-year period. Additionally, either party may terminate the Agreement on 1 year's written notice. I recognize the importance of executive branch consultations with the Congress regarding the status of the Agreement prior to the end of the 30-year period after entry into force and prior to the end of each 5-year period thereafter. To that end, it is my strong recommendation that future administrations conduct such consultations with the appropriate congressional committees at the appropriate times.

The proposed Agreement permits the transfer of information, material, equipment (including reactors), and components for nuclear research and nuclear power production. It does not permit transfers of Restricted Data, sensitive nuclear technology, sensitive nuclear facilities, or major critical components of such facilities. In the event of termination of the Agreement, key nonproliferation conditions and controls continue with respect to material, equipment, and components subject to the Agreement.

Vietnam is a non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons. Vietnam has in force a comprehensive safeguards agreement and an Additional Protocol with the International Atomic Energy Agency. Vietnam is a party to the Convention on the Physical Protection of Nuclear Material, which establishes international standards of physical protection for the use, storage, and transport of nuclear material, and has ratified the 2005 Amendment to the Convention. A more detailed discussion of Vietnam's intended civil nuclear program and its nuclear nonproliferation policies and practices, including its nuclear export policies and practices, is provided in the NPAS and in a classified annex to the NPAS submitted to you separately. As noted above, the Director of National Intelligence will

provide an addendum to the NPAS containing a comprehensive analysis of Vietnam's export control system with respect to nuclear-related matters.

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g. United Kingdom

On July 24, 2014, the President transmitted to Congress the text of an amendment to the Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Uses of Atomic Energy for Mutual Defense Purposes of July 3, 1958, as amended (the "U.S.-U.K. Mutual Defense Agreement"). The transmittal, pursuant to Section 123d. of the Atomic Energy Act, included the President's written approval, authorization, and determination concerning the amendment. The President's message to Congress transmitting the amendment is available at *www.whitehouse.gov/the-press-office/2014/07/24/message-congress-amendment-between-united-states-and-united-kingdom-grea*, and includes the following explanation of the effect of the amendment and the basis for the President's determination that it is in the national interest:

> The Amendment extends for 10 years (until December 31, 2024), provisions of the 1958 Agreement that permit the transfer between the United States and the United Kingdom of classified information concerning atomic weapons; nuclear technology and controlled nuclear information; material and equipment for the development of defense plans; training of personnel; evaluation of potential enemy capability; development of delivery systems; and the research, development, and design of military reactors. Additional revisions to portions of the Amendment and Annexes have been made to ensure consistency with current United States and United Kingdom policies and practice regarding nuclear threat reduction, naval nuclear propulsion, and personnel security.
>
> In my judgment, the Amendment meets all statutory requirements. The United Kingdom intends to continue to maintain viable nuclear forces into the foreseeable future. Based on our previous close cooperation, and the fact that the United Kingdom continues to commit its nuclear forces to the North Atlantic Treaty Organization, I have concluded it is in the United States national interest to continue to assist the United Kingdom in maintaining a credible nuclear deterrent.

On November 19, 2014, the U.S. House of Representatives passed H.R. 5681, which provided authorization for the Amendment to the U.S.-U.K. Mutual Defense Agreement to be brought into effect notwithstanding the provisions for congressional consideration of a proposed agreement for cooperation in 123d. of the Atomic Energy Act of 1954 (42 U.S.C. § 2153). The Senate approved the bill on December 3, 2014, and the President signed it into law on December 19, 2104. P.L. No. 113-228. The Amendment entered into force on December 17, 2014.

C. IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTION 1540

On April 29, 2014, Nayyera Haq, acting spokesperson for the U.S. Mission to the United Nations, delivered a statement on the ten year anniversary of UN Security Council Resolution 1540. Her remarks are excerpted below and available in full at *http://usun.state.gov/briefing/statements/225417.htm*.

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Ten years ago this week, the United States co-sponsored and the UN Security Council unanimously adopted Resolution 1540. This seminal resolution legally binds all states to take a wide range of measures to combat the proliferation of nuclear, chemical, and biological weapons and their means of delivery, especially to terrorists and other non-state actors. Since then, the resolution has had a profoundly positive impact in reducing the vulnerability this threat posed to international peace and security.

Dozens of countries, including the United States, have adopted or adapted laws, regulations, policies, and programs to comply with the more than two hundred individual obligations of the resolution, while more than forty international, regional, and sub-regional organizations have incorporated elements of the resolution into their mandates and work programs, such as the G8 Leaders' 2011 decision to expand the mandate of the Global Partnership Against the Spread of Weapons and Materials of Mass Destruction to include implementation of the resolution.

The United States remains resolute in its support for full implementation of the resolution. As shown in its most recent report to the 1540 Committee, the United States meets or exceeds international standards in implementing its obligations under the resolution. It also has an expansive range of programs to help other States implement the resolution.

Despite this good news, much work remains. Many States, for example, need to take still more steps to secure related materials, control sensitive exports, or prevent the financing of proliferation. Even where States have taken actions, they must remain cognizant of the emergence of new technologies or changes in the international community that terrorists and other criminals might abuse to acquire nuclear, chemical, or biological weapons. Recognizing this challenge, President Obama has fostered several initiatives, such as advancing the Global Health Security Agenda, which seeks to accelerate the capacity of States to prevent, detect and respond to biological threats, and initiating the Nuclear Security Summit process, which strengthens the development of a comprehensive nuclear security architecture. The United States reiterates its support for full implementation of the resolution, including the work of the 1540 Committee.

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On May 7, 2014, Ambassador Rosemary DiCarlo, U.S. Deputy Permanent Representative to the UN, delivered remarks at a Security Council debate on Resolution 1540. Her statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/225738.htm*.

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My government is pleased to join in commemorating the 10th anniversary of UN Security Council Resolution 1540 and in adopting a Presidential Statement regarding our continued commitment to the goals of that landmark measure.

Over the past year, we have been reminded of the horror that can result when weapons of mass destruction are used. Resolution 1540 was designed to minimize that possibility through concerted international action to prevent the proliferation of nuclear, chemical, and biological arms and their means of delivery, especially to non-state actors, including terrorists.

In 2004, working with many of you, my government crafted a resolution specifying some two hundred technical and legal obligations every state should undertake to make proliferation riskier for those who attempt it and easier to detect and stop when they do.

Since Resolution 1540 was adopted, the 1540 Committee has identified hundreds of additional measures States on every continent have taken to prohibit WMD proliferation activities, secure sensitive related materials, and combat illicit trafficking of such items in response to the obligations the resolution created. Fifteen international organizations and almost four dozen countries, including my own, have registered as "assistance providers." When a country, in order to meet its obligations, requests help, we are prepared to provide it. Regional groups – such as the AU, EU, OAS, and OSCE have incorporated elements of the resolution into their mandates and daily work.

Nonproliferation has also become a major goal for civil society. As Secretary-General Ban Ki-moon remarked last week, the resolution has become a "key component of the global security architecture."

Accordingly, I commend the efforts of the Council's 1540 Committee including its current and highly effective chair, the Republic of Korea. Since its creation, the committee has done an excellent job of coordinating the global effort to implement this vital resolution.

Looking ahead, we know that there remains much more that we can and must do. Stopping the spread of nuclear, biological and chemical weapons is not one of those fields where a "pretty good" record is enough. The potential consequences of failure anywhere and at any time could be catastrophic.

Recognizing this challenge, President Obama established the Nuclear Security Summit process. During the third Summit in March in the Hague, over 30 countries produced a joint statement calling for full global implementation of the nuclear security elements of Resolution 1540 prior to the Council's next comprehensive review in 2016, a welcome sign that global vigilance is high and that we are determined to work cooperatively to protect our citizens.

The imperative now is to continue moving forward with the tasks outlined a decade ago. Each state must identify its own vulnerabilities and gaps in implementation. Each must develop a plan for next steps based on a clear sense of priorities for action. Any state that lacks the capacity to take needed measures should request help. States and organizations that are in the position to

assist should do so. Everyone involved should be open to sharing useful information on a timely basis.

The United States is committed to doing its part. As shown in its most recent report to the 1540 Committee, my government meets or exceeds international standards in implementing all of its obligations. The report documents dozens of measures taken since 2004 that are designed to implement the resolution's goals.

On the financial side, the United States has contributed $4.5 million to the UN trust fund to support Resolution 1540. This is in addition to numerous bilateral aid projects. We have also emphasized the importance of helping states to draft effective laws to criminalize and prosecute activities that enable proliferation to take place. We are pleased that the 1540 Committee has begun working with parliamentarians, including the Inter-Parliamentary Union, to organize this assistance.

Mr. President, the widespread availability of information is a defining characteristic of our age. There are many benefits to this, but one of the dangers is that people who wish to inflict great harm on others have access to the knowledge that would allow them to do so. This is especially the case with respect to biological agents which are often able to reproduce themselves, meaning that a proliferator need only acquire a small amount of a pathogen to pose a large risk. For this reason, my government proposes that special emphasis be placed on improving the design of national and global approaches to the problem of bio-security, and one way to do so is to promote the Global Health Security Agenda.

We recognize that terrorists and other proliferators will employ new technologies and methods to gain access to prohibited materials and to avoid detection in transporting and possibly using them. In response, we cannot afford to be complacent. A security system that was adequate five years ago may not be sufficient now; and today's good system may be obsolete within a few years.

In closing, Mr. President, I emphasize the global nature of the threat addressed by Resolution 1540. This includes chemical weapons of the type so ruthlessly deployed against civilians in Syria; toxins sent through the mail in the United States; the complicity of some governments in proliferation, including that of the Democratic People's Republic of Korea; and the knowledge that terrorist and militant groups in many parts of the world have actively sought to acquire the means to produce WMD. With this threat always before us, we must proceed with renewed vigor to implement Resolution 1540 fully, cooperatively, and urgently. Thank you.

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D. PROLIFERATION SECURITY INITIATIVE

On May 22, 2014, the United States welcomed the Government of Vietnam's support of the Statement of Interdiction Principles of the Proliferation Security Initiative ("PSI"). A May 22 State Department media note, available at *www.state.gov/r/pa/prs/ps/2014/05/226449.htm*, indicates that Vietnam announced its decision to support and participate in the PSI on May 20, 2014, demonstrating "its strong commitment to stopping the proliferation of weapons of mass destruction (WMD), enhancing the security and safety of global trade, and promoting a peaceful

Asia-Pacific region." For background on the PSI, see *Digest 2003* at 1095-1100 and www.state.gov/t/isn/c10390.htm.

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E. CHEMICAL AND BIOLOGICAL WEAPONS

1. Chemical Weapons

Efforts continued in 2014 to rid Syria of its chemical weapons. On January 30, 2014, Ambassador Robert P. Mikulak, head of the United States Delegation to the Executive Council of the Organization for the Prohibition of Chemical Weapons ("OPCW"), delivered remarks to the OPCW's Executive Council on difficulties encountered in those efforts. Ambassador Mikulak's statement is excerpted below and available at www.state.gov/t/avc/rls/2014/220783.htm.

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Since the last meeting of this Council on January 8th, the effort to remove chemical agent and key precursor chemicals from Syria has seriously languished and stalled. To date, only four percent of the Priority One chemicals declared by the Syrian Arab Republic have been removed, and roughly the same small percentage of the Priority Two chemicals. Let us not forget that this Council on November 15th of last year adopted specific timelines for the elimination of Syria's chemical weapons program, which required that 100 percent of the Priority One chemicals be removed from Syria by 31 December. The United States recognizes that 31 December was an ambitious goal for completing removal of the many tons of Priority One chemicals. However, the Syrian Arab Republic had not even begun the transport of Priority One chemicals to Latakia by 31 December, despite urgings from the Joint Mission Special Coordinator to "intensify" its preparation efforts.

…Today we are one month past the 31 December completion date set by the Council. Almost none of the Priority One chemicals have been removed, and the Syrian government will not commit to a specific schedule for removal. This situation will soon be compounded by Syria's failure to meet the February 5th completion date set by this Council for the removal of all Priority Two chemicals. Syria has said that its delay in transporting these chemicals has been caused by "security concerns" and insisted on additional equipment—armored jackets for shipping containers, electronic countermeasures, and detectors for improvised explosive devices. These demands are without merit, and display a "bargaining mentality" rather than a security mentality.

The Joint Mission and the OPCW Technical Secretariat have rightly concluded that the additional equipment demanded by Syria is not needed for the safe transport of the chemicals to Latakia. And let us not forget that that these chemicals have often been moved during the ongoing conflict without such equipment, demonstrating that Syria has been able to ensure sufficient protection to date with its current capabilities, and without this additional "wish list" of equipment. As Secretary-General Ban said recently, "...the Syrian Arab Republic has

sufficient material and equipment necessary to carry out multiple ground movements to ensure the expeditious removal of chemical weapons material." Secretary-General Ban added that "...it is imperative that the Syrian Arab Republic now examines the situation, intensifies its efforts to expedite in-country movements of chemical weapons material, and continues to meet its obligations" under UN Security Council Resolution 2118 and the OPCW Executive Council decisions.

…Syria's requests for equipment and open-ended delaying of the removal operation could ultimately jeopardize the carefully timed and coordinated multi-state removal and destruction effort. For our part, the international community is ready to go, and the international operation to remove the chemicals is fully in place and ready to proceed once Syria fulfills its obligation to transport the chemicals to Latakia. On Monday, the U.S. ship Cape Ray set sail from Norfolk, Virginia, and will be in the Mediterranean shortly. The delay by Syria is increasing the costs to nations that have made donations for shipping, escort, and other services related to the removal effort.

…The United States is deeply concerned about the failure of the Government of Syria to transport to Latakia all of the chemical agent and precursors as mandated by OPCW Executive Council decisions.

After missing the December 31, 2013, target date, the first movement of chemical agents took place on January 7, 2014. It took another three weeks, until January 27, 2014, for another shipment to take place. Syria must immediately take the necessary actions to comply with its obligations under the Chemical Weapons Convention, Executive Council decisions, and UN Security Council Resolution 2118.

It is imperative that the removal effort be conducted with regularity, rather than after long intervals. In order for obligations to be kept, it is essential that the Syrian government establish a plan that will give the international community confidence that movements will be made regularly. There should be no doubt that responsibility for the lack of progress and increasing costs rests solely with Syria. In the report for this meeting, the Council should express "deep concern" over Syria's delays in implementation of its chemical weapons elimination obligations and call for the transport of all chemicals to Latakia for removal without any further delay.

…At this meeting, there is yet another serious issue involving the Syrian Arab Republic which must be addressed by this Council—the destruction of Syrian chemical weapons production facilities. Syria has proposed that seven hardened aircraft hangars and five underground structures previously used in connection with the production of its chemical weapons be "inactivated" and rendered inaccessible, for example, by welding doors shut and constructing interior obstacles. These proposed measures are readily reversible within days and clearly do not meet the requirement of "physically destroyed" as provided for by the Convention and the precedents for implementing that requirement.

…With respect to the hangars, the United States is willing to explore an approach which would entail collapsing the roof, rendering them "physically destroyed" in line with the Convention.

The tunnels are a more challenging destruction problem that is complicated by Syria's revision of its initial declaration. In its conversion proposal, Syria declared the entire interior space of the tunnel as a CWPF. When its conversion proposal was rightfully rejected by this Council, Syria revised its declaration to encompass only a small fraction of the interior space of the tunnels. It is clear that Syria got it right the first time and its revised declaration lacks credibility. With respect to meeting the requirement for physical destruction, the United States

has concluded that the entire tunnel need not be collapsed or filled. Instead, we would propose that the tunnel portals be collapsed and the overall structural integrity of the tunnels be compromised at key junctures.

This Council must reject Syria's proposal to "inactivate" its hangar and tunnel CWPFs, rather than physically destroying them as the CWC requires. The United States invites Council members to review the analysis and proposals contained in our recently circulated national paper.

…This Council has before it several important decisions that once again underline the commitment of the international community to make an extraordinary effort to destroy Syrian chemical weapons. One is to approve a Model Agreement produced by the Technical Secretariat related to contract arrangements with commercial companies selected for the destruction of Syrian chemicals outside Syria. My delegation supports the Decision.

The selection of the companies will be soon completed by the Technical Secretariat on the basis of a tender process conducted in accordance with international bidding standards. To further support the Technical Secretariat's efforts, the decision before us also gives formal and specific authority to the Director General to conclude, in consultation with the relevant States Parties, commercial contracts for the destruction of the chemicals. This authorization is fully consistent with the Council's wishes, previously recorded in EC-M-34/Dec.1 and EC-M-36/Dec.2.

The Council also has before it a request for the approval of the verification measures for the destruction of isopropanol in Syria, as called for in EC-M-34/Dec.1. My delegation supports the verification plan as submitted.

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Ambassador Mikulak again addressed the OPCW Executive Council on February 21, 2014. His statement is excerpted below and available at *www.state.gov/t/avc/rls/2014/221891.htm*.

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In the three weeks since this Council last met, there has been progress in eliminating the isopropanol in Syria and in transporting limited quantities of the stabilizer hexamine to Latakia. The fact remains, however, that 95.5 percent of Priority One chemicals—CW agent and key binary precursors—remain in Syria as well as 81.1 percent of Priority Two chemicals, well beyond the dates set for removal by the Executive Council. And the Syrian Government continues to put its energy into excuses, instead of actions.

Regrettably, this Council at its January 30th meeting failed to address Syria's unacceptable delay in completing removal of all designated chemicals. Why? Because a single member of this Council put its own political agenda above the welfare of the people of Syria and the international community. This lapse in leadership was unworthy of this Council and an affront to the dedicated efforts of the OPCW Technical Secretariat and the OPCW-UN Joint Mission to remove chemical weapons from the military arsenal of the Assad regime.

…While this Council was silent, the growing concern of the international community thankfully found its voice at the UN Security Council. On February 6th, the Security Council publicly addressed the Syria CW situation. In particular,

-- The Security Council noted growing concern, with respect to the decision of OPCW Executive Council EC-M-34/DEC.1, dated 15 November 2013, about the slow pace of the removal of the chemical weapons from the territory of Syria, which has placed efforts behind schedule;

-- The Security Council called upon the Syrian Arab Republic to expedite actions to meet its obligation to transport, in a systematic and sufficiently accelerated manner, all relevant chemicals to Latakia for removal from Syrian territory, and in this regard noted the Secretary-General and Joint Mission's call for the Syrian Arab Republic to intensify its efforts to expedite in-country movements of chemical weapons material;

--The Security Council noted the Secretary-General and Joint Mission's assessment that the Syrian Arab Republic has sufficient material and equipment necessary to carry out multiple ground movements to ensure the expeditious removal of chemical weapons material, and noted the substantial international support already provided for the removal of chemical weapons materials from the territory of the Syrian Arab Republic;

--Finally, the Security Council expressed its commitment to continue to closely monitor compliance with resolution 2118 (2013) with less than five months until the date for completing destruction of 30 June 2014 established in the OPCW Executive Council decision of 15 November 2013, which is a deadline that Security Council members remain committed to seeing met.

…The United States fully supported the press elements by the UN Security Council chairman on February 6th and reaffirms that position today. In that regard, I would like to underscore the final element and make clear the position of the United States. It was the decision of this Council on November 15th that destruction—not just removal—of Syrian chemical weapons must be completed by June 30, 2014. Despite Syria's inaction, the experts in the OPCW's Operational Planning Group agreed last week that completion of removal and destruction by June 30, 2014 is indeed achievable if action is taken by Syria now.

The international community has put into place everything that is necessary for transport and destruction of these chemicals. Sufficient equipment and material [have] been provided to Syria. The ships to carry the chemicals away from Syria are waiting. The U.S. ship to destroy CW agent and precursors is now in the region and waiting. Commercial facilities to destroy other chemicals have been selected and contracts awarded; they are waiting. And yet Syria continues to drag its feet.

…The Council should endorse all of the statements made by the President of the UN Security Council on February 6th, and reaffirm the June 30, 2014, date for removal and destruction of all Syrian chemical weapons. Further, this Council should reject Syria's delaying tactics and insist that an expedited removal schedule be adhered to by the Syrian Government that will provide the international community sufficient time to destroy Syria's chemical weapons by June 30, 2014.

…At our meeting on January 30th, the United States called this Council's attention to another serious issue—the destruction of Syrian chemical weapons production facilities (CWPF). Syria has proposed that seven hardened aircraft shelters and five underground structures previously used in connection with the production of chemical weapons be "inactivated," by rendering them inaccessible. As detailed in a U.S. national paper and underscored by other members of this Council, Syria's proposed measures would be readily and easily reversible within days. Thus, they clearly do not meet the requirement that such facilities be "physically destroyed" under the Convention and as implemented by the other States Parties that have

declared chemical weapons production facilities. In an effort to resolve this impasse, the United States has engaged Syrian officials at the OPCW on several occasions, most recently a week ago. No progress has been made. Syria has flatly rejected U.S. efforts to find compromises for achieving the "physical destruction" requirement.

…The deadline set by this Council for the destruction of Syria's twelve chemical weapons production facilities is March 15—just three weeks from today. Apparently, the Syrian Government intends to ignore yet another requirement set by the Council. This Council, however, cannot ignore the completion dates it established in its consensus decisions.

The United States believes the Council needs to address this issue, and we are considering a draft decision for the Seventy-Fifth Session of the Executive Council to address this impending situation. The United States believes this decision needs to have two principal components:

-- First, with respect to the seven hardened aircraft shelters, this Council should require that Syria by March 15 collapse the roofs using precision explosives. The United States has carefully analyzed this approach and concluded that it would meet the Convention standard for physical destruction in an expedited and cost-effective manner.

-- Second, with respect to the five underground structures, this Council, noting the additional technical challenges they entail, should extend the deadline for destruction but only on the condition that specified measures be undertaken by Syria first to inactivate them and then to physically destroy the entire underground structure.

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Ambassador Mikulak again addressed the OPCW Executive Council at its session on March 4, 2014. His remarks are excerpted below and available at *www.state.gov/t/avc/rls/2014/222942.htm*.

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Over the last few weeks we all have witnessed two extraordinary meetings of the Council. On January 30, delegation after delegation after delegation expressed concern about the slow pace of removal of chemicals from Syria and called for acceleration of the CW removal process. Again, on February 21, delegation after delegation after delegation … repeated and strengthened their expressions of concern. Now, due to the insistence of members of the Council that Syria meet its commitments, there is the possibility that Syria may at last be starting to take its removal obligations seriously. Syria has now withdrawn its 100-day removal plan, which was indefensible, and presented a 65-day removal plan. Although, this is useful, the Operational Planning Group had earlier recommended steps that would allow all the chemicals to be removed in just 37 days. Moreover, the revised Syrian plan appears vulnerable to quickly expanding back to its original length since the gains were made by simply shrinking the original time devoted to packaging the chemicals at each site. There are few or no gains made by other means, for example consolidating movements into fewer than 24 missions. The Director-General made it

clear that the OPG plan offered a faster timeline while also addressing Syrian concerns regarding security and the availability of equipment and personnel.

The United States believes that Syria should implement and, with the assistance of the Operational Planning Group, accelerate the new Syrian plan immediately to ensure that these deadly chemicals are out of Syria as soon as possible. We look forward to learning the Director-General's detailed assessment, and the further recommendations of the OPCW.

To any members of this Council who might be flush with optimism over the new Syrian plan, a word of caution is appropriate and necessary. What counts is not a plan on paper, but actual performance on the ground. This Council should resist any temptation to simply assume that the government of Syria will follow through on its new plan to remove chemicals from its territory. Syria's dismal record of compliance to date with the Council's removal decisions should belie any such assumption. Now is not the time for complacency, but rather for circumspection and diligent exercise of the oversight responsibilities of this Council.

As it has repeatedly done, after weeks of inaction, Syria has moved chemicals just before an Executive Council session. Perhaps more will be moved while the Council is in session this week. What counts is what happens on a consistent and regular basis going forward. The Council needs to see a systematic, sustained, and accelerated series of movements of chemicals to Latakia for removal.

This Council should consider the acceleration of the new plan to be a test of Syria's commitment to finally comply with its elimination obligations under Executive Council Decisions and UN Security Council Resolution 2118. Syria should be held to account for the plan it has put forward and directed to work with the Joint Mission to substantially accelerate the timeline for completing removal. It should immediately begin to make substantial and regular deliveries of chemicals, particularly Priority One chemicals, to Latakia. We request that the Director-General provide the Council with a chart showing the aggregate amount of chemicals to be moved each week under the plan so that the Council can monitor Syria's efforts. Weekly reports on removal actions should be provided to the Council by the Technical Secretariat. This Council should not tolerate any slippage on removal actions or political backsliding by the Syrian government.

…As you are well aware, this Council has held two successive meetings to discuss the Syria CW situation—on January 30th and February 21st—without issuing a report, unfortunately, because consensus could not be achieved. On September 27th, this Council put politics aside and let itself be guided by the moral compass of the Chemical Weapons Convention. Every State Party on this Council has pledged through the Convention's preamble "for the sake of all mankind to exclude completely the possibility of the use of chemical weapons ..." So long as those chemicals remain in Syria, the possibility of use remains. For the sake of the Syrian people, let us once again put politics aside and ensure through the actions of this Council that the Syrian government completes, with urgency and dispatch, the removal effort it has begun. To that honorable end, the report of this session should unequivocally reflect the Council's determination and commitment to closely monitor the government of Syria's efforts to implement and accelerate its new removal plan.

…Let us also not forget that Syria is about to disregard yet another deadline set by this Council. The date set by this Council for completing destruction of Syria's twelve chemical weapons production facilities is March 15—two weeks from today. The United States has made every effort to work with Syria to reach an understanding on a destruction plan. Syria has refused to negotiate, and has adamantly clung to its proposal to inactivate, rather than destroy, these CW production facilities.

…The Convention is clear with respect to the physical destruction requirement and this Council should also be clear. Since Syria has failed to propose destruction methods that meet the Convention's requirements, the United States has tabled a draft decision for this Council's consideration for addressing Syria's inertia and calculated misreading of the Convention. …

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On March 26, 2014, Assistant Secretary Countryman addressed the Senate Foreign Relations Committee on the efforts of the UN and the OPCW to eliminate Syria's chemical weapons. His remarks, excerpted below, are available at *www.state.gov/t/isn/rls/rm/2014/223973.htm*.

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… While we have made important progress in the past months toward the elimination of Syria's chemicals weapons program, considerable work remains to be done to ensure the Asad regime can never again use these terrible weapons against its own people, or threaten our regional and international partners with them.

Just last year, the regime did not even publicly acknowledge that it possessed chemical weapons, despite having used them on multiple occasions, including in attacks that killed over 1,400 people. Today, OPCW inspectors on the ground in Syria, with UN support, have conducted full inspections of Syria's declared chemical weapons-related sites, and have verified the functional destruction of the chemical weapons production, mixing, and filling equipment at those sites. In addition, as of today, more than 49 percent of Syria's declared chemical weapons materials slated for destruction outside of Syria have been removed, including all of Syria's declared sulfur mustard agent, and the OPCW has verified the destruction in Syria of 93 percent of Syria's declared isopropanol, a binary component of the nerve agent sarin. But that's not good enough. Syria has yet to remove 65 percent of its most dangerous (Priority 1) declared chemicals. We must continue to work with the international community to maintain pressure on the Asad regime to remove all of these chemicals as urgently as possible.

The international community has established a firm legal framework, through UN Security Council Resolution (UNSCR) 2118 and decisions of the OPCW Executive Council, to ensure that this immense undertaking is completed in a transparent, expeditious, and verifiable manner, with a target for destroying all of Syria's declared chemicals by June 30 of this year.

The progress made in the past months has been achieved by diplomacy backed by a willingness to use military force. It remains critically important, as this process continues, that members of the international community continue to monitor closely the Syrian regime's compliance with its Chemical Weapons Convention (CWC)-related obligations. Syria's

obligations are clear, and we will continue to underscore the importance of the Asad regime's continued cooperation. The Security Council decided in UNSCR 2118 to impose Chapter VII measures in the event of non-compliance with the resolution.

While we have made progress, the task before us remains considerable. After months of Syrian foot dragging, we have made clear to the Asad regime that the internationally agreed upon schedule for chemical weapons destruction is simply not up for negotiation; the regime has all the equipment that it needs and has run out of excuses. We remain focused on underscoring the need for Syria to move forward rapidly with transporting chemical weapons materials to the port of Latakia for removal, consistent with its responsibilities under the CWC and UNSCR 2118. The next few weeks are critical in the removal effort, and we and the rest of the world are watching. We have, of course, also been in contact with Syrian opposition leaders, updating them throughout this process, and confirming their commitment that they will not interfere with the activities of the international elimination effort.

With the continuing support of the international community, and the dedicated commitment of the OPCW-UN Joint Mission, we believe the Syrians are capable of completing the removal effort by late April. The international community continues to work toward the June 30 target date for the complete elimination of the program. While Syrian delays have placed that timeline in some danger, we continue to believe they remain achievable.

The path ahead is not an easy one. Syria has missed several intermediate target dates, including most recently the target date for the destruction of chemical weapons production facilities. The regime must meet all chemical weapons destruction obligations, including for the physical destruction of chemical weapons production facilities, consistent with the CWC. The OPCW is currently advising Syria on an appropriate facilities destruction plan. It is essential that Syria accept its recommendations, and submit a revised facilities destruction plan for consideration by the OPCW Executive Council at its next scheduled meeting.

The United States and the international community have provided extensive assistance to the international effort to eliminate the Syrian chemical weapons program. There are no more excuses on the part of the Asad regime for not meeting the agreed timeline. We continue to encourage all countries to make whatever contribution they can to this important undertaking – whether that contribution is financial, technical, or in-kind—to enable the OPCW and UN to complete their missions. The United States has led by example in providing tens of millions of dollars in assistance to the OPCW-UN Joint Mission, including the provision of containers, trucks, forklifts and other materials necessary for the safe transportation of chemical weapons materials in Syria. The State Department's Nonproliferation and Disarmament Fund has provided eight million dollars in financial and in-kind assistance to the OPCW inspection team, including armored vehicles, training, protective equipment, and medical countermeasures. Most significantly, the United States is also contributing unique capabilities to the elimination effort through the Department of Defense's provision of a U.S. vessel, the Motor Vessel (M/V) Cape Ray, equipped with deployable hydrolysis technology to neutralize at sea Syria's highest priority chemical weapons materials (sulfur mustard agent and the sarin precursor chemical, DF).

While U.S. contributions to the elimination efforts are significant, this is ultimately a mission that reflects a remarkable international division of labor. Many of our international partners are participating and providing financial and in-kind assistance that is critical to the effort's success…

As the removal and elimination process continues, we will also continue to fully support the OPCW's verification and inspection efforts, to ensure the accuracy and completeness of

Syria's declaration. We have never taken the Asad regime at its word, and will continue to press for a robust verification regime to ensure the absence of undeclared materials and facilities. We approach this process with our eyes wide open, and will insist on international verification.

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On April 20, 2014, Ambassador Mikulak addressed the Fortieth meeting of the OPCW Executive Council. His statement, excerpted below, is available at *www.state.gov/t/avc/rls/2014/225340.htm*.

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Last September, when this Council embarked upon the effort to eliminate Syria's chemical weapons program, in the aftermath of the terrible August 21, 2013 attacks in the suburb of Damascus, I think all of us expected to be at a very different stage of the effort than we are today.

While we recognize the accomplishment reflected in the removal of 92 percent of the declared stockpile, this job is not done until it's fully done. Although the international community quickly readied an operation to transport and destroy Syria's declared chemical weapons program, the Assad regime has delayed the operation at every opportunity. As a result, multiple dates established by the Council by consensus have been missed. Now Syria has not even met its own schedule for completing removal on 27 April. Almost 100 tons of Priority 1 and Priority 2 chemicals still remain in Syria, which represents approximately eight percent of the total declared material. And the international effort to actually destroy this deadly material is on hold and costing all involved significant sums every day.

Our understanding is that Syria has yet to even undertake the packing and other actions necessary to prepare the chemicals at the final site for transport. The excuse that the site, which is occupied by Syrian Government forces, is "inaccessible" was not acceptable before, and is not acceptable now. The Asad regime needs to develop and implement without further delay a plan to meet its obligations. We need to see immediate and tangible signs that Syria intends to transport, in the very near future, the remaining chemicals from the last site. Such signs could include, for example: destruction of the remaining isopropanol; prepositioning transport equipment; decanting chemicals; beginning packing and site preparations; and maintaining a readiness posture at the port of Latakia. These actions should already have taken place. They should be implemented immediately in order for Syria to demonstrate good faith that the regime is taking its obligations seriously, and is not playing political games. The international community cannot wait indefinitely for Syrian action.

…Despite the destruction deadlines established in this Council by consensus, twelve chemical weapons production facilities declared by Syria remain structurally intact. Why is that? The answer is Syria's intransigence and refusal to even discuss the matter with other delegations over the past weeks. The Technical Secretariat has helpfully contributed its expertise, but it cannot negotiate a final document in place of this Council. The United States continues to hope that a mutually acceptable approach can be found in the near future, but Syria must come to the

table to discuss possible approaches. Our delegation is ready to actively and constructively participate in discussions to reach an acceptable solution.

Unfortunately, Syria's position seems to be that the destruction requirements should be substantially lower for Syria than they were for other countries. This cannot be the case, especially in light of the Syrian regime well demonstrated willingness to use chemical weapons. In 2001, for example, the Technical Secretariat informed the United States that "any underground structure designated for locating any equipment related to the CWPF shall also be destroyed or filled in, and provided with permanent cover." The same requirement should apply to underground structures in Syria. In its 27 September decision, this Council made clear that the Syrian CW situation demanded stringent verification measures and, to that end, we must ensure that these facilities can never be used by the Syrian regime to retain or restart a chemical weapons program.

…Up to this point, the elimination effort has been focused solely on the chemical weapons and associated equipment and facilities disclosed by Syria to the OPCW Technical Secretariat and States Parties. The fundamental goal of the 27 September decision of this Council, UN Security Council Resolution 2118, and indeed the Convention itself is the prevention of further regime use of chemical weapons through the total elimination of Syria's chemical weapons program. Questions remain unanswered about the information provided by Syria. Therefore, additional attention will need to be focused on verifying the accuracy and completeness of Syria's submissions. We welcome the initiative to send an OPCW team that has recently begun working on this task in Damascus. States Parties will also have an important role to play during this verification phase. This Council will need to monitor this effort closely as an essential part of its diligent oversight of the elimination of Syria's chemical weapons program.

…As we reflect upon what still needs to be done to ensure the complete elimination of Syria's chemical weapons program, nothing is more disturbing than the recent reports of chemical weapons use. As we are all aware, there are public reports and videos indicating the use of a toxic chemical—probably chlorine—in Syria this month against the opposition-dominated village of Kafr Zayta. These reports are too serious to be ignored by this Council or the international community at large. The United States considers them to be a matter of serious concern requiring an immediate international effort to determine what has happened. We commend the leadership of the Director-General in seeking to establish the facts surrounding the recent allegations of chlorine CW use against Kafr Zayta, as he has just informed us that he will. This Council should welcome these efforts and call upon Syria to immediately and fully cooperate.

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On May 22, 2014, Ambassador Mikulak addressed the 41st session of the OPCW Executive Council. His remarks are available at *www.state.gov/t/avc/rls/2014/226445.htm*. On June 16, 2014, the OPCW released a report to States Parties finding that "toxic chemicals, most likely pulmonary irritating agents such as chlorine, have been used in a systematic manner in a number of attacks" in Syria. See State Department Answer to Taken Question, June 19, 2014, available at *www.state.gov/r/pa/prs/ps/2014/06/228035.htm*.

On June 23, 2014, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, delivered a statement on the removal of chemical weapons from Syria. Her statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/228340.htm*.

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Today, consistent with United Nations Security Council resolution 2118 and the relevant Organization for the Prohibition of Chemical Weapons (OPCW) Executive Council decisions, the final eight percent of chemical weapons materials in Syria's declaration were removed from the country. This represents a significant step.

The work of the Joint Mission of the United Nations and OPCW demonstrates what can be accomplished when international organizations, including the UN Security Council, are united in purpose and vision. The United States will begin destruction of a large amount of Syria's declared chemical weapons precursors aboard the M/V Cape Ray.

Looking forward, now that Syria's declared chemical weapons have been removed or destroyed, the international community must give its urgent attention to serious outstanding issues related to the Assad regime's chemical weapons program, including the investigation of numerous reports about the systematic use of chlorine as a chemical weapon. We must also resolve discrepancies and omissions related to the Syrian government's declaration of its chemical weapons program, and we must ensure the destruction of all of Syria's chemical weapons production facilities.

None of us can afford to forget that on August 21, 2013, Assad's forces launched a brutal chemical attack that killed over 1,400 children, women, and men, reminding us why the world has worked for 100 years to rid the world of chemical weapons. We cannot waver in our resolve to make sure Syria's chemical weapons program is fully and finally dismantled and eliminated so these weapons can no longer threaten the Syrian people or the rest of the international community.

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Ambassador Robert A. Wood, Alternate Representative for the U.S. delegation to the UN, addressed the First Committee's thematic discussion on other weapons of mass destruction at the 69th UN General Assembly on October 24, 2014. Ambassador Wood's remarks regarding Syria's chemical weapons, excerpted below, are available at *www.state.gov/t/avc/rls/2014/233343.htm*.

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Last year the international community welcomed UN Security Council Resolution 2118 and the September 27th OPCW Executive Council decision that legally mandated the complete elimination of Syria's chemical weapons program. These decisions were an historic and

unprecedented achievement that allowed for the removal and verified destruction of Syria's declared chemical weapons—a significant step toward the complete dismantling of the Syrian chemical weapons program. This effort could not have been accomplished without the commitment and resolve of the international community. President Obama expressed his gratitude to the OPCW-UN Joint Mission and the entire international coalition for this extraordinary achievement. President Obama also made clear that the task of ensuring that Syria's chemical weapons program has been entirely eliminated is far from over. Serious concerns remain; including Syria's continued use of chemical weapons against the Syrian people in direct contravention of its obligations under Resolution 2118, the Chemical Weapons Convention and the decisions of the OPCW Executive Council.

Mr. Chairman, the OPCW Fact-Finding Mission, set up by the Director-General to establish the facts around allegations that chlorine has been used as a chemical weapon, has confirmed the use of such a chemical in its second report dated 10 September 2014. The United States commends the courage and dedication of the Mission and its professional and impartial efforts to ascertain the facts regarding chemical weapons use in Syria. We join the rest of the international community in strongly supporting the Director-General's decision to have the Fact-Finding Mission continue its work.

This second report contains a compelling set of conclusions and evidentiary findings implicating the Syrian government in deadly chemical weapons attacks against three villages in northern Syria during April and May of 2014. The Fact-Finding Mission concluded that the testimony of primary witnesses and supporting documentation, including medical reports and other relevant information, constitutes a compelling confirmation with a high degree of confidence that chlorine was used as a weapon, systematically and repeatedly in the villages of Talmanes, Al Tamanah, and Kafr Zeta in northern Syria. The Fact-Finding Mission emphasized that "in describing the incidents involving the release of toxic chemicals, witnesses invariably connected the devices to helicopters flying overhead." It is well known that the Syrian Government is the only party to the conflict in Syria possessing helicopters or any other aerial capability.

Mr. Chairman, the use of chlorine or any other toxic chemical as a weapon is a clear breach of the Chemical Weapons Convention and of Resolution 2118. Such a breach raises serious concerns about the willingness of Syria to comply with its fundamental treaty obligations not to possess or use chemical weapons.

We are also concerned about Syria's declaration, as it contains gaps, discrepancies and inconsistencies which give rise to important questions and concerns about the declaration's accuracy and completeness. We call on Syria to cooperate fully with the OPCW and promptly begin destruction of its remaining chemical weapon production facilities. The Syrian Arab Republic must provide the international community with credible evidence to support its assurances that it has fully abandoned its chemical weapons program. This cannot be achieved while use of chemical weapons continues and new allegations of such use continue to be made. Complete and accurate declarations must be provided, and destruction operations must be completed promptly and in full in order to prevent further use of chemical weapons against the Syrian people. The Syrian CW file remains open and will not be closed until all of these issues are addressed and Syria complies with its obligations under the CWC and UN Security Council Resolution 2118.

Mr. Chairman, on other CWC related matters, the United States looks forward to working closely with States Parties to meaningfully advance the work and recommendations of the Third Review Conference held in April 2013. While there is more work to be done in our efforts to further strengthen the implementation of the CWC, we remain encouraged by the progress made by the OPCW and its extraordinary efforts in working toward a world free of chemical weapons. The OPCW has accomplished a great deal and remains an indispensable multilateral body with a global responsibility.

For our part, the United States continues to act on opportunities to accelerate destruction and has safely destroyed almost 90 percent of our chemical weapons stockpile under OPCW verification. We continue our steadfast commitment to the CWC and will continue working in a transparent manner towards the complete destruction of our remaining chemical weapons.

The United States remains fully committed to the charge given in the preamble of the Chemical Weapons Convention, that all States Parties "determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention…." We must stand together to make this goal a reality.

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2. Biological Weapons

Ambassador Wood's statement on other weapons of mass destruction at the 69th UN General Assembly on October 24, 2014, excerpted above, also addressed biological weapons. That portion of his remarks follows.

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Mr. Chairman, as we pursue these important goals, we must not lose sight of the threat posed by biological weapons, whether in the hands of states or non-state actors. The Biological Weapons Convention bans the development, production, and stockpiling of such weapons. It embodies an aspiration as profound as that of the CWC: to completely exclude the possibility of biological agents and toxins being used as weapons. The United States strongly supports the BWC.

The 7th BWC Review Conference took steps to strengthen the Convention's contribution to international security, establishing an ambitious agenda of important topics for ongoing work. But this agenda has not been matched by the resources or political will needed to deliver results. Even as we consolidate gains under the existing process, we must begin to look toward the 8th RevCon. What issues should we seek to address over the coming years, and how should we seek to address them?

Some will call—inevitably—for another effort to negotiate an all-encompassing supplementary treaty or protocol. We've been down that road. The problems are well known—and, despite the popular narrative, not limited to U.S. objections. Under this approach, nothing is

agreed until everything is agreed. This is a formula for years of inaction. The BW threat won't wait for us.

There is a better way. We can strengthen our intersessional process. We can—like so many other international entities—adopt decisions on the things we agree upon, while continuing to discuss those on which we do not. And there IS agreement on a great deal. We agree on the need to strengthen national implementation; on the importance of international cooperation, especially to build nations' capacity to address challenges to health security posed by infectious disease and toxins; on the need to give practical effect to the mutual assistance provisions of Article VII. And—even if we do not agree on how to go about it—we agree on the need to find ways to strengthen confidence that Parties to the BWC are living up to their obligations.

Mr. Chairman, we HAVE a treaty. We don't need to wait for some distant day when the stars align and another one emerges—and the threats we face will most certainly not wait. Let's take the tools that we have, strengthen them where necessary, and put them to use.

F. BALLISTIC MISSILE DEFENSE

On November 18, 2014, Under Secretary Gottemoeller spoke in Bucharest, Romania on the U.S. commitment to ballistic missile defense and the European Phased Adaptive Approach. Her remarks are excerpted below and available at *www.state.gov/t/us/2014/234157.htm*.

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…The Obama Administration's commitment to deploying missile defenses to defend the United States homeland, our Allies and partners never waivers. In Europe, we are on track for Phase 2 of the European Phased Adaptive Approach and we are committed to having Phase 3 in Poland completed in 2018. We are working closely across the board with our Israeli Allies on missile defense. We remain committed to missile defense cooperation among our Gulf Cooperation Council partners. In Asia, we also continue to deploy more and more capable missile defense systems and continue our efforts to enhance cooperation with allies and partners.

We are committed to these deployments in the face of constant criticism, particularly from the Russian Federation.

We often hear the refrain from certain corners that missile defenses are destabilizing. With an emphasis on transparency and confidence-building, we have explained that nothing that we are doing with respect to our missile defense plans will undercut international security. It would not be in our interest to do so, it would be prohibitively expensive and from a technical perspective, it would be extremely difficult. So let me take some time to again outline these points, based on logic, physics and math, to prove that our missile defense deployments are a benefit, not a threat, to global strategic stability.

First, the Cold War mindset about ballistic missile defenses is no longer valid. Limited ballistic missile defense capabilities are not capable of threatening Russia's strategic nuclear forces and are not a threat to strategic stability.

Ballistic missiles during the Cold War were the tools the United States and the Soviet Union used to maintain the strategic balance between our two countries. Today, ballistic missiles are proliferated around the world and are seen as a common battlefield weapon.

That is why today's limited missile defenses are essential to ensuring regional strategic stability. That is the one and only reason that the United States is pursuing regional missile defense capabilities.

Missile saber rattling is not particularly effective when there are defenses to protect against those missiles. Missile defense can also prevent a country or group from taking cheap shots of one or two launches that it thinks can be used to compel or deter a government. Instead these countries or groups would need to fire a much larger salvo to overcome missile defenses, thereby raising the stakes of entering into a conflict.

Further, missile defenses create uncertainty about the outcome of attacks, thereby increasing the costs to countries and groups attempting to overcome defenses. By reducing a country's confidence in the effectiveness of missile attacks, we enhance deterrence and regional stability.

Missile defenses and missile defense cooperation also [provide] reassurance. Reassurance helps reduce a country's vulnerability to ballistic missile attacks, as well as reassurance regarding the United States' commitment to their defense. The last part is particularly important since it demonstrates that the United States will stand by our Alliance commitments, even in the face of growth in the military potential of regional adversaries.

Finally, when confronted with an attack, missile defenses can buy time for other courses of actions, such as diplomacy, to help resolve the crisis. All of you know, whether you are policy-makers or military planners, that time—and lack thereof—is one of the most important factors during a crisis.

These are the factors that drive our deployment efforts. Our efforts are aided by the increasing sophistication and accuracy of our ballistic missile defenses, as well as the experience that U.S. forces, our Allies and our partners have gained from being the targets of missile attacks.

Many of our regional defense deployments, like the Patriot system and the Terminal High Altitude Area Defense, or THAAD system, are inherently designed for theater use. They are not capable of defending against ICBMs launched at the United States. THAAD, however, is capable of defending against the medium-range and intermediate-range ballistic missile that North Korea is deploying.

Yet despite our repeated attempts to convey these demonstrable facts, the Russian Federation continues to maintain that our global deployment of these systems is designed somehow to encircle Russia.

Understanding the universal truth of physics, we have also taken care to demonstrate how the systems we are deploying are located in places that are ideal for addressing regional threats. Based on the irrefutable laws of science, these systems cannot do the things the Russian government says they can. You may have seen the Russia trajectory maps that show how the SM-3 Block IIA interceptor could be used against Russian ICBMs. The problem with this argument is that it assumes that the instant—the very second—of a Russian ICBM launch, we would also launch our interceptor. The argument also assumes that we would have perfect knowledge of where that Russian ICBM is going and where it is going to be located several minutes from launch in order to strike the reentry vehicles.

As Admiral Syring attests and our flight tests clearly show, we cannot begin to consider launching an interceptor until well after a ballistic missile has finished its boost phase, the warheads have separated, and we have had time to develop a firing solution. We need considerable time to gather knowledge about where the missile is going before we can launch our interceptor. As a result, the physics just don't add up. There is no way a U.S. SM-3 IIA interceptor can chase down Russian reentry vehicles.

At one point, we did explore the feasibility of a faster interceptor that had what we called "early intercept" capabilities, but that still relied on intercepting the reentry vehicles after burnout. Again, this was not a boost phase concept. In fact, there are many unclassified reports that discuss the challenges inherent in doing boost phase intercept.

Beyond our theater, capabilities, our Ground-Based Interceptors (known as GBIs) deployed in Alaska and California do not pose a threat to Russian strategic nuclear forces either. Our GBIs are designed to deal with rudimentary systems deployed in limited numbers and with simple countermeasures. Technologically, GBIs cannot counter Russia's sophisticated ICBM capabilities and countermeasures.

In addition to our other efforts, we have also outlined the plain and simple numbers to the Russians. Our GBI numbers are nowhere remotely near their strategic offensive arsenal numbers. As of October 1st, Russia declared that under the New START counting rules, they were deploying 1,643 warheads on 528 deployed ICBMs, SLBMs and heavy Bombers. Let me say that number again: the Russian Federation currently fields 1,643 deployed nuclear warheads. Currently, the United States has 30 ground-based interceptors deployed in Alaska. So, hypothetically if all 30 of those GBIs performed perfectly and took out 30 Russian warheads, 1,613 Russian warheads would still get past our defenses.

We will deploy an additional 14 interceptors in Alaska and should we ever deploy an additional east coast site with 20 additional interceptors, Russia would still have 1,579 warheads that could get through our defenses. And while I am optimistic we will negotiate a future nuclear reduction Treaty after New START, even then, our limited numbers of defensive systems cannot even come close to upsetting the strategic balance.

Reversing this equation, I would note that we are not concerned about the impact to strategic stability of Russia's deployment of 68 interceptors at the Moscow ABM system. Sixty eight deployed interceptors is 24 more than the United States even has plans to deploy. Further, Russia is very open about declaring that the Moscow ABM system is specifically designed against the United States. And just like the United States, Russia is modernizing its radars and interceptors as part of their system. However, that still hasn't raised concerns in the United States about strategic stability.

Despite our best efforts, none of these facts has made any difference in our discussions with the Russian Federation. They continue instead to argue the system is designed against them. The bottom line is this: The United States will continue to deploy our missile defense systems around the world to defend against limited regional threats. We will continue to deploy the EPAA as our contribution to NATO missile defense. There should be no doubt about our commitment. Moreover, we will not accept any obligations that limit our ability to defend ourselves, our allies, and our partners, including where we deploy our BMD-capable Aegis ships. There is no reason why we should and no reason we would.

Further, at this time, we have serious concerns about Russia's invasion of Ukraine and its violation of the Intermediate-Range Nuclear Forces (INF) Treaty. We continue to work closely

with our NATO partners on addressing the changes to European security brought about by the invasion of Ukraine and are seeking Russia's return to compliance with the INF Treaty.

While Russia has accused the United States of being in violation of the INF Treaty, we are in complete compliance with the INF Treaty. We can describe, in detail, why each of our systems complies with the Treaty. One thing that the United States and Russia have agreed on is that this important Treaty remains in our mutual security interests. May it remain so. In the meantime, we will continue to make our case to the world about the important of limited missile defenses and continue our essential efforts to cooperatively deploy systems around the world.

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G. NEW START TREATY

The U.S. and Russian delegations to the Bilateral Consultative Commission ("BCC"), which was established under the New START Treaty, met in Geneva twice in 2014. Decisions and agreements reached by the BCC are available at *www.state.gov/t/avc/newstart/c39917.htm*.

H. OTHER ARMS CONTROL AGREEMENTS

In 2014, the United States determined that the Russian Federation "is in violation of its obligations under the INF Treaty not to possess, produce, or flight-test a ground-launched cruise missile (GLCM) with a range capability of 500 km to 5,500 km, or to possess or produce launchers of such missiles." 2014 Compliance Report at 8 (available at *www.state.gov/t/avc/rls/rpt/2014/230047.htm* and discussed *supra* in section 19.A). Representatives of the United States and Russia met to discuss Russian non-compliance with the Intermediate-Range Nuclear Forces Treaty ("INF Treaty"), but U.S. concerns were not resolved. See September 11, 2014 media note, available at *www.state.gov/r/pa/prs/ps/2014/09/231490.htm*. On December 10, 2014, Under Secretary Gottemoeller testified at a joint hearing of the House Foreign Affairs Committee, Subcommittee on Terrorism, Nonproliferation, and Trade and the House Armed Services Committee, Subcommittee on Strategic Forces, on arms control agreements, their ongoing importance, and Russian compliance with its arms control obligations, in particular. Her testimony is available at *http://docs.house.gov/meetings/FA/FA18/20141210/102793/HHRG-113-FA18-Wstate-GottemoellerR-20141210.pdf*. Excerpts below relate to Russian non-compliance with the INF Treaty.

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… In July of this year, the United States announced its determination that Russia is in violation of its INF Treaty obligations not to possess, produce, or flight-test a ground-launched cruise missile with a range capability of 500 to 5,500 kilometers, or to possess or produce launchers of such missiles.

We take this violation extremely seriously. The INF Treaty, negotiated and ratified during the Reagan Administration, eliminated an entire class of ballistic and cruise missiles, capable of delivering nuclear and non-nuclear weapons. The INF Treaty benefits the security of the United States, our allies, and the Russian Federation. The United States is committed to making every effort to ensure the continued viability of the INF Treaty.

We have raised with Russia our concerns regarding its violation of the INF Treaty and have since held senior-level bilateral discussions with the aim of returning Russia to verifiable compliance with its Treaty obligations.

To date, Russia has been unwilling to acknowledge its violation or address our concerns. Therefore, we are reviewing a series of diplomatic, economic, and military measures to protect the interests of the United States and our Allies, and encourage Russia to uphold its nuclear arms control commitments. First, the United States is engaging diplomatically with Russia as noted above, and we continue to consult closely with our Allies. Let me underscore that our Allies have made clear their interest in preserving the INF Treaty. On September 5, at the NATO Summit in Wales, Allies noted:

> "it is of paramount importance that disarmament and non-proliferation commitments under existing treaties are honoured, including the Intermediate-Range Nuclear Forces (INF) Treaty, which is a crucial element of Euro-Atlantic security. In that regard, Allies call on Russia to preserve the viability of the INF Treaty through ensuring full and verifiable compliance."

Second, we are actively reviewing potential economic measures in response to Russia's violation. And third, the United States is assessing options in the military sphere to ensure that Russia would not gain a significant military advantage from its violation of the INF Treaty.

Currently, there is debate in Russia about its nuclear modernization programs and about the contribution of the INF Treaty to Russia's security. It is important for Russia to take into account that no military decisions happen in a vacuum. Actions beget actions. Our countries have been down the road of needless, costly, and destabilizing arms races. We know where that road leads, and we are fortunate that our past leaders had the wisdom and strength to turn us in a new direction. We will keep pressing the Russian leadership to come back into compliance with all of its international obligations.

I would like to assure this committee that the Obama Administration is committed to bringing Russia back into compliance with the INF Treaty. We will not waver in this effort. But the security of the United States and its allies is not negotiable. We must also take steps to ensure our continued collective security should Russia continue in this violation of its INF obligations.

But just as during the Cold War, we will not allow Russia's bad actions in one arena to compromise U.S. national security in another. For more than 40 years, arms control has been a tool that has contributed substantially to the national security interest of the United States, providing predictability and stability to us and to the global community. As the owners of more than 90% of the global nuclear stockpile, the United States and Russia continue to have a special responsibility to protect and preserve those regimes. We will continue to pursue arms control and nonproliferation tools—along with effective verification mechanisms—because they are the best

path that we can take to effectively limit and reduce nuclear threats and prevent such weapons from proliferating to other nation states or falling into the hands of extremists bent on causing colossal destruction. We are committed to monitoring and ensuring compliance with these agreements, and we will continue to tirelessly press Russia to return to its obligations under the INF Treaty. At the same time, we will continue to assess all of the tools—military, economic, and diplomatic—available to the United States and its allies to ensure our national security. And of course we will continue to consult with Congress and our allies and partners on these efforts.

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I. ARMS TRADE TREATY

For background on the Arms Trade Treaty, see *Digest 2013* at 710-15 and *Digest 2012* at 674-79. On October 22, 2014, Ambassador Robert A. Wood, Alternate Representative for the U.S. Delegation to the UN, delivered remarks at the 69th UN General Assembly at a thematic discussion on conventional weapons. Ambassador Wood addressed several issues: the Arms Trade Treaty ("ATT"), the Convention on Certain Conventional Weapons ("CCW"), Lethal Autonomous Weapons Systems ("LAWS"), conventional weapons destruction, small arms and light weapons ("SA/LW"), and man-portable air defense systems ("MANPADS"). Excerpts follow from Ambassador Wood's remarks, which are available in full at *www.state.gov/t/avc/rls/2014/233251.htm*.

The Arms Trade Treaty entered into force on December 24, 2014. In accordance with Article 17 of the treaty, the first Conference of States Parties will convene in 2015. See the website of the ATT, *www.un.org/disarmament/ATT/*. The Arms Trade Treaty has been signed by 130 states, including the United States, though it has not yet been ratified by the United States.

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Arms Trade Treaty

Let me start with the Arms Trade Treaty.

The ATT is important for establishing the highest possible common international standards for regulating the international trade in conventional arms. The Treaty will help reduce the risk that international transfers of arms will be used to carry out the world's worst crimes, including genocide, crimes against humanity, and war crimes. The Treaty requires State Parties to take responsibility for their decisions to transfer arms internationally and to implement safeguards and national procedures to ensure such international arms transfers are governed by relevant national authorities. This Treaty will strengthen countries' national security, build global security, and advance important humanitarian goals without undermining the legitimate international trade in conventional arms.

I am pleased to note that the Treaty has crossed the fifty State Party threshold and will enter into force on December 24. The United States calls on those countries that have not signed it to consider doing so as soon as possible.

The United States applauds Mexico's offer to host the First Conference of States Parties (CSP1). The Conference will take a series of decisions on rules of procedure, financial rules, and establishing the Secretariat, and those decisions will help determine the future direction of the Treaty. It is important that the Treaty is operated in an open, transparent, and inclusive manner so that the international community can maintain the momentum that led to the Treaty in the first place. The more States Parties and Signatories the Treaty has, the stronger it will be. Finally, we need to recognize that States are at different stages in developing the national control systems required by the Treaty and in being able to sign and/or ratify the Treaty. We need to ensure that interested States are able to observe the process for themselves and that States that have committed to the Treaty are able to participate in the operation of the Treaty to the maximum extent possible. For our part, the United States will support Mexico and other interested States in pursuit of a successful CSP1 that will lay the groundwork for a Treaty that lives up to all of our expectations.

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Cross References

Bond *case regarding the CWC*, **Chapter 4.B.**
Ukraine/Russia, **Chapter 9.B.1.**
Outer space, **Chapter 12.B.**
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